



National  
Native Title  
Tribunal

# Registration test decision.

Application name: Bar Barrum People #6

Name of applicant: Layne Malthouse, Tennyson Kynuna & Lynette Burke

State/territory/region: Queensland, Far North Queensland

NNTT file no.: QC01/34

Federal Court of Australia file no.: QUD6032 of 2001

Date application made: 28 September 2001

Date application last amended: 21 November 2006

Name of delegate: Graham Miner

I have considered this claim for registration against each of the conditions contained in ss. 190B and 190C of the *Native Title Act 1993* (Cwlth).

For the reasons attached, I am satisfied that each of the conditions contained in ss. 190B and C are met. I accept this claim for registration pursuant to s. 190A of the *Native Title Act 1993* (Cwlth).

For the purposes of s.190D(1B), my opinion is that the claim satisfies all of the conditions in s. 190B.

\_\_\_\_\_  
Date of decision: 23 May 2007

Graham Miner

Delegate of the Native Title Registrar pursuant to sections 190, 190A, 190B, 190C, 190D of the *Native Title Act 1993* (Cwlth)

# Edited Reasons for decision

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# Introduction

This document sets out my reasons for the decision to accept or not accept, as the case may be, the claimant application for registration.

Section 190A of the *Native Title Act 1993* (Cwlth) (the Act) requires the Native Title Registrar to apply a 'test for registration' to all claimant applications given to him under ss. 63 or 64(4) by the Registrar of the Federal Court of Australia (the Court).

## **Delegation of the Registrar's powers**

I have made this registration test decision as a delegate of the Native Title Registrar (the Registrar). The Registrar delegated his powers regarding the registration test and the maintenance of the Register of Native Title Claims under ss. 190, 190A, 190B, 190C and 190D of the Act to certain members of staff of the National Native Title Tribunal, including myself, on 17 May 2007. This delegation is in accordance with s. 99 of the Act.

## **The test**

In order for a claimant application to be placed on the Register of Native Title Claims, s. 190A(6) requires that I must be satisfied that *all* the conditions set out in ss. 190B and 190C of the Act are met.

Section 190B sets out conditions that test particular merits of the claim for native title. Section 190C sets out conditions about 'procedural and other matters'. Included amongst the procedural conditions is a requirement that the application must contain certain specified information and documents. In my reasons below I consider the s. 190C requirements first, in order to assess whether the application contains the information and documents required by s. 190C *before* turning to questions regarding the merit of that material for the purposes of s. 190B.

## **Information considered when making the decision**

Section 190A(3) directs me to have regard to certain information when testing an application for registration; there is certain information that I *must* have regard to, but I *may* have regard to other information, as I consider appropriate.

I am also guided by the case law (arising from judgements in the courts) relevant to the application of the registration test. Amongst issues covered by such case law is the issue that some conditions of the test do not allow me to consider anything other than what is contained in the application while other conditions allow me to consider wider material.

Attachment B of these reasons lists all of the information and documents that I have considered in reaching my decision.

I have *not* considered any information provided to the Tribunal in the course of its mediation functions in relation to this or any other claimant application. I take this approach because matters disclosed in mediation are 'without prejudice' (see s. 136A of the Act). Further, mediation is private as between the parties and is also generally confidential (see also ss. 136E and 136F).

Your application is affected by the provisions of Item 89 of the *Native Title Amendment Act 2007*, having been made before the commencement day of the amendment (15 April 2007). By reason of that amendment must consider any additional information provided directly to me with respect to all the procedural conditions of the registration test described in s. 190C of the Act. Normally, I would be limited to considering information contained in or accompanying the filed application in relation to all the conditions of s. 190C conditions of the test.

### **Application overview**

Please see Attachment C.

### **Procedural fairness steps**

As a delegate of the Registrar and as a Commonwealth Officer, when I make my decision about whether or not to accept this application for registration I am bound by the principles of good administrative law, including the rules of procedural fairness, which seek to ensure that decisions are fair, just and unbiased. Procedural fairness requires that a person who may be adversely affected by a decision be given the opportunity to put their views to the decision-maker before that decision is made. They should also be given the opportunity to comment on any material adverse to their interests that is before the decision-maker. The steps that the Tribunal has undertaken to ensure procedural fairness is observed in this matter are set out in Attachment D.

**Please note:** All references to legislative sections refer to the *Native Title Act 1993* (Cwlth), unless otherwise specified. The description of each condition of the registration test that appears prior to the delegate's result and reasons is in many instances a paraphrasing of the relevant legislative section in the Act. Please refer to the Act for the exact wording of each condition.

# Procedural and other conditions: s. 190C

## *Section 190C(2)*

### *Information etc. required by ss. 61 and 62*

The Registrar/delegate must be satisfied that the application contains all details and other information, and is accompanied by any affidavit or other document, required by sections 61 and 62.

#### **Delegate's comment**

I address each of the requirements under ss. 61 and 62 in turn and I come to a combined result for s. 190C(2) at page 15.

### *Native title claim group: s. 61(1)*

The application must be made by a person or persons authorised by all of the persons (the native title claim group) who, according to their traditional laws and customs, hold the common or group rights and interests comprising the particular native title claimed, provided the person or persons are also included in the native title claim group.

#### **Result**

The application **meets** the requirement under s. 61(1).

#### **Reasons**

The description of the persons in the native title claim group is found in Schedule A as follows:

The Bar Barrum People are all those people who are descendants of:  
**[Descendants – names deleted]**

The Registrar's task under s. 61(1) was clarified by his Honour Justice Mansfield in the case of *Northern Territory v Doepel* (2003) 203 ALR 385 (*Doepel*). This case is authority for the following propositions.

Section 190(C)(2) is confined to ensuring that the application, and accompanying affidavits or other materials, contains what is required by ss. 61 and 62 - at [16].

Bearing in mind that the Registrar's consideration of s. 61(1) is defined by the procedural task set in s. 190C(2), I must be satisfied that the application sets out the native title claim group in the terms required by s. 61. That is one of the procedural requirements to be satisfied to secure registration: s. 190(A) (6) (b) - at [36].

If the description of the native title claim group indicates that not all persons in the native title group were included, or that it was in fact a sub-group of the native title group, then the relevant requirement of s. 190C(2) would not be met and the claim cannot be accepted for registration - at [36].

This consideration does not involve me going beyond the information in the application, and in particular does not require me to undertake some form of merit assessment of the material to determine whether I am satisfied that the native title claim group is the correct native title claim group - at [37] and [39].

In light of the above I am of the view that I am not required to consider here whether the group described in the application is the “native title claim group”.

There is nothing on the face of the application which would cause me to conclude that the requirements of this section are not met, bearing in mind that my consideration of it is limited by the task set in s. 190C(2).

I am satisfied that this description of the persons in the native title claim group meets the requirement in s. 61(1), as is imposed by s. 190C(2).

### *Name and address for service: s. 61(3)*

The application must state the name and address for service of the person who is, or persons who are, the applicant.

#### **Result**

The application **meets** the requirement under s. 61(3).

#### **Reasons**

The application states the names of the persons who are the applicant and provides the required address for service.

### *Native title claim group named/described: s. 61(4)*

The application must:

- (a) name the persons in the native title claim group, or
- (b) otherwise describe the persons in the native title claim group sufficiently clearly so that it can be ascertained whether any particular person is one of those persons.

#### **Result**

The application **meets** the requirement under s. 61(4).

#### **Reasons**

The application does not name the persons in the native title claim group but does describe the persons in the native title claim group sufficiently clearly so that it can be ascertained whether any particular person is one of those persons.

### *Application in prescribed form: s. 61(5)*

The application must:

- (a) be in the prescribed form,
- (b) be filed in the Federal Court,
- (c) contain such information in relation to the matters sought to be determined as is prescribed, and
- (d) be accompanied by any prescribed documents and any prescribed fee.

## **Result**

The application **meets** the requirement under s. 61(5).

## **Reasons**

I am satisfied the application meets the requirements of this section for the reasons set out under ss. 61(1), 61(3), 61(4), 62(1)(a) and 62(2)(c).

### *Affidavits in prescribed form: s. 62(1)(a)*

The application must be accompanied by an affidavit sworn by the applicant that:

- (i) the applicant believes the native title rights and interests claimed by the native title claim group have not been extinguished in relation to any part of the area covered by the application, and
- (ii) the applicant believes that none of the area covered by the application is also covered by an entry in the National Native Title Register, and
- (iii) the applicant believes all of the statements made in the application are true, and
- (iv) the applicant is authorised by all the persons in the native title claim group to make the application and to deal with matters arising in relation to it, and
- (v) stating the basis on which the applicant is authorised as mentioned in subparagraph (iv).

## **Result**

The application **meets** the requirement under s. 62(1)(a).

## **Reasons**

The application is accompanied by affidavits have been signed by each of the persons named as the applicant. The affidavits are apparently sworn before a competent person. They contain the statements required by sub paragraphs (i) to (v) of s. 62(1)(a).

### *Application contains details required by s. 62(2): s. 62(1)(b)*

The application must contain the details specified in s.62(2).

## **Delegate's comment**

My decision regarding this requirement is the combined result I come to for s. 62(2) below. Subsection 62(2) contains 8 paragraphs (from (a) to (h)), and I address each of these sub-requirements in turn, as follows immediately here. My combined result for s. 62(2) is found at page 15 below and is one and the same as the result for s. 62(1)(b) here.

## **Result**

The application **meets** the requirement under s. 62(1)(b).

### *Information about the boundaries of the area: s.62(2)(a)*

The application must contain information, whether by physical description or otherwise, that enables the following boundaries to be identified:

- (i) the area covered by the application, and
- (ii) any areas within those boundaries that are not covered by the application.

## **Result**

The application **meets** the requirement under s. 62(2)(a).

## **Reasons**

Information that enables the boundaries of the area covered by the application to be identified is found in the description and the maps contained in the application.

Information that enables the boundaries of any areas within the external boundaries not covered by the application to be identified is found in Schedule B and Attachment B.

I note that the final paragraph of Schedule B there is a reference to paras. (a) – (k) of that Schedule. I take this to be a reference to paras. (a) – (h).

### *Map of external boundaries of the area: s. 62(2)(b)*

The application must contain a map showing the boundaries of the area mentioned in s. 62(2)(a)(i).

## **Result**

The application **meets** the requirement under s. 62(2)(b).

