

Item No.	08.3	
REPORT TITLE	Native Title Determination Application – Barada Kabalbara Yetimarala	
AUTHOR	Kristine Smith	
ATTACHMENTS	Andrew Kerr, Moray & Agnew Lawyers Report	

PURPOSE

To accept and endorse Andrew Kerr's recommendation to progress the Native Title process relating the Barada Kabalbara Yetimarala Application.

REPORT

- On Monday, 8th April, Andrew Kerr, Moray & Agnew Lawyers provided Council with an update to the Barada Kabalbard Yetimarala (BKY) Native Title Application.
- The BKY Claim was lodged in the Federal Court on 2 July 2013
- The claim are within the Woorabinda Local Government area includes Lot 1 on LR146 on LR146 being Foley Vale and the Foley Vale Airstrip.
- Woorabinda Aboriginal Shire Council as Local Local Government is required to put forward a position as an interested party on BKY Native Title Application

RISK MANAGEMENT IMPLICATIONS

Yet to be determined – A Indigenous Land Use Agreement may have to be developed.

POLICY IMPLICATIONS

Land Management Agreement

LEGISLATIVE & OTHER REGULATORY REQUIREMENTS

Qld Local Government Act 2009

Native Title Act 1993

BUDGET, FINANCIAL AND RESOURCE IMPLICATIONS

Yet to be determined

CONSULTATION

Nil

RECOMMENDATION

That Council resolves as follows:

1. The material provided in support of section 47A of the NTA being the Affidavit of Mr Randolph Powder and Ms Davina Tilberoo (Snr) is noted. Council further notes the State's acceptance of occupation evidence in relation to Lot 1 on LR 146 (Foley Vale). Council accepts the occupation evidence provided.

2. Council accepts that the standard generic public works exclusion as detailed in Schedule 5 of the Determination is sufficient.
3. Council agrees to the final tenure positions specifically the recognition of exclusive native title over Lot 1 on LR 146, subject to reliance on section 47A of the NTA, and the recognition of non- exclusive native title over Lot 5 on LR 146.
4. Council seeks to have its interests recorded consistent with the “other interests” clause included for Rockhampton Regional Council, Central Highlands Regional Council, Isaac Regional Council and Livingstone Shire Council.
5. Council accepts the acknowledgements from the Barada Kabalbara Yetimarala Applicant regarding the operation of Foley Vale and the activities of the Woorabinda Pastoral Company Pty Ltd under the Master Land Management Agreement are preserved in the s87 Agreement.
6. Council agrees to enter the section 87 Agreement and resolves to authorise Moray & Agnew Lawyers to sign the section 87 Agreement on its behalf.
7. Council authorises the Mayor and Chief Executive Officer to agree to any minor amendments to the section 87 agreement if required prior to the making of the Determination by the Federal Court.



WOORABINDA ABORIGINAL SHIRE COUNCIL

COUNCIL REPORT

DATE: 17 April 2024

ITEM: Native Title

SUBJECT: Native Title Determination Application QUD 13/2019 – Barada Kabalbara Yetimarala

AUTHOR: Andrew Kerr, Moray & Agnew Lawyers

PRESENTER: Kristine Smith, Chief Executive Officer

Introduction:

Council is a party to the Barada Kabalbara Yetimarala People's native title claim ("BKY Claim").

The BKY Claim was lodged in the Federal Court on 2 July 2013.

The Applicants are Sam Dallachy, Lalu Asela, Elizabeth Doyle, Juanita Mason, Skye Muller, Norman Ross, Deborah Santo, Vanessa Saunders, Michael Smith, Davina Tilberoo Snr, Claudine Walsh on behalf of the Barada Kabalbara and Yetimarala People.

The claim area within the Woorabinda local government area includes Lot 1 on LR 146 and Lot 5 on LR 146 being Foley Vale and the Foley Vale Airstrip.

As part of progressing the claim the Applicant in consultation with the State and other parties has prepared a case management timetable. This Timetable has been endorsed by the Federal Court and the parties are required to comply with the dates for each milestone.

The timetable contemplates a determination occurring in August/September 2024.

