

NATIONAL NATIVE TITLE TRIBUNAL

REGISTRATION TEST

REASONS FOR DECISION

DELEGATE: Simon Nish

Application Name: Bar-Barrum People

Names of Applicant(s): Mr Tom Congoo, Mr John Wason

Region: Far North Queensland NNTT No.: QC96/105

Date Application Made: 08/11/96 Federal Court No.: QG6222 of 1998

DECISION – Bar-Barrum People

The application IS ACCEPTED for registration pursuant to s.190A of the *Native Title Act* 1993 (C'th).

Simon Nish

Delegate of the Registrar pursuant to
sections 190, 190A, 190B, 190C, 190D

Date of Decision

19 June 2001

Brief History of the Application

The original application was lodged with the Tribunal on 8 November 1996. The application has been amended on four occasions:

Date notice of motion and amendment application filed	Judge/Registrar granting leave to amend	Date order made granting leave to amend
28/5/99	Deputy District Registrar Robson	4/6/99
7/12/00	Deputy District Registrar Robson	12/12/00
20/4/01	Honourable Justice Drummond	24/4/01
1/6/01	Honourable Justice Drummond	8/6/01

The application as amended by leave granted on 28/5/99, was considered by me as the Registrar's delegate and accepted for registration pursuant to s190A on 25/6/99.

The application as amended by leave granted 7/12/00 was considered and accepted for registration by me as the Registrar's delegate on 14/3/01. On that occasion the substantive amendment to the application was to claim the benefit of s47B in relation to some of the claim area. I considered the claimed native title rights and interests afresh in light of the decision of the Full Federal Court in *The State of Western Australia –v- Ward* [2000] 170 ALR 159. That amended application was accepted for registration. As a result of my decision the Register of Native Title Claims was updated to remove the one claimed right and interest that I found could not be prima facie established as a result of the decision in Ward's case.

The amendment of the application in April and June 2001 has triggered the requirement to consider the amended application pursuant to the requirements of s190A (cf. s64(4) & s190A(1)).

Information considered when making the Decision

In making this new decision I have considered and reviewed the application, the first amended application (including the applicants' affidavits at attachments F, R and L) and all of the information and documents from the following files, databases and other sources:

- ◆ The Working Files QC96/105 Volumes 1, 2 and 3.
- ◆ The Personnel File QC96/105
- ◆ The Registration Test Compliance File QC96/105, including original application lodged with the Tribunal on 8/11/96, amendments thereto prior to commencement of amended NTA, and the first amended application filed 28/05/99
- ◆ The National Native Title Tribunal Geospatial Database;
- ◆ The Register of Native Title Claims;
- ◆ The Native Title Register;
- ◆ Tenure History Report for Bar-Barrum People Claimant Application prepared by the Department of Natural Resources, September 1998
- ◆ Preliminary Anthropological Assessment of the Bar-Barrum Native Title Claim by *{name deleted}* and *{name deleted}*, October 1997
- ◆ Letters from applicant's legal representative dated 18/1/99 and 7/6/99
- ◆ Statutory declaration of *{name deleted}* dated 9 February 1999
- ◆ the amended applications filed 20/4/01 and 1/6/01
- ◆ Federal Court orders dated 24/4/01 and 8/6/01
- ◆ National Native Title Register

- ◆ Register of Native Title Claims
- ◆ The Register of Indigenous Land Use Agreements

Copies of the statutory declaration by *{name deleted}* (9/2/99), anthropological material (Oct 1997) and legal representative letters provided directly by the applicants for my consideration in the s190A registration of application QC96/105 have now been provided to the State. This is in compliance with the decision in *State of Western Australia v Native Title Registrar & Ors [1999] FCA 1591 – 1594*.

The State has not provided any comments in response to the contents of this material.

Note: I have not considered any information and materials provided in the context of mediation of the group's native title application. This is due to the without prejudice nature of mediation communications and the public interest in maintaining the inherently confidential nature of the mediation process.

All references to legislative sections refer to the Native Title Act 1993 unless otherwise specified.

Reasons for Decision

1. The claim consists of a series of discrete parcels of land. The two further amended applications effect a contraction of the claim area. The two amended applications remove a number of parcels previously referred to in schedule B as forming part of the claim area (see schedule S of each amended application for a description of the parcels now removed from the claim area). There is a consequential change to schedule L (which contains a claim to the benefit of s47B) by removing reference to the parcels that are now no longer part of the claim area.
2. In considering this application afresh pursuant to s.190A, I have looked at the amendments referred to above against the conditions of 62(2)(a) & (b), and s.190B2. As a result of recent case law, it is also necessary to consider afresh the requirements of s61(1) and s62(2)(e).

s.61(1) *The native title claim group includes all the persons who, according to their traditional laws and customs, hold the common or group rights and interests comprising the particular native title claimed.*