## **Reasons**

The application contains maps showing the external boundaries of the area covered by the application at Attachment C

### *Searches: s. 62(2)(c)*

The application must contains the details and results of all searches carried out to determine the existence of any non-native title rights and interests in relation to the land and waters in the area covered by the application.

## **Result**

The application **meets** the requirement under s. 62(2)(c).

## **Reasons**

Schedule D states that to the applicant's knowledge no such searches have been conducted. The applicant is only obliged to provide results and details of searches of which the applicant is aware.

### *Description of native title rights and interests: s. 62(2)(d)*

The application must contain a description of native title rights and interests claimed in relation to particular lands and waters (including any activities in exercise of those rights and interests), but not merely consisting of a statement to the effect that the native title rights and interests are all native title rights and interests that may exist, or that have not been extinguished, at law.

#### **Result**

The application **meets** the requirement under s. 62(2)(d).

#### **Reasons**

Schedule E contains a description of the claimed native title rights and interests. The description does not amount to a mere assertion that the native title rights and interests are all the native title rights and interests that may exist, or that have not been extinguished at law. For the reasons given in my conclusion that the applicants have met the requirements of s. 190B(4), I am also satisfied that the requirements of this section are met.

### *Description of factual basis: s. 62(2)(e)*

The application must contain 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.

#### **Result**

The application **meets** the requirements under s. 62(2)(e).

#### **Reasons**

I am satisfied that the application contains a general description of the factual basis upon which it is asserted that the native title rights and interests claimed exist and for the particular assertions in sub-paragraphs (i) to (iii). See Schedules F, G, and M of the application.

### *Activities: s. 62(2)(f)*

If the native title claim group currently carries out any activities in relation to the area claimed, the application must contain details of those activities.

### **Result**

The application **meets** the requirement under s. 62(2)(f).

### **Reasons**

Schedule G of the application provides details of activities currently carried out by members of the native title claim group in the claim area.

### *Other applications: s. 62(2)(g)*

The application must contain details of any other applications to the High Court, Federal Court or a recognised state/territory body of which the applicant is aware, that have been made in relation to the whole or part of the area covered by the application and that seek a determination of native title or of compensation in relation to native title.

### **Result**

The application **meets** the requirement under s. 62(2)(g).

### **Reasons**

Schedule H of the application states that the applicant is unaware of any other such application. In an assessment dated 1 December 2006 the Tribunal's Geospatial Analysis & Mapping Branch stated that no other claimant or non-claimant applications fall within the external boundaries of the current application.

### *Section 29 notices: s. 62(2)(h)*

The application must contain details of any notices given under s. 29 (or under a corresponding provision of a law of a state or territory) of which the applicant is aware that relate to the whole or a part of the area covered by the application.

### **Result**

The application **meets** the requirement under s. 62(2)(h).

### **Reasons**

At Schedule I of the application the applicant sets out several s 29 notices of which they are aware. I take this to mean these are the only notices of which the applicant is aware.

I note that the Tribunal's Geospatial Analysis & Mapping Branch assessment, dated 1 December 2006, lists seven (7) notices issued under s. 29 of the Act (or under a corresponding provision of a law of the State or Territory) in relation to the whole or part of the application area as at 1 December 2006. I see that the notices listed are no longer current, the most recent being 8 February 2006. By *no longer current* I mean the four months after the notification day required in

the s. 29 notice, in which period the Registrar is required to use best endeavours to consider the claim, has expired.

However, even if my conclusion that the applicant is unaware of the additional notices is incorrect, I am of the view that Parliament's intention in relation to the requirements of this section is relatively clear. Both the note at the end of that paragraph, which states that notices under s.29 are relevant to s. 190A(2), and also s. 190A(2) itself, make it reasonably clear that the purpose of the provision was to ensure that the Registrar was aware that the claim was affected by the relevant notice and, therefore, expedited the registration test of the application as required under s.190A(2). The Tribunal is of course aware of the notices and they are no longer current. I am of the opinion that in those circumstance it would be unduly harsh not accept an application for registration for not including details of notices of which the Tribunal is aware and which are no longer current.

I am satisfied that the application meets the requirements of this condition.

### **Combined result for s. 62(2)**

The application meets the combined requirements of s. 62(2). See also the result for s. 62(1)(b) above.

### **Combined result for s. 190C(2)**

The application **satisfies** the condition of s. 190C(2), because it contains all of the details and other information and documents required by ss. 61 and 62, as set out in the reasons above.

## *Section 190C(3)*

### *No common claimants in previous overlapping applications*

The Registrar/delegate must be satisfied that no person included in the native title claim group for the application (the current application) was a member of the native title claim group for any previous application if:

- (a) the previous application covered the whole or part of the area covered by the current application, and
- (b) the previous application was on the Register of Native Title Claims when the current application was made, and
- (c) the entry was made, or not removed, as a result of the previous application being considered for registration under s. 190A.

### **Result**

The application **satisfies** the condition of s. 190C(3).

### **Reasons**

A search of the Geospatial database and Register of Native Title Claims reveals that there are no overlapping applications that cover the area of this application which are on the Register of Native Title Claims as a result of a consideration pursuant to s. 190A. This was confirmed in the

overlap analysis dated 1 December 2006 prepared by the Tribunal's Geospatial Analysis & Mapping Branch. Consequently, I need not consider this matter further.

I am satisfied that this application complies with the provisions of s. 190C(3).

## *Sections 190C(4) and (5)*

### *Authorisation/certification and requirements for uncertified applications*

Under s. 190C(4) the Registrar/delegate must be satisfied either that:

- (a) the application has been certified under s. 203BE, or under the former s. 202(4)(d), by each representative Aboriginal/Torres Strait Islander body that could certify the application, or
- (b) the applicant is a member of the native title claim group and is authorised to make the application, and deal with matters arising in relation to it, by all the other persons in the native title claim group.

Under s. 190C(5), if the application has not been certified, the application must:

- (a) include a statement to the effect that the requirement in s. 190C(4)(b) above has been met (see s. 251B, which defines the word 'authorise'), and
- (b) briefly set out the grounds on which the Registrar should consider that the requirement in s. 190C(4)(b) above has been met.

### **Result**

I must be satisfied that the circumstances described in either ss. 190C(4)(a) or (b) are the case in this application, in order for the condition of s. 190C(4) to be satisfied. If the circumstances described by s. 190C(4)(a) are not the case, then for the condition of s. 190C(4) to be satisfied, I must be satisfied that the requirements of s. 190C(5) are met.

In relation to this application, I am satisfied that the conditions of s. 190B(4) is met because the circumstances described in s. 190C(4) are the case, in turn because I am satisfied that s. 190C(5) requirements are met.

### **Reasons**

The application is not certified pursuant to s.190C(4)(a). Consequently I must be satisfied that the requirements of s.190C(4)(b) are met.

#### *The applicants are members of the native title claim group*

The original and amended applications contain the following information relevant to whether the applicants are members of the native title claim group.

Attachment R of application filed 28 September 2001 (the original application (2001)) and the amended application filed on or about 1 April 2005 (the amended application (2005)) contain affidavits by each of the persons named as the applicant stating that they are the child of a named Bar Barrum person. In each case the applicants refer to ancestors that establish that they are descended from an ancestor named in Schedule A.

I also see that in his affidavit sworn on 14 February 2005 at Attachment R of the amended application (2005), **[Claimant 1 – name deleted]** states that he is a Bar Barrum person through his grandmother.

I am satisfied on the basis of this information that the persons named as the applicant are members of the Bar Barrum native title claim group.

*Applicants authorised to make the application, and deal with matters arising in relation to it, by all the other persons in the native title claim group.*

Part A of the current application states:

The Applicants were so authorised as a result of an authorisation meeting whereby the joint members who constitute the applicant were authorised in a manner consistent with the traditional laws and customs of the members of the Native Title claim group to bring this application on behalf of the claim group. The grounds for this assertion are set out in the affidavits of the applicant named above. The affidavits are labelled "Attachment R".

Each of the applicants has sworn an affidavit addressing the matters required by s. 62 (s. 62 affidavits). The applicants' s. 62 affidavits state that they are authorised by all persons in the native title claim group to make the application and to deal with matters arising in relation to it. These affidavits attached to the current application are copies of affidavits attached to the original application (2001). Each affidavit in turn refers to a further affidavit in Attachment R. There are no other affidavits by the deponents at Attachment R of the current application. However, affidavits addressing the basis for authorisation sworn by the persons named as the applicant are provided as attachments to the amended application (2005). These affidavits are copies of the affidavits attached to the original application (2001). Each of these affidavits states that the applicant was authorised by the Bar Barrum People at a meeting held at Herberton on 7 July 2001, through a traditional and customary decision-making process that must be complied with by the Bar Barrum, to make the application. **[Claimant 1]** in his affidavit ( 3 September 2001) explains the Bar Barrum traditional and customary decision making process in the following terms:

6. When the BAR- BARRUM People want to make decisions about land business there is a decision making process that we must comply with under tradition and custom This process involves discussion amongst the Elders and talks with other members of the BAR- BARRUM community. This process results in a consensus being reached amongst the Elders and other senior members of the BAR- BARRUM People that binds all members of the BAR- BARRUM People (aka Bar-Barrum People). This process also binds BAR- BARRUM people who have been removed and have not been able to maintain their physical connection with country.

He also says:

7. I am authorised by the BAR-BARRUM People, through our traditional decision-making process that must be complied with, to swear this affidavit and to put forward this application. I am authorised to pursue this application to a determination of native title by whatever means necessary and to do whatever is necessary to be done to achieve that outcome.
8. I am authorised by the other applicants to state that they are authorised by the BAR-BARRUM People to put forward this application as well.

Each of the other persons named as the applicant also say much the same in their respective affidavits.

I also see that [**Claimant 1**] says in his affidavit sworn 20 October 2004 that he is a member of the native title claim group and that:

5. I have been authorised by all the persons in the native title claim group to make these applications and to deal with matters arising in relation to them.
6. I am so authorised on the following basis. At a 7 July 2001 authorisation meeting at Herberton, Bar Barrum people after lengthy discussions authorised these applications according to our traditional law & custom.
7. In accordance with our traditional law & custom, Bar Barrum people & elders entitled to speak for country discussed who would be authorised to act as representatives of the native title claim group & to make decisions about the claims.
8. The terms of the applications were accepted and I was authorised to act as one of the applicants to make the claims & to deal with any matters arising in relation to them on behalf of the native title claim group.

Further information on the authorisation meeting held on 7 July 2001 was provided by the applicants' legal representative in a letter dated 12 March 2002. He states that the authorisation meeting was a large meeting held on 7 July 2001. Around 50 Bar Barrum people attended the meeting and the minutes and attendance sheets are held by the Bar Barrum Aboriginal Corporation, the Registered Native Title Body Corporate.

This is a convenient point to note that in a letter dated 30 October 2002, the applicant's legal representative explained why there are different combinations of applicants in each of six Bar Barrum applications. He stated that different Bar Barrum families assert closer affiliation with some estates within Bar Barrum country than others and wanted to be representatives on applications in relation to certain areas only. For example, the [**Family 1 – name deleted**] family asserts a closer relationship to the Mt Garnett area (Bar Barrum applications #2 and #3); while [**Person 1 – name deleted**] and her family assert a closer relationship to the Petford area (Bar Barrum applications #4 and #6). An assertion of closer relationships by certain families to areas within Bar-Barrum country is consistent with Bar Barrum traditional laws and customs.

In relation to the amended application (2005) a further meeting of Aboriginal people asserting rights and interests in the areas in and surrounding the claim area was held at Dimbulah on 13 October 2004. This meeting was called by North Queensland Land Council (NQLC). They hold a computer database of Bar Barrum persons' contact information and on 20 September 2004 they sent a letter and notice by post to each person on this database to inform them of the meeting and its subject matter, details attached to this application. Attached to the amended application (2005) is an affidavit sworn by [**Person 2 – name deleted**] on 11 February 2005. He says that:

1. I am a project officer in the employ of the North Queensland Land Council Native Title Representative Body Aboriginal Corporation (NQLC).
2. While NQLC does not currently act on behalf of the Bar Barrum people (BB) in respect of this native title determination (claimant) application, we have recently provided facilitation and general assistance in respect of a boundary dispute between BB and the neighbouring Jirrbal people.

3. A meeting of the claim group for this application was held at Dimbulah Town Hall on 13 October 2004.
4. At the meeting, the claim group authorised certain amendments to be made to the application, primarily an amendment to reduce the area of the application.
5. The meeting was called by NQLC in response to requests for assistance received from current BB claim applicants and community members.
6. NQLC holds a computer database of BB persons' contact information. On 20 September 2004, I caused a letter and attached notice to send by post to each person on this database to inform them of the meeting details and its subject matter. Attached and marked "A" are true copies of these documents.
7. I am informed and believe to be true that NQLC staff did contact in person and by telephone a number of persons claiming BB ancestry to confirm meeting arrangements and offer assistance with travel and accommodation arrangements where needed.
8. I also caused to be published a prominent, double column advertisement in the 'public notices' section of the following newspapers, a copy of which is attached and marked "B":  
Cairns Weekend Post on Saturday 2 October 2004  
Tablelands Advertiser on Wednesday 6 October 2004
9. I attended this authorisation meeting together with former NQLC legal officer, **[Lawyer 1 – name deleted]** and the BB legal representative, **[Lawyer 2 – name deleted]**.
10. Circulated at the meeting was a written agenda and draft proposed resolutions, comprising business relating to the claim area changes and various sundry matters.
11. Authorisation meeting attendees, comprising representatives of claim group families asserting BB ancestry, were recorded by NUC staff at about 11:30 a.m. following which all claim amendments (based on the draft of the Form 1 Application provided to participants) were discussed and authorised.
12. The list of meeting attendees was subsequently verified by Aboriginal project staff of NQLC against claim group membership lists maintained by NQLC,
13. Meeting participants' claim group membership was based upon descent from the following apical ancestors: **[Descendants]**
14. Minutes of the meeting were taken by NQLC staff, including recording of all resolutions passed, motion movers and seconders – all resolutions were passed unanimously.
15. I was present when, on the basis of BB law, custom and tradition elders and other meeting participants unanimously authorised the current applicants to make amendments to the application on behalf of BB people.
16. I was informed by the group and believe to be true that such authorisation occurred in a manner consistent with BB traditional law and custom, binding BB people as a whole,

All facts and circumstances herein deposed are within my knowledge save such as are deposed to from information only and my means of knowledge and source of information appear on the face of my affidavit.

Copies of the attachments referred to in [Person 2] affidavit are with the amended application (2005).

Further, [Claimant 2 – name deleted] deposed in his affidavit made 10 February 2005 as follows:

1. I am an elder of the Bar Barrum People and as such have the authority to speak on behalf of Bar Barrum People.
2. On 7 July 2001 there was a meeting of Bar Barrum People held in Herberton. I attended the meeting. The purpose of the meeting was to authorise the making of certain applications for determination of native title, including this application.
3. The meeting was attended by numerous Bar Barrum People, including elders representing the various family groups which make up the Bar Barrum People. In accordance with our traditional law and custom, each of the elders is authorised, to talk about and make decisions about land business upon behalf of his or her family group. We discussed the issues and reached a consensus about a decision. The decision will then bind all members of the Bar Barrum People. This is our traditional decision making process, and it was the process which was followed at the meeting on 7 July 2001.
4. As a result of our traditional decision making process, at the meeting on 7 July 2001 the Bar Barrum People authorised this application to be made by the people who are named as applicants in the proceeding, including myself
5. Since this application was made, the applicants have been trying to move forward with it with the intention of achieving a determination of native title. One of the issues which we as applicants have had to deal with has been an overlap of area with an adjoining claim. A further meeting of Bar Barrum People was called to make some amendments to the application to change the claim area to avoid areas, where there was an overlap with an adjoining claim. That meeting was held in Dimbulah on 13 October 2004 ("the October meeting"). I attended the October meeting.
6. There was a good attendance of Bar Barrum People at the October meeting. Again, the meeting was held and discussion took place in accordance with the traditional decision making process which I described previously. A consensus was reached and decisions were taken to amend the application amended as per [Claimant 1] affidavit.

[Claimant 1] affidavit, sworn on 14 February 2005, is in similar terms to that of [Claimant 2] and supports the conclusion that the persons named as the applicant have been, and remain, appropriately authorised to make this application and to deal with all matters arising in relation to it.

A further meeting was held on 17 August 2005. Information about this meeting is also found in the current application at Schedule R:

The requirements of section 190C(4)(b) have been met. The grounds on which they have been met are that on 17 August 2005 at Dimbulah members of the Bar Barrum native title claim group attended an authorisation meeting. The purpose of that meeting was to discuss a number of matters arising in relation to those matters and authorised the applicant to make necessary amendments to the form 1 application in accordance with traditional law and customs, to deal with matters arising in relation to the application on behalf of the native title claim group.

This information is provided by the affidavit of **[Claimant 2]** and of the three affidavits of the current applicant and labelled as "Attachment R".

**[Claimant 2]** says in his affidavit sworn on 8 September 2006 attached to the current application:

1. I am a Traditional Owner and member of the claim group for the Bar Barrum Native Title determination application QUD6032/01 (Bar Barrum #6).
2. I was notified by a notice sent to me on 25 July 2005 which stated that an authorization meeting would be held on 17 August 2005 at Dimbulah in the said State. I also received a letter from **[Lawyer 3 – name deleted]**, Senior Legal Officer employed at the North Queensland Land Council Native Title Representative Body Aboriginal Corporation (NQLC) dated 25 July 2005 outlining the purpose of a number of issues to be discussed at the said meeting.
3. On 5 August 2005 I was made aware of the advertisement that appeared in the "Cairns (Weekend) Post" newspaper stating that the Bar Barrum Authorization Meeting will be held at the same date and place as mentioned in paragraph 2 above.
4. On 17 August 2005 at Dimbulah I attended at the Bar Barrum authorization meeting. I participated and agreed with all members present in that meeting that the process of decision making under our traditional laws and customs would be complied with in relation to authorizing things during the course of that meeting.
5. We discussed the issues raised by copies of relevant correspondence sent by the National Native Title Tribunal (NNTT) and forwarded to us by the NQLC and **[Lawyer 3]** present at that meeting pointed out the discrepancies concerning aspects of the Bar Barrum #6 amended form 1 application.
6. The working group unanimously agreed and instructed **[Lawyer 3]** to do all things necessary to clarify the said form 1 application.
7. Following discussions about other matters the meeting was officially closed at 2pm.
8. All facts and circumstances herein depose to be within my knowledge says such as deposed from information only and by means of knowledge and source of information appear on the face of this my Affidavit.

I note that Schedule R states that the requirements of section 190C(4)(b) have been met. I am satisfied that the application briefly sets out the grounds on which the Registrar should consider that the requirement in s. 190C(4)(b) above has been met (see s. 190C(5)).

As a result of the information above, I am satisfied that the Bar Barrum people have a traditional and customary decision making process that must be followed in matters of this kind, and that the applicants are so authorised by that process. I am satisfied that the persons named as the applicant have been properly authorised and continue to be authorised as required by s. 190C(4)(b) of the Act.

## Merit conditions: s. 190B

### *Section 190B(2)*

#### *Identification of area subject to native title*

The Registrar must be satisfied that the information and map contained in the application as required by ss. 62(2)(a) and (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.

## **Delegate's comment**

I consider whether the condition of s. 190B(2) is met firstly with respect to what is required by s. 62(2)(a) and then with respect to what is required by s. 62(2)(b). I come to a combined result for whether or not s. 190B(2) as a whole is met at page 21 below.

### *Information regarding external and internal boundaries: s. 62(2)(a)*

The application must contain information, whether by physical description or otherwise, that enables identification of the boundaries of:

- (i) the area covered by the application, and
- (ii) any areas within those boundaries that are not covered by the application.

## **Result**

The application **satisfied** the condition of s. 190B(2) with respect to what is required by s. 62(2)(a).

## **Reasons**

### *The external boundary*

Attachment B provides a written description of the external boundary of the claim area. This is supplemented by two maps at Attachment C showing the external boundaries.

### *The internal boundary*

Schedule B identifies, by use of a formula, areas that are excluded from the claim.

I am of the opinion that at this stage of the proceedings, describing areas not covered by the application by use of a formula is acceptable (see *Daniels & Ors v State of Western Australia* [1999] FCA 686).

In Schedule D the applicants say that to their knowledge no searches have been conducted. I have no information that the applicant has conducted any searches. I thus find that the applicant has a limited state of knowledge about any particular areas that would so fall within the description provided. In the circumstances the written description provided is acceptable.

The description provided offers an objective mechanism to identify which areas fall within the categories described. This may require considerable research of tenure data held by the particular custodian of that data, but nevertheless it is reasonable to expect that the task can be done on the basis of the information in the application.