3. The compliance of the application with the requirements of s61(1) needs to be considered afresh in light of the decision of the Honourable Justice O’Loughlin in *Risk v NNTT* [2000] FCA 1589 (10/11/2000). The effect of that decision is that:
 - (a) an application that is not made on behalf of a native title claim group cannot validly proceed,
 - (b) a native title claim group is not established or recognised merely because a group of people (of whatever number) call themselves a native title claim group,
 - (c) it is incumbent on the delegate to be satisfied that the claimants truly constitute such a group,
 - (d) the tasks of the delegate [include] the task of examining and deciding who, in accordance with traditional law and customs, comprised the native title group,
 - (e) this question must be addressed prior to the issue of authorisation being considered.
4. At Attachment A of the application it is stated that the application is made on behalf of the Bar-Barrum People, and at attachment A is a list of the Bar-Barrum People prepared by a professional ethnographer, *{name deleted}*
5. +. It is stated in schedule A that the Bar-Barrum people includes the persons named in the list and their descendants. The list in attachment A is found at attachment A of the first amended application (filed 28/5/99). It is 8 pages long and names many people. It appears comprehensive, as is asserted in schedule A of the application.
6. I do not have any other information that would indicate that the description of the group does not include, or may not include, all the persons who hold native title in the area of the application. I am therefore satisfied, in light of the information in schedule A and attachment A, that the group described includes all the persons who, according to their traditional laws and customs, hold the native title claimed.
7. The requirements of s61(1) are met in relation to this application.

s. 62(2)(e) *The application contains a general description of the factual basis on which it is asserted that the native title rights and interests claimed exist and in particular that:*
(i) the native title claim group have, and the predecessors of those persons had, an association with the area; and
(ii) there exist traditional laws and customs that give rise to the claimed native title; and
(iii) the native title claim group have continued to hold the native title in accordance with those traditional laws and customs.

8. It is necessary to consider afresh whether the requirements of s62(2)(e) are met by this application in light of the decision by Keifel J in *State of Queensland v Peter Hutchison* [2001] FCA 416, 12 April 2001. This case is authority for the proposition that to comply with s62(2)(e), a general description of the required factual basis must be contained in the application, and not in documents provided separately to the Registrar.
9. The application contains a general description of the factual basis upon which it is asserted that the native title rights and interests claimed exist. The ‘general description’ required by this section is found in the application at Schedule F which in turn refers to the two affidavits by members of the native title claim group, at Attachment “F” and also in schedule G.
10. I am satisfied that the application complies with the requirements of s62(2)(e).

S190B(2) and s62(2)(a) & (b)

11. The claim area consists of a series of discrete parcels of land scattered over an area west and south-west of the town of Herberton on the Atherton Tablelands, in Far North Queensland.
12. A new map of the parcels now claimed as a result of the two latest amended applications is found in attachment C of the application filed 1/6/01. It is A3 in size and is produced by the State of Queensland's Department of Natural Resources. Each of the land parcels identified in schedule B is shown and labelled on this map. There is hatching of the claim area in black ink to show the contraction of the boundaries, by removal of the parcels of land identified in schedule S of each of the latest two amended applications. The external boundaries for each parcel named in schedule B are drawn in fine black ink.
13. The written description in schedule B defines the claim area as being comprised of 25 parcels of land each described with a lot/plan number, and tenure reference code. This information clearly identifies the parcels included in the claim area according to the State of Queensland's public land tenure record system.
14. Under s62(2)(a)(i) I must be satisfied that the application contains details being *'information, whether by physical description or otherwise, that enables the boundaries of the area covered by the application to be identified'*.
15. Under s62(2)(a)(ii), I must be satisfied that the application contains details being *'information, whether by physical description or otherwise, that enables the boundaries of the area covered by the application and any areas within those boundaries that are not covered by the application.'*
16. Under s62(2)(b) I must be satisfied that the application contains *'a map showing the boundaries of area mentioned in s62(2)(a)(i).'*
17. Under s190B2 I must be satisfied that *'the information and map contained in the application as required by paragraphs 62(2)(a) & (b) are sufficient for it to be said with reasonable certainty whether native title rights and interests are claimed in relation to particular land or waters'*.
18. The use of lot, plan and tenure reference codes from the State's public land tenure record system and the inclusion of a map that shows each of the claimed parcels enables identification of the claim area to be made with reasonable certainty. It is quite clear from the description in schedule B (supplemented by the new map in attachment C) which parcels of land are included in the claim area.
19. I am therefore satisfied that external boundaries of the claim area can be identified with reasonable certainty, having regard to the written description and map contained in the application.
20. It follows that I am also satisfied that the physical description of the external boundaries meets the requirements of s62(2)(a)(i) and that the map shows the external boundaries of the claim area in compliance with the requirements of s62(2)(b).

Generally in relation to the conditions of s190B and s190C

21. In considering the two latest amended applications against the remaining conditions of s190B and s190C, I have reviewed and considered all of the material outlined at the commencement of this statement of reasons. The amendments to the application outlined above have not had any additional consequential effects on my findings on the two previous occasions that I have

considered this application for registration. There have been no other Federal Court or common law decisions in the interim that cause me to come to a different finding in relation to the other conditions.

22. In considering this application against the remaining conditions of s.190B and s.190C, I am therefore able to rely on my original findings (see reasons for decision dated 25/6/99 and 14/3/01) for all the other conditions. I have again reviewed the information and material relevant to this application (see above) and I am satisfied that my original findings should not be disturbed.
23. In reaching this decision I note that there are still no other previously registered applications made that cover any part of the area also covered by this application. Further, a search of the Register of Indigenous Land Use Agreements does not reveal the existence over any part of the claim area of a registered agreement whereby the claimed native title rights and interests have been extinguished by surrender.
24. For the reasons outlined above, I am satisfied that the applications filed 20/4/01 and 1/6/01 meet all the conditions of s190B and s190C and should remain on the Register of Native Title Claims (as should the rights and interests that are currently recorded on the Register) with the necessary adjustments relating to area that is covered by the application.

End of Document