For these reasons, I am satisfied that the information and map in the application required by sections 62(2)(a) and (b) are sufficient for it to be said with reasonable certainty whether the native title rights and interests are claimed in relation to the particular areas of land or waters.

### *Map of external boundaries: s. 62(2)(b)*

The application must contain a map showing the boundaries of the area mentioned in s. 62(2)(a)(i).

## **Result**

The application **satisfies** the condition of s. 190B(2) with respect to what is required by s. 62(2)(b).

### **Reasons**

Two maps that show the external boundary of the claim area are attached to the application at Attachment C.

### **Combined result for s. 190B(2)**

The application **satisfies** the condition of s. 190B(2) as a whole.

## *Section 190B(3)*

### *Identification of the native title claim group*

The Registrar must be satisfied that:

- (a) the persons in the native title claim group are named in the application, or
- (b) the persons in that group are described sufficiently clearly so that it can be ascertained whether any particular person is in that group.

### **Result**

The application **satisfies** the condition of s. 190B(3).

### **Reasons**

The application does not name all the persons in the native title claim group. As a result, it is necessary for the application to meet the requirements of s. 190B(3)(b). In order to meet this condition of the registration test, the description of the group must be sufficiently clear so that it can be ascertained whether any particular person is a member of the native title claim group.

The description of the persons in the group is found at Schedule A of the application. The membership of the group is said to be the Bar Barrum people, who are descendants of the named Bar Barrum apical ancestors.

In *State of Western Australia v Native Title Registrar* [1999] FCA 1591-1594, Carr J said that:

...[i]t may be necessary, on occasions, to engage in some factual inquiry when ascertaining whether any particular person is in the group as described. But that does not mean that the group has not been described sufficiently....The Act is clearly remedial in character and should be construed beneficially.

I note that a description of the native title claim group in terms of named apical ancestors and their descendants is acceptable under s.190B(3)(b), even though these descendants are not always named, and some factual inquiry would need to be made in these instances to determine if any one person is a member of the group.

I am satisfied that a description of the group as all persons descended from the identified ancestors is a sufficiently clear description so that it can be ascertained whether any particular person is in the native title claim group.

## *Section 190B(4)*

### *Native title rights and interests identifiable*

The Registrar must be satisfied that the description contained in the application as required by s. 61(2)(d) is sufficient to allow the native title rights and interests claimed to be readily identified.

#### **Result**

The application **satisfies** the condition of s. 190B(4).

#### **Reasons**

It is my view that to be satisfied under s. 190B(4) the description of the claimed native title rights and interests must have a meaning that is clear and understandable. In other words do they make sense?

The description of the native title rights and interests claimed in this application is found in Schedule E. I am satisfied that the description provided of the claimed native title rights and interest is clear and understandable and that hence they are readily identifiable.

## *Section 190B(5)*

### *Factual basis for claimed native title*

The Registrar must be satisfied that the factual basis on which it is asserted that the native title rights and interests claimed exist is sufficient to support the assertion. In particular, the factual basis must support the following assertions:

- (a) that the native title claim group have, and the predecessors of those persons had, an association with the area, and
- (b) that there exist traditional laws acknowledged by, and traditional customs observed by, the native title claim group that give rise to the claim to native title rights and interest, and
- (c) that the native title claim group have continued to hold the native title in accordance with those traditional laws and customs.

#### **Delegate's comments**

I consider each of the three assertions set out in the three paragraphs of s. 190B(5) in turn and come to combined result for s. 190B(5) at page 26 below.

#### ***The applicable law governing my consideration under this section***

Guidance about how to apply this condition of the registration test is found in *Northern Territory of Australia v Doepel* [2003] FCA 1384 at [16] - [17] and [125] to [132]. I refer to the following:

Section 190B(5) is carefully expressed. It requires the Registrar to consider whether the 'factual basis on which it is asserted' that the claimed native title rights and interests exist 'is sufficient to support the assertion'. That requires the Registrar to address the quality of the asserted

factual basis for those claimed rights and interests; but only in the sense of ensuring that, if they are true, they can support the existence of those claimed rights and interests. In other words, the Registrar is required to determine whether the asserted facts can support the claimed conclusions. The role is not to test whether the asserted facts will or may be proved at the hearing, or to assess the strength of the evidence which may ultimately be adduced to establish the asserted facts.[17]

At [127] His Honour said that the section does not itself require some weighing of that factual assertion. That is the task required by s. 190B(6) [127]. At [128] he said that all it requires is that the Registrar be satisfied that there is a proper factual basis on which it was asserted that the claimed native title rights and interests exist.

His Honour also said at [131] that:

In considering the factual basis provided it is appropriate to focus primarily upon the three particular requirements of the section as that is the way that the Act directs his attention. The general requirement that the factual basis must support an assertion that the claimed native title rights and interests exist - is not intended to involve a parallel or equally onerous obligation in relation to each of the claimed native title rights and interests separately.

I am also able to consider material outside the application to address this condition [16] & [125], following the decisions in *Martin v Native Title Registrar* [2001] FCA 16, *Western Australia v Strickland*, (2000) 99 FCR 33 and *Queensland v Hutchison* (2001) 108 FCR 575.

#### ***My consideration of the factual basis***

Material which addresses the requirements of s. 190B(5) is contained in Schedules F, G and M. A general description of the factual basis on which it asserted that the three criteria identified at s.190B5(a) - (c) are met is provided in Schedule F of the application. This in turn refers to the attached affidavit of **[Claimant 2]**. There are also affidavits included with the original application (2001). Schedule G provides details of activities currently carried out within the claim area. Schedule M briefly outlines the traditional physical connection of members of the claim group to the area claimed and refers to further details in the attached affidavits of claim group members.

I have also had regard to the *Preliminary Anthropological Assessment of the Bar Barrum Native Title Claim* (QC96/105) by **[Anthropologists 1 and 2 – names deleted]** (dated October 1997). Given the proximity of the area claimed in that application to the area claimed in the current application and the fact that much of the information in the report refers to broader Bar Barrum country, I am of the view that it is appropriate to consider this information as relevant to the current application. That the information contained in the report relates to Bar Barrum people in general and Bar Barrum country at large was confirmed by the applicant's then legal representative in a letter dated 17 May 2002. In that letter, the legal representative for the applicants also confirmed that consideration was to be had to the report in relation to the s. 190B(5) condition of the registration test:

The Bar Barrum applicants have instructed that the Registrar may make reference to the Connection report of **[Anthropologist 1]** that is held by the NNTT from the time of the first consent determination, for the purposes of registration and to the affidavits and affidavits filed in Schedules F and L of the first determination as they are relevant to the broader use and enjoyment of the domain area by the Bar Barrum.

This report provides further information regarding the association of the Bar Barrum with the claim area, the traditional laws and customs from which the native title rights and interests claimed derive, and the relationship between those traditional laws and customs and the native title rights and interests claimed.

I have formed the view that the information in the application and the additional information referred to above provides sufficient probative detail to address each element of this condition. I will now deal in turn with each of these elements.

### **Result re s. 190B(5)(a)**

I am **satisfied** that the factual basis provided is sufficient to support the assertion described by s. 190B(5)(a).

### **Reasons re s. 190B(5)(a)**

Schedule F refers to the affidavit of **[Claimant 2]** attached. The affidavit made by **[Claimant 2]** attached is dated 15 August. The year of the 15 August affidavit is not stated but is probably 2001. I will continue use that date to identify the affidavit.

The factual basis provided in the affidavits of **[Claimant 2]** is sufficient to support an assertion that the Bar Barrum People have an association with the claim area and are descended from people who also had an association with the claim area. The deponent provides examples of his association and the association of his parents, uncles, grandchildren, and other relatives with the area claimed. See paras 4-9, 11-13, 15-19.

At Schedule G of the application the applicants set out details of the native title claim group's current activities on the area claimed.

The anthropological assessment prepared by **[Anthropologists 1 and 2]** outlines the anthropological, archaeological, and linguistic evidence for the association of the Bar Barrum people with the claim area (pp. 23 - 28). Due to the isolated and rugged terrain inhabited by the Bar Barrum, there is little reference to the Bar Barrum in nineteenth and early twentieth century literature. Nevertheless, more recent research unanimously holds that the Bar Barrum people were, and are, the sole indigenous inhabitants of that country located about the Great Dividing Range west of Atherton, with a distinctive language and a kinship system in common with that of other groups in the Cape York Peninsula. The authors refer to the work of **[Anthropologist 3 – name deleted]** on the unique Bar Barrum language, and to the work of **[Anthropologist 4 – name deleted]** on the social organisation of the tribes of north-east Australia (1939).

The above research suggests that the domain claimed by the Bar Barrum is well accepted by neighbouring groups as being legitimate (pp. 32 - 36). The authors conducted interviews and field trips with members of the native title group and documented their knowledge of significant sites in the claim area. They also describe how the Bar Barrum have maintained a continuing connection with their traditional domain, through 'scratch mining' of wolfram and tin in the more rugged areas and employment on cattle stations (p. 23).

Having regard to the information contained in the application and the additional material referred to above, I am satisfied that there is a sufficient factual basis to support an assertion

that the native title claim group have, and the predecessors of those persons had, an association with the area subject to this application.

### **Result re s. 190B(5)(b)**

I am **satisfied** that the factual basis provided is sufficient to support the assertion described by s. 190B(5)(b).

### **Reasons re s. 190B(5)(b)**

Schedule E describes those rights and interests which are said to derive from and be exercisable by reason of the existence of native title. The applicants also assert recognition and observance of traditional laws and customs in relation to the land.

The affidavit of [**Claimant 2**] (15 August 2001) refer to traditional laws and customs relating to knowledge and use of bush medicine, hunting and fishing techniques, traditional dances, songs and ceremonies, knowledge of traditional tribal boundaries, significant sites and the stories associated with them. The affidavit also refers to teaching traditional Bar Barrum customs to Bar Barrum children and to behaviours that must be observed at particular special sites (paras 7-19)

Schedule G lists details of activities in regard to traditional usage of their country to support these traditional laws and customs. These activities include:

- a. gathering hunting and fishing in the claim area;
- b. controlling access to, speaking and caring for country;
- c. holding ceremonies on and use of traditional country, and
- d. camping and occupying country, visiting, protecting and preserving special sites.

The anthropological assessment prepared by [**Anthropologists 1 and 2**] describes some of the traditional laws and customs of the Bar Barrum from which the claimed native title rights and interests derive (pp. 44 - 53, 62 - 69). The authors outline traditional Bar Barrum kinship systems, systems of governance and rules of succession and modifications that have occurred since European contact. They also identify the roots of contemporary practices in traditional laws and customs. They also document the ongoing transmission of cultural knowledge relating to the availability of food resources and raw materials, hunting and gathering techniques and manufacture of tools and artefacts.

Having regard to the information contained in the application, and the additional material referred to above, I am satisfied that there is a sufficient factual basis to support an assertion that traditional laws and customs exist; that those laws and customs are respectively acknowledged and observed by the native title claim group, and that those laws and customs give rise to the claim to native title rights and interests.

### **Result re s. 190B(5)(c)**

I am **satisfied** that the factual basis provided is sufficient to support the assertion described by s. 190B(5)(c).

### **Reasons re s. 190B(5)(c)**

In his affidavit referred to above [**Claimant 2**] deposes that he continues to collect firewood and timber and other forest products in the claim area to make tools and artefacts, and for food; that he and his family and other Bar Barrum families continue to camp and occupy country under claim; and that he runs programs on country to teach Aboriginal children about significant sites, culture and bush-craft.

Activities conducted by the native title claim group on the lands and waters of the claim area pursuant to traditional laws and customs are found at Schedule G.

I also refer again to the report of [**Anthropologists 1 and 2**] in which the authors outline modifications to traditional Bar Barrum kinship systems, systems of governance and rules of succession that have occurred since European contact, and clearly identify the roots of contemporary practices in traditional laws and customs. They also document the ongoing transmission of cultural knowledge relating to the availability of food resources and raw materials, hunting and gathering techniques and manufacture of tools and artefacts.

I am satisfied that there is sufficient information available to me to support the continued observation of traditional laws and customs from which the native title rights and interests claimed are said to derive.

### **Combined result for s. 190B(5)**

The application meets the condition of s. 190B(5) because the factual basis provided is **sufficient** to support each of the particularised assertions in s. 190B(5), as set out in my reasons above.

## *Section 190B(6)*

### *Prima facie case*

The Registrar must consider that, prima facie, at least some of the native title rights and interests claimed in the application can be established.

### **Result**

The application **satisfies** the condition of s. 190B(6). The claimed native title rights and interest that I consider can be prima facie established are identified in my reasons below.

### **Reasons**

Under s. 190B(6) I must consider that, prima facie, at least some of the native title rights and interests claimed by the native title group can be established. I am of the view that this requires only one right or interest to be registered.

The term “prima facie” was considered in *North Ganalanja Aboriginal Corporation v Qld* (1996) 185 CLR 595. In that case, the majority of the court (Brennan CJ, Dawson, Toohey, Gaudron and Gummow JJ) noted [citing Oxford English Dictionary (2nd ed) 1989]:

The phrase can have various shades of meaning in particular statutory contexts but the ordinary meaning of the phrase “prima facie” is: “At first sight; on the face of it; as it appears at first sight without investigation.”

I have adopted the ordinary meaning referred to by their Honours in considering this application, and in deciding which native title rights and interests claimed can be established *prima facie*.

I add that the meaning of *prima facie* was recently considered in and approved in *Northern Territory v Doepel* [2003] FCA 1384, see paras 134 -135. Briefly, the Court concluded that although the above case was decided before the 1998 amendments of the Act there is no reason to consider the ordinary usage of 'prima facie' there adopted is no longer appropriate.

The native title rights and interests claimed by the applicants are described in Schedule E of the application. I see that at Schedule L the Bar Barrum people continue to occupy all USL (unallocated State Land) and Aboriginal Reserves within the claim area. The rights and interests claimed are further qualified by the following statements in Schedules Q and P respectively:

The native title claim group does not claim ownership of minerals, petroleum, or gas wholly owned by the Crown.

The applicants do not claim exclusive possession over any offshore place

Turning now to a consideration of whether the native title rights and interests claimed in Schedule E can be *prima facie* established:

***1. In relation to land where there has been no prior extinguishment of native title or where s. 238 (the non-extinguishment principle) applies, the native title rights & interests claimed comprise the right to possession, occupation, use and enjoyment of the claim area as against the whole world pursuant to the traditional law & custom of the claim group, but subject to the valid laws of the Commonwealth of Australia & the State of Queensland.***

Established

Subject to the satisfaction of other requirements, the majority of the High Court in *Western Australia v Ward* (2002) 191 ALR 1 indicated that a claim to exclusive possession, occupation, use and enjoyment of lands and waters can be *prima facie* established.<sup>1</sup>

However, the Court indicated that such a claim may only be able to be established *prima facie* in relation to some parts of a claim area, such as those areas where there has been no previous extinguishment of native title, or where extinguishment is to be disregarded (for example, where the applicants claim the benefit of ss.47, 47A or 47B). The applicant has recognised this in respect of the areas where the above composite right is claimed.

I add that over areas where a claim to exclusive possession cannot be sustained (i.e., where the claim is non-exclusive in nature), the Court has indicated that a claim to 'possession, occupation, use and enjoyment' of the land and waters cannot be *prima facie* established. In other words, where native title rights and interests do not amount to an exclusive right, as against the whole world, to possession, occupation, use and enjoyment of the claim area, the Court said that "it will seldom be appropriate or sufficient, to express the nature and extent of the relevant native title rights and interests by using those terms": at [51].<sup>2</sup> Similarly, in *De Rose v South Australia* [2002] FCA 1342, O'Loughlin J said that such a description was

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<sup>1</sup> At [51].

<sup>2</sup> Refer also *Ward*, [48], [52], [53] and [89].

“inappropriate”: at [919].<sup>3</sup> It would seem then, that a non-exclusive right to possession, occupation, use and enjoyment is not capable of being established *prima facie*.

In light of the comments of the majority of the High Court in *Ward* and of O’Loughlin J in *De Rose*, it appears that a non-exclusive right to possession, occupation, use and enjoyment *cannot*, on the face of it, be *prima facie* established pursuant to s. 190B(6).

I will now consider whether the native title rights and interests claimed at para. 1. can be *prima facie* established.

Schedule F states in part that:

Examples of facts giving rise to the assertion of native title include

- i. Members of the claim group continue to have a close association, including a spiritual connection with the claim area according to their traditional law and custom
- ii. Members of the claim group continue to pass on to their descendants traditional laws & customs stories and beliefs concerning their traditional country including the claim area
- iii. Members of the claim group continue to use the claim area for traditional hunting and fishing and for the gathering of traditional bush medicines and other materials
- iv. Members of the claim group continue to care for their traditional country, including the claim area, in accordance with traditional laws and customs passed down to them by their forebears and predecessor.
- v. Members of the claim group continue to exercise a body of traditional laws and customs, which has been passed down to them from generation to generation by their forbears and predecessors; such traditions and customs include traditional laws & customs, which deal with caring for country, controlling access to country, the holding of ceremonies on traditional country and the use of traditional country

The attached affidavit of [**Claimant 2**] provides examples & further information.

Schedule G says that:

Claim group members continue to exercise a body of traditional law & custom passed down from generation to generation by their forebears and predecessors

Such tradition & custom includes:

- a gathering, hunting & fishing in the claim area
- b controlling access to, speaking & caring for country
- c the holding of ceremonies on & use of traditional country
- d camping & occupying country, visiting & protecting & preserving special sites and story places, and
- e participation in consultation processes & land use decision-making in relation to third parties

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<sup>3</sup> Refer also *De Rose*, [918]-[920]

Bar Barrum children & youth are taken to country to learn about their history & culture; claim group members also access their land to maintain & supplement their livelihoods”

The affidavits made by the persons named as the applicant that are required by s. 62(1)(a) of the Act, state that the contents of the application are true.

Further, **[Claimant 2]** affidavit made on or about 15 August 2001 supports the existence of this claimed right. He says:

1. I was born in 1932.
2. I am a tourist guide and cultural consultant.
3. My father, **[Claimant's relative 1 - name deleted]** was a Bar Barrum man.
4. I take my identity as a Bar Barrum man from my father.
5. I used to live with my parents on the Bar Barrum side of the Wild River in Herberton in what was called the “one mile camp”. This was an Aboriginal encampment outside Herberton.
6. When I was eight years old my parents moved to Woolaman Creek in Bar Barrum country in the Silver Valley area.
7. Later I lived near the junction of the Dry and Wild rivers, an area currently in my application.
8. I used to go hunting with my father and uncle. There were plenty of Kangaroos and possums and other animals to eat at that time. We needed the bush tucker as we didn't have much money.
9. My uncle and father and other relatives taught me about bush medicine, such as how the sap of the pencil orchid cures cuts and bruises.
10. My two uncles and my father taught me dances that were traditional Bar Barrum ceremonies. My father used to sing songs in Bar Barrum language.
11. I have taught these dances to my grandsons who perform them these days at the Bar Barrum outstation and other location in Bar Barrum country.
12. With my family I used to go "Scratch mining" and I have continued to do so all my life, throughout Bar Barrum country. I used to have a scratch mine by a spring that was a traditional Bar Barrum, camping area, later the spring was dammed. I continue to visit this area with my grand son. The area is south of Irvinebank in the area under claim.
13. I collect firewood and timber to make tools and artefacts in country.
14. I was shown how to make fish traps to catch fish in the rivers by my father and uncles to feed our family, and the tree leaves that stun the fish and make them easy to catch.
15. My family and I and other Bar Barrum families and my grand sons continue to camp in and occupy country under claim.
16. I have been involved in cultural heritage work in the claim area and have worked extensively with the Department of Environment & Heritage. In this way I have cared for country and been involved in environmental and cultural management.
17. I have run programs sponsored by Commonwealth Government agencies to bring Aboriginal children on to Bar Barrum country to explain culturally significant sites and ways and to teach bushcrafts.
18. I was shown culturally significant sites by my father and uncles when I was growing up. I have passed on stories to my grandsons and also the locations of these sites, which are very important to Bar Barrum people.
19. There are special sites that Bar Barrum people must talk to the spirits before we go there.
20. I collect wood for fires and building and forest products for artefacts and food in Bar Barrum country to this day.

21. I lived at Emu Creek and raised my family in that area, I also used to live around Irvinebank and visited Bar Barrum people in Watsonsville and right up near Atherton.
22. I currently live in Dimbulah, in Bar Barrum country.
23. I am working now in the Watsonville and in the Herberton State Forest area.
24. All the facts and circumstances deposed to are within my own knowledge, save such as are deposed to from information only, and my means of knowledge and sources of information appear on this the face of my affidavit."

Also, **[Claimant 2]** further affidavit made 10 February 2005 supports the existence of this claimed right:

7. I have lived and worked on or near the claim area all my life. I have worked on Bar Barrum country as a miner, both as an employee and for myself, as well as working as a timber cutter and an employee for Shire Councils.
8. I feel a strong spiritual connection to Bar Barrum country, including the claim area. I have maintained this connection all my life.
9. In recent times I estimate that I have spent about 75% of my time residing on or camping on Bar Barrum country. I regularly make fish traps, hunt, fish and gather bush tucker and medicines from Bar Barrum country. I also show others how to do so.
10. Much of my time over the past decade or more has been invested in passing on knowledge about Bar Barrum country to young people, including conduction training for traditional owner rangers (currently approximately 12 trained up and active) or taking young people onto Bar Barrum country as part of TAFE studies, Court diversion and other government or community projects.
11. I am familiar with all our story places, sacred and significant sites on our country, including the hot springs area near the junction of Nettles Creek and the Herbert River, parts of Mowbray Creek, Dry River, Women's sites, border grounds and corroboree places, massacre locations, poison water and our initiation places.
12. The knowledge which I have about these places has been with the Bar Barrum People for a long time. It was passed on to me as part of our traditional process. As I am now an elder of the Bar Barrum People, it is part of my role to pass on knowledge of our country to younger Bar Barrum People when they are ready. I do this regularly.
13. I routinely care for Bar Barrum country by rehabilitating former mine sites, clearing creeks and the like.

I also refer to the information to which I have referred under s. 190B(5) above in the report of **[Anthropologists 1 and 2]**.

All the above information supports a conclusion that the native title claim group occupy, use and enjoy the area claimed. I am consequently satisfied that the right claimed can be prima facie established in relation to those areas.

I will now consider whether the native title rights and interests claimed in paragraph 2. can be prima facie established. Unless otherwise indicated, if native title rights and interests are said to be established they are established in respect of the whole claim area.

*2. There are five further groups or categories of non - exclusive rights and interests (or specific activities in exercise of the core right to use and enjoyment of the land and waters) that can be described in the following terms:*

*A Discharge cultural, spiritual traditional & customary rights, duties, obligations and responsibilities on, in relation to & concerning the native title land & its welfare, by acting to:*

*a. preserve sites of significance to native title holders & other Aboriginal people on the native title land.*

Established

Schedule G provides information relating to the claimants carrying out cultural heritage protection work on country. See:

- d camping and occupying country, visiting, protecting & preserving special sites and story places, and
- e participation in consultation processes & land use decision-making in relation to third parties

In his affidavit made 15 August 2001, **[Claimant 2]** deposes to involvement in cultural heritage work in the claim area and working with the Department of Environment and Heritage (para 16, but more generally 16-19). He also refers to passing on the knowledge of these sites and the stories relating to them to his grandsons and other young people and the importance of observing appropriate behaviour at these sites (paras 17-19).

In the anthropological assessment of the Bar Barrum people's application the authors note that none of the songs and dances associated with mythology has survived. However the Bar Barrum continue to observe site-relevant constraints on behaviour and also ask others to observe them (p. 69).

**[Claimant 2]** also speaks in his affidavit made 10 February 2005 of his knowledge of story places, sacred and significant sites (para. 11) and also says that he routinely cares for Bar Barrum country by rehabilitating former mine sites, clearing creeks and the like (para 13).

*b determine, give effect to, pass on and expand the knowledge & appreciation of their culture & traditions*

Established

I am of the view that in the context of paragraph A above this claimed right relates to the native title land the subject of the claim.

At Schedule G of the application the applicants state that the Bar Barrum people teach Bar Barrum children about Bar Barrum culture on country (see final para).

The affidavits of **[Claimant 2]** provides evidence for the transmission of cultural knowledge directly related to the use of the land: for example, observance of customary rules when fishing, learning usages for fauna and flora on country for medicinal purposes, visiting significant places and passing on of knowledge between the generations about culturally significant places on country. See:

Affidavit of **[Claimant 2]** (15 August 2001), paras 8-9, 10-11, 14, 16-18;

Affidavit of **[Claimant 2]** (10 February 2005), paras 11 - 12.

In the anthropological assessment of the Bar Barrum people's application, the authors describe how the current attachment of various Bar Barrum families to particular areas within the Bar Barrum domain reflects the traditional system of clan estates, passed down through traditional rules of patrilineal succession. They document the changes in social structure and governance that have occurred, so that the contemporary Bar Barrum may derive their rights to Bar Barrum country through their mother or their father. The authors also document how knowledge of the seasonal availability of resources is passed down from generation to generation (for example from grandfather to grandson in the **[Family 2 – name deleted]** family), where certain species can be found and *hunting* and gathering techniques. They also describe how one of the claim group members, **[Claimant 2]**, is involved in teaching young people about bush foods and the medicinal uses of plants at cultural and first offender camps held in the Emuford property.

*c. regard the native title land as part of the attachment of the native title holders to the native title land & ensure that the use of the native title land is consistent with that attachment*

Established

I refer to the information under b. above.

I also refer to the contents of Schedule F, in particular to:

- v. Members of the claim group continue to exercise a body of traditional laws and customs, which has been passed down to them from generation to generation by their forbears and predecessors; such traditions and customs include traditional laws & customs, which deal with caring for country, controlling access to country, the holding of ceremonies on traditional country and the use of traditional country

I am of the view that the report of **[Anthropologists 1 and 2]** referred to above, and **[Claimant 2]** affidavits set out above, support the prima facie establishment of this right.

*d. maintain the cosmological relationship, beliefs, practices & institutions through ceremony and proper & appropriate custodianship of the native title land and special and sacred sites, to ensure the continued vitality of culture, and the well-being of the native title holders*

Established

I refer to the information described under c). above. Based on the same information I am of the opinion this claimed right and interest can be prima facie established.

*e. inherit, dispose of or confer native title rights & interests in relation to the native title land on other (sic) in accordance with traditional law & custom*

Established

At Schedule G of the application the applicants state that the Bar Barrum people teach Bar Barrum children about Bar Barrum culture on country (see final para).

The affidavits of **[Claimant 2]** provides evidence for the transmission of cultural knowledge directly related to the use of the land: for example, observance of customary rules when fishing,

learning usages for fauna and flora on country for medicinal purposes, visiting significant places and passing on of knowledge between the generations about culturally significant places on country. See:

Affidavit of **[Claimant 2]** (15 August 2001) - paras 8-9, 10-11, 14, 16-18;

Affidavit of **[Claimant 2]** (10 February 2005), paras 11 - 12.

In the anthropological assessment of the Bar Barrum people's application, the authors describe how the current attachment of various Bar Barrum families to particular areas within the Bar Barrum domain reflects the traditional system of clan estates, passed down through traditional rules of succession. They document the changes in social structure and governance that have occurred, so that the contemporary Bar Barrum may derive their rights to Bar Barrum country through their mother or their father. The authors also document how knowledge of the seasonal availability of resources is passed down from generation to generation (for example from grandfather to grandson in the **[Family 2]** family), where certain species can be found and hunting and gathering techniques. They also describe how one of the claim group members, **[Claimant 2]**, is involved in teaching young people about bush foods and the medicinal uses of plants at cultural and first offender camps held in the Emuford property.

*f. conduct secular, ritual & cultural activities on the native title land*

Established

Schedule G outlines information concerning activities of the above nature on the area claimed, e.g. hunting, fishing gathering, conducting ceremonies and visiting and protecting special sites. This is supported by the affidavits of **[Claimant 2]** referred to above.

*g. conduct burials*

Not Established

I have been unable to find sufficient information to support the prima facie establishment of this right.

I refer to s. 190(3A) of the Act. This section permits an applicant to provide additional information to the Registrar in support of any rights and interests that were not registered when the application was tested and accepted for registration. In brief, provided that additional information satisfies the Registrar (or his delegate) that, had it been before him at the time of testing, the right would have been accepted for registration, then, subject to meeting the other conditions of the test, the right in question will be entered in the Register of Native Title Claims.

*h. construct & maintain structures for the purpose of exercising native title*

Established

In Schedule G, the applicants state that the Bar Barrum People camp, hunt gather and fish in the area. They also say they visit Bar Barrum country, care for it and protect special sites and story places. In his affidavit, dated 15 August 2001, **[Claimant 2]** speaks of camping on and occupying the country under claim (paras 5-7, 15). He also deposes that he lived and raised his family at Emu Creek and currently lives in Dimbulah, in Bar Barrum Country (paras 21-22). I note also the statement in Schedule L of the application that at the time of filing this application

the Bar Barrum people occupied and continue to occupy all vacant crown land (unallocated State land) in this application and an Aboriginal Reserve at Herberton.

The anthropological assessment of the Bar Barrum people's application referred to above records ample evidence of the residence of members of the native title claim group in the claim area. The authors conducted field work and obtained detailed information about the location of residences and the history of occupation of Bar Barrum families in the area, notably the **[Family 2]** and **[Family 3 – name deleted]** families.

The right to construct and maintain structures for the purpose of exercising native title seem to me to be consistent with, and part of, the activities outlined. In respect of areas where exclusive possession cannot be sustained there is nothing in the description of this right which conveys to me an intention or capacity on the part of the members of the native title claim group to control access to or use of those areas. I note that elsewhere in the application the right to "establish residences on the native title land" is claimed (para B c.).

*i. determine who are the native title holders & resolve disputes in relation to the native title land*

Not Established

There are in my opinion two parts to the right claimed. (1) The right to determine who are the native title holders. (2) The right to resolve disputes in relation to the native title land.

In respect of (1). In the *Northern Territory v Alyawarr, Kaytetye, Warumungu, Wakay Native Title Claim Group* (2005) 145 FCR 442 the right to Determine and Regulate the Membership of and Recruitment to a Landholding Group was held on appeal to be part of the claim group's laws and customs rather a right or interest in relation to land or waters (at [para 165]). The right to determine who the native title holders are is similar to the right to determine the membership the landholding group.

Also it was found in *Daniel v State of Western Australia* at [303] that the right to *Identify Members of the Native Title Group* was not a right that gives rise to a connection to land or waters. Additionally in the light of the provisions in Pt 2 Div 6 of the NTA and the Native Title (Prescribed Bodies Corporate) Regulations 1999 this is a matter to be determined by application of that law and is not therefore to be approached as a native title right and interest.

For the same reasons as appear above the right to determine who are the native title holders is not a right in relation to land or water and cannot, in my opinion, be prima facie established. It follows that the claimed right cannot be prima facie established even if part (2) can be established. I say this because I am unable to find that part of the right claimed can be established as that would in effect involve amending the application.

*B. a. reside on the native title land*

Established

A question arises here whether the right claimed necessarily amounts to a right to control access to and use of the claim area. To the extent that it would do so, such a right is not *prima facie* capable of being established over areas for which a claim to exclusive possession cannot be sustained. In respect of areas where exclusive possession cannot be sustained there is nothing in

the description of this right which conveys to me an intention or capacity on the part of the members of the native title claim group to control access to or use of those areas. I note that elsewhere in the application the right to "establish residences on the native title land" is claimed (see para B c. below).

I refer to the information under Para A. h. above. Based on that I am satisfied that there is sufficient information available to prima facie establish this native title right and interest. For instance Schedule G refers to the group camping & occupying country, visiting & protecting & preserving special sites and story places (para d). This is supported by **[Claimant 2]** who says in his affidavit of 10 February 2005:

7. I have lived and worked on or near the claim area all my life. I have worked on Bar Barrum country as a miner, both as an employee and for myself, as well as working as a timber cutter and an employee for Shire Councils.
8. I feel a strong spiritual connection to Bar Barrum country, including the claim area. I have maintained this connection all my life.
9. In recent times I estimate that I have spent about 75% of my time residing on or camping on Bar Barrum country. I regularly make fish traps, hunt, fish and gather bush tucker and medicines from Bar Barrum country. I also show others how to do so.

I am satisfied this right can be prima facie established.

***b. camp on the native title land***

Established.

I refer to the information under para a. and para A h. above. Based on that information I am satisfied that there is sufficient information available to prima facie establish this native title right and interest.

***c. establish residences the native title land***

Established

Insofar as the applicants claim the right to establish 'residences' on the claim area, a question arises as to whether such a right necessarily amounts to a right to control access to and use of the claim area. To the extent that it would do so, such a right would not be prima facie capable of being established over areas for which a claim to exclusive possession cannot be sustained.

In response to a query from the Tribunal in relation to this point, the then legal representative for the applicants has stated that "[t]he applicants assert the rights in question as between the Bar Barrum people who maintain strong cultural and traditional ties to their land and their customary laws. These rights are not asserted vis a vis non-Bar Barrum people in tenures where there are other interest holders. The Bar Barrum recognise the rights of coexisting tenure holders where appropriate and don't presume to control other interest holder's rights" (letter dated 31 October 2001).

In light of these comments, I am of the opinion that the right to establish residences on the claim area does not amount to a right to control access to, or use of, the claim area. That said, there is

sufficient information in Schedule G, in the affidavits to which I have referred, and in the anthropological report to satisfy me that this right can be prima facie established.

It is stated in Schedule G of the application that the Bar Barrum People camp, occupy and visit Bar Barrum country and are in continuous use and occupation of that country. [Claimant 2] in his affidavits dated 15 August 2001 and 10 February 2005 tells of camping on and occupying country under claim (see above). I note also the statements in Schedule L of the application that the Bar Barrum people continue to occupy the USL land claimed in the application and the Aboriginal reserves located in the claim area.

The anthropological assessment of the Bar Barrum people's application records ample evidence of the residence of members of the native title claim group in the claim area. The authors conducted extensive field work and obtained detailed information about the location of residences and the history of occupation of Bar Barrum families in the area, notably the [Family 2] and [Family 3] families.

*d. travel across the native title land*

Established

I refer to Schedule G (paras a – d.) and the affidavits of [Claimant 2] set out above.

I am satisfied there is sufficient information available to support the prima facie establishment this claimed right.

*C. Determine use rights in relation to activities which may be carried out by others on the native title land, including the right to grant, deny or impose conditions in relation to activities which may be carried out on the native title land*

Established but only in respect of areas where exclusive possession can be sustained.

Over areas where a claim to exclusive possession cannot be sustained, the majority in *Ward* (Gleeson CJ, Gaudron, Gummow and Hayne JJ) questioned the appropriateness of claims to control access to and use of the land: at [52]. *Ward* is authority for the proposition that rights which amount to a right to control access to the land or a right to control the use to which it is put, are not capable of registration where a claim to exclusive possession cannot be sustained.

A question arises here whether the right claimed necessarily amounts to a right to control access to and use of the claim area. To the extent that it would do so, such a right is not *prima facie* capable of being established over areas for which a claim to exclusive possession cannot be sustained. In my opinion it amounts to such a claim. Hence the claim can only be established over areas for which a claim to exclusive possession **can** be sustained.

Schedule F (v) states that:

Members of the claim group continue to exercise a body of traditional laws and customs, which has been passed down to them from generation to generation by their forbears and predecessors; such traditions and customs include traditional laws & customs, *which deal with caring for country, controlling access to country*, the holding of ceremonies on traditional country and the use of traditional country. (italics added)

Schedule G speaks of the group:

- c controlling access to, speaking & caring for country;
- d camping & occupying country, visiting & protecting & preserving special sites and story places, and
- e participation in consultation processes & land use decision-making in relation to third parties.

I refer to the information in the report of **[Anthropologists 1 and 2]** to which I have referred above.

**[Claimant 2]** says in his affidavit of 15 August 2001 that:

I have been involved in cultural heritage work in the claim area and have worked extensively with the Department of Environment & Heritage. In this way I have cared for country and been involved in environmental and cultural management (para 16).

I am satisfied there is sufficient information available to prima facie establish this claimed right in respect of areas where exclusive possession can be sustained.

***D. a. exercise & carry out economic life (including by way of barter) on the native title land***

Established

I am satisfied that the terminology ‘carry out economic life . . . on [emphasis added] the native title land’ makes it clear that the right relates to activities on the claim area that are not divorced from physical presence on the land. I am of the view that this right is clearly grounded in and carried out on country and for traditional purposes. I note in this regard reference to the right being carried out on the area involved. The use of the term “barter” further supports an interpretation that this right does not extend beyond trade in traditional resources, if read in conjunction with the evidence produced by the applicants in support of this right (refer below). That the application does not claim a right to trade in non-traditional resources is further supported by the statement in Schedule Q that the group does not claim ownership of minerals, petroleum or gas wholly owned by the Crown.

The affidavit of **[Claimant 2]** (15 August 2001) states that he and his family hunted, fished and foraged for bush foods, bush medicine, timber and firewood, and conducted mining activities on the land (paras 8-9, 12-14, 19). There are similar statements in his affidavit of 10 February 2005. At Schedule G of the application, the applicants state that the Bar Barrum people collect food resources and gather their livelihood from natural resources on Bar Barrum country.

In the anthropological assessment of the Bar Barrum people’s application, the authors document how knowledge of the seasonal availability of resources (where certain species can be found and hunting and gathering techniques), is passed down from generation to generation, for example from grandfather to grandson in the **[Family 2]** family. They also describe how a member of the native title claim group, **[Claimant 2]**, is involved in teaching young people about bush foods and the medicinal uses of plants at cultural and first offender camps held in the Emuford property.

***b. hunt, fish & carry out activities on the native title land***

Established

I refer to the information in Schedule G and in the affidavits of **[Claimant 2]**.

I am satisfied there is sufficient information available to prima facie establish this claimed right.

*c. create, grow, produce on the native title land*

*d. husband on the native title land*

Not Established

I am unable to find sufficient information to support the prima facie establishment of these two claimed rights.

I refer to the provisions of s. 190(3A) which I have outlined above.

**e. harvest & exchange natural resources on the native title land**

Established

Based on the same information and for the same reasons as appear under para D a above I am satisfied there is sufficient information available to prima facie establish this claimed right.

In considering the following claims in para E I have had regard to the definition of “*cultural resources*” set out in Schedule E and repeated below.

*E Have access to, use and dispose of the cultural\* resources of the native title land, by acting to*

*i maintain & use the native title land;*

*ii conserve the cultural resources of the native title land;*

*iii safeguard & protect the cultural resources of the native title land for the benefit of the native title holders;*

*iv manage & care for the native title land for the benefit of the native title holders;*

*v use the native title land & its cultural resources for social, cultural, economic, religious, spiritual, customary & traditional purposes.*

*\* To avoid doubt, references to cultural resources means natural resources of the land which are used by the claim group for sustenance, ceremonial, medicinal or other traditional purposes.*

The native title rights at subparagraphs E i-v is expressed in such a way that they appear to specify the content of the general right expressed in para. E. A question which arises here for consideration is whether rights to 'maintain', 'conserve', 'safeguard' and 'manage' necessarily imply a right to control the access to, and use of, land in areas where a claim to non-exclusive possession cannot be sustained. Were this so, these rights would **not** be capable of registration in respect of areas where exclusive possession cannot be sustained. Again, I have had reference to a letter (dated 31 October 2002) from the applicant's then legal representative in relation to the rights and interests claimed by the applicants. The representative states that the rights are as between the Barr Barrum who maintain strong cultural and traditional ties to their land and their customary laws and that the Bar Barrum recognise the rights of co-existing tenure holders

and don't presume to control other interests holders rights. In addition, I note that right E only speaks in terms of having access to, use of and disposal of the cultural resources. That term is defined to mean "natural resources of the land which are used by the claim group for sustenance, ceremonial, medicinal or other traditional purposes". I am satisfied that the rights expressed in E and E(i)-(v) are rights which do not presume a right of control and which are capable of being established prima facie.

I further note that these rights do not include a right to ownership of minerals, petroleum or gas wholly owned by the Crown (Schedule Q); nor do they extend to offshore places (Schedule P).

There is evidence to support the prima facie establishment of these rights in the affidavits of **[Claimant 2]**, at Schedule G of the application and in the anthropological assessment of the Bar Barrum people's application. Refer to my reasons for decision above and as follows.

*i. maintain & use the native title land*

Established

I am satisfied there is sufficient information available in Schedule G and the affidavits of **[Claimant 2]** to support the prima facie establishment of this right.

*ii. conserve the cultural resources of the native title land*

Established

I am satisfied there is sufficient information to support the prima facie establishment of this claimed right to conserve the cultural resources of the land. Schedule G refers to the group speaking for country and caring for country. In my opinion cultural resources as defined are an integral part of country. I also refer to **[Claimant 2]** affidavit of 15 August 2001 in which he states that he has been involved in caring for country and involved in environmental and cultural management (para 16),

*iii. safeguard & protect the cultural resources of the native title land for the benefit of the native title holders.*

Established

This right is similar to that in ii above. I see that in *Mary Yarmirr v Northern Territory* [1998] 1185 FCA, the Court accepted a right to maintain and protect places of cultural importance over an area where a claim to exclusive possession was not available. The right claimed here appear similar to that right except that the present right relates to cultural resources as defined. In my opinion such resources can be seen as closely related to places of cultural importance. For these reason, the rights appear to be capable of being *prima facie* established over such areas.

Based on the same information as referred to under ii above, I am satisfied there sufficient information to support the prima facie establishment of this claimed right to safeguard and protect the cultural resources of the land.

*iv. manage & care for the native title land for the benefit of the native title holders.*

Established

This right is akin to that claimed at *i* above to maintain the native title land.

I am satisfied there is sufficient information available in Schedule G and the affidavits of **[Claimant 2]** to support the prima facie establishment of this right.

*v use the native title land & its cultural resources for social, cultural, economic, religious, spiritual, customary & traditional purposes.*

Established

I am satisfied there is sufficient information available in Schedule G and the affidavits of **[Claimant 2]** to support the prima facie establishment of this right.

At Schedule G of the application the applicants state that the Bar Barrum people collect food resources and gather their livelihood from natural resources on Bar Barrum country, and teach Bar Barrum children about Bar Barrum culture on country.

In his affidavit (15 August 2001) **[Claimant 2]** refers to a range of economic activities carried out in the claim area. He deposes that he and his family hunt, fish, gather bush tucker and medicine, firewood, timber and other forest products and make tools and artefacts in the claim area (paras 8-9, 13-15, 20). He also refers to religious and cultural activities such as traditional dancing, paying respect to spirits at significant sites and teaching young people about Bar Barrum culture on country (paras 10, 11, 17, 19). There is also information in his affidavit of 10 February 2005 that supports the establishment of this right.

## *Section 190B(7)*

### *Traditional physical connection*

The Registrar must be satisfied that at least one member of the native title claim group:

- (a) currently has or previously had a traditional physical connection with any part of the land or waters covered by the application, or
- (b) previously had and would reasonably be expected to currently have a traditional physical connection with any part of the land or waters but for things done (other than the creation of an interest in relation to the land or waters) by:
  - (i) the Crown in any capacity, or
  - (ii) a statutory authority of the Crown in any capacity, or
  - (iii) any holder of a lease over any of the land or waters, or any person acting on behalf of such a holder of a lease.

### **Result**

The application **satisfies** the condition of s. 190B(7).

### **Reasons**

I refer to the affidavits of **[Claimant 2]**. I am satisfied that he is a member of the native title claim group and that he has a traditional physical association and connection with the claim area that is continuous and is current.

## *Section 190B(8)*

### *No failure to comply with s. 61A*

The application and accompanying documents must not disclose, and the Registrar must not otherwise be aware, that because of s.61A (which forbids the making of applications where there have been previous native title determinations or exclusive or non-exclusive possession acts), the application should not have been made.

#### **Delegate's comments**

Section 61A contains four subsections. The first of these, s. 61A(1), stands alone. However, ss. 61A(2) and (3) are each limited by the application of s. 61(4). Therefore, I consider s 61A(1) first, then s. 61A(2) together with (4), and then s. 61A(3) also together with s. 61A(4). I come to a combined result at page 43.

### *No approved determination of native title: s. 61A(1)*

A native title determination application must not be made in relation to an area for which there is an approved determination of native title.

#### **Result**

The application **meets** the requirement under s. 61A(1).

#### **Reasons**

A search of the Native Title Register has revealed that there is no determination of native title in relation to the area claimed in this application.

### *No Previous Exclusive Possession Acts (PEPAs): ss. 61A(2) and (4)*

Under s. 61A(2), the application must not cover any area in relation to which

- (a) a previous exclusive possession act (see s. 23B)) was done, and
- (b) either:
  - (i) the act was an act attributable to the Commonwealth, or
  - (ii) the act was attributable to a state or territory and a law of the state or territory has made provisions as mentioned in s. 23E in relation to the act.

Under s. 61A(4), s. 61A(2) does not apply if:

- (a) the only previous exclusive possession act was one whose extinguishment of native title rights and interests would be required by section 47, 47A or 47B to be disregarded were the application to be made, and
- (b) the application states that ss. 47, 47A or 47, as the case may be, applies to it.

#### **Result**

The application **meets** the requirement under s. 61A(2), as limited by s. 61A(4).

#### **Reasons**

In Schedule B of the application, any area that is covered by the categories of previous exclusive possession acts defined in s. 23B of the *Native Title Act* is excluded from the claim area. I am therefore satisfied that the claim is not made over any such areas.

### *No exclusive native title claimed where Previous Non-Exclusive Possession Acts (PNEPAs): ss. 61A(3) and (4)*

Under s. 61A(3), the application must not claim native title rights and interests that confer possession, occupation, use and enjoyment to the exclusion of all others in an area where:

- (a) a previous non-exclusive possession act (see s. 23F) was done, and
- (b) either:
  - (i) the act was an act attributable to the Commonwealth, or
  - (ii) the act was attributable to a state or territory and a law of the state or territory has made provisions as mentioned in s. 23I in relation to the act.

Under s. 61A(4), s. 61A(3) does not apply if:

- (a) the only previous non-exclusive possession act was one whose extinguishment of native title rights and interests would be required by section 47, 47A or 47B to be disregarded were the application to be made, and
- (b) the application states that ss. 47, 47A or 47, as the case may be, applies to it.

### **Result**

The application **meets** the requirement under s. 61A(3), as limited by s. 61A(4).

### **Reasons**

The applicants state in Schedule B that they do not claim exclusive possession over areas covered by previous non-exclusive possession acts (s. 23F).

At Schedule L the applicants claim the benefit of s. 47B in relation to vacant crown land (unallocated State land) in the claim area, and the benefit of s. 47A in relation to the Aboriginal reserve at Herberton.

### **Conclusion**

For the reasons as set out above I am satisfied that the application and accompanying documents do not disclose and it is not otherwise apparent that pursuant to s. 61A the application should not have been made.

### **Combined result for s. 190B(8)**

The application **satisfies** the condition of s. 190B(8), because it **meets** the requirements of s. 61A, as set out in the reasons above.

### *Section 190B(9)*

*No extinguishment etc. of claimed native title*

The application and accompanying documents must not disclose, and the Registrar/delegate must not otherwise be aware, that:

- (a) a claim is being made to the ownership of minerals, petroleum or gas wholly owned by the Crown in the right of the Commonwealth, a state or territory, or
- (b) the native title rights and interests claimed purport to exclude all other rights and interests in relation to offshore waters in the whole or part of any offshore place covered by the application, or
- (c) in any case, the native title rights and interests claimed have otherwise been extinguished, except to the extent that the extinguishment is required to be disregarded under ss. 47, 47A or 47B.

### **Delegate's comments**

I consider each sub-condition under s. 190B(9) in turn and I come to a combined result at page 46.

#### **Result re s. 190B(9)(a)**

The application **satisfies** the sub-condition of s. 190B(9)(a).

#### **Reasons re s. 190B(9)(a)**

The applicants state at Schedule Q of the application that the native title claim group do not claim ownership of minerals, petroleum or gas wholly owned by the Crown.

#### **Result re s. 190B(9)(b)**

The application **satisfies** the sub-condition of s. 190B(9)(b).

#### **Reasons re s. 190B(9)(b)**

The application does not include an offshore place.

#### **Result re s. 190B(9)(c)**

The application **satisfies** the sub-condition of s. 190B(9)(c).

#### **Reasons re s. 190B(9)(c)**

The application does not disclose and I am not otherwise aware of any other extinguishment of native title rights and interests in the area claimed.

#### **Combined result for s. 190B(9)**

The application **satisfies** the condition of s. 190B(9), because it **meets** all of the three sub-conditions, as set out in the reasons above.

[End of reasons]

# Attachment B

## Documents and information considered

The following lists documents and other information that were considered by the delegate in coming to his decision about whether or not to accept the application for registration.

In making this decision I have considered and reviewed the original and amended applications, and all of the information and documents from the following files, databases and other sources:

The National Native Title Tribunal's file for QCO1/34.

The National Native Title Tribunal's files for the other native title determination applications made by the Bar Barrum people: Bar Barrum people #2 (QC01/17), Bar Barrum people #3 (QC01/18), Bar Barrum people #4 (QC01/32), Bar Barrum people #5 (QC01/33), Bar Barrum people #7 (QC01/35). This included the applications, all attachments to them and any documents that accompanied the applications.

Additional material:

Correspondence from the applicant's legal representative between 12 March 2002 to 31 October 2002.

National Native Title Tribunal's Geospatial Analysis & Mapping Branch's assessment, dated 1 December 2006.

Preliminary Anthropological Assessment of the Bar Barrum Native Title Claim by **[Anthropologists 1 and 2 ]**, October 1997

The consent determination of native title made in relation to the Bar Barrum People's application QG6222 of 1998 on 28 June 2001 (QC96/105).

# Attachment C

## Application overview

The original application was filed in the Federal Court, Queensland District Registry, on 28 September 2001.

This application passed the registration test on 3 December 2002.

A notice of motion to amend, together with an amended application, was filed in the Federal Court on 4 March 2005.

On 1 April 2005, Deputy District Registrar Connard of the Federal Court granted leave to the applicant to amend the application in accordance with the Amended Application attached as an exhibit to the affidavit of **[Lawyer 2]** sworn 25 February 2005, incorporating the replacement pages faxed to the Registry on 31 March 2005. Further filing of the amended application was dispensed with.

A further notice of motion seeking to amend the application, together with an amended application, was filed in the Federal Court on 13 October 2006.

On 7 November 2006, Deputy District Registrar Fewings of the Federal Court granted leave to the applicants to amend the application in accordance with the draft Amended Application attached as an exhibit to the affidavit of **[Lawyer 3]** sworn 1 September 2006 and filed 13 October 2006. The Deputy Registrar ordered that the amended application be filed and served within the next 14 days. The amended application was filed on 21 November 2006.

# Attachment D

## Procedural fairness steps

Copies of any material provided directly to the Registrar by the applicants in relation to my consideration of the application were provided to the State. The State did not provide any comments in relation to this material.

I have not considered any information and materials that may have been 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.

[End of document]