Connection

The State late last year accepted the Applicants connection material and has advised that there was sufficient evidence to support the negotiation of a consent determination.

Council has not independently reviewed the Applicants connection evidence which comprises anthropological expert reports and other evidence to support the existence of native title including maintaining connection to country through continued acknowledgement and observance of traditional law and customs.

Council has relied on the State's assessment of connection evidence.

Tenure

The tenure for the parts of the Local Government area covered by the claim are as follows:-

- a) Lot 1 on LR 146 - Deed of Grant in Trust ("DOGIT") with Council as Trustee on behalf of the Aboriginal Inhabitants; and
- b) Lot 5 on LR 146 - Reserve for Landing Ground purposes with Council as Trustee.

The native title outcome for these tenures based on current and historical tenures is non-exclusive native title.

The Registered Native Title Claimant has sought the benefit of section 47A of the *Native Title Act 1993* (Cth) ("NTA") and provided occupation evidence to the State. The evidence relied upon by the Applicant comprises the Affidavit of Mr Randolph Powder and Ms Davina Tilberoo (Snr.). In summary the evidence details how both Mr Powder and Ms Tilberoo have physically visited over a long period of time and activities undertaken whilst they have been "on country" including undertaking cultural activities and ceremonies, use of natural resources hunting, fishing and collection of sandalwood.

Based on the evidence, and the operation of section 47A of the NTA, the non-exclusive native title over part of the DOGIT can be upgraded to exclusive native title as the extinguishing effect of the DOGIT tenure can be disregarded.

Copies of the unsworn affidavits of Mr Randolph Powder and Ms Davina Tilberoo (Snr.) are **attached** to this report which details occupation evidence relating to Lot 5 on LR 146 (Foley Vale).

Council has several outstanding items on the case management timetable.

These items and the "subject to instructions" responses are outlined below:-

1. *Item 20 – response to the Applicant on occupation, due by 12 January 2024, noting the Council's request for provision of occupation evidence in respect of Lot 1 on LR146 on 12 January 2024 and provision of the relevant evidence to you by the Applicant on 16 January 2024.*

Woorabinda Aboriginal Shire Council notes the material provided in support of section 47A of the NTA and further notes the States acceptance of occupation evidence in relation to Lot 1 on LR 146. Council accepts the occupation evidence provided.

2. *Item 21 – public works extinguishment, either asserting specific public works, with evidence, or advising whether the standard public works exclusion clause is sufficient, due by 11 January 2024;*

Council considers the standard generic public works exclusion being sufficient.

3. *Item 24 – finalisation of positions on tenure, due by 8 February 2024;*

Council accepts the final tenure positions specifically the recognition of exclusive native title over Lot 1 on LR 146 and non-exclusive native title over Lot 5 on LR 146.

4. *Item 28 – other interests and how to be recorded in the CD, due by 8 December 2024;*

Council seeks to have its interests recorded in the following way in the "other interests" clause consistent with the "other interests" clause included for Rockhampton Regional Council and Central Highlands Regional Council with a couple of minor amendments.

- "6. *The rights and interests of Rockhampton Regional Council, Central Highlands Regional Council and Woorabinda Aboriginal Shire Council ("the Councils"):*

- (a) *under their local government jurisdiction and functions under the Local Government Act, under the Stock Route Management Act 2002 (Qld) and under any other legislation, for that part of the Determination Area within the area declared to be within their respective Local Government Areas;*
 - (b) *as the:*
 - (i) *lessor under any leases which were validly entered into before the date on which these orders are made and whether separately particularised in these orders or not;*
 - (ii) *grantor of any licences or other rights and interests which were validly granted before the date on which these orders were made and whether separately particularised in these orders or not;*
 - (iii) *holder of any estate or interest in land, including as trustee of any Reserves, under access agreements and easements that exist in the Determination Area;*
 - (c) *as the owner and operator of infrastructure, structures, earthworks, access works and any other facilities and other improvements located in the Determination Area validly constructed or established on or before the date on which these orders are made, including but not limited to any:*
 - (i) *gravel pits operated by Councils;*
 - (ii) *undedicated but constructed roads except for those not operated by Councils;*
 - (iii) *water pipelines and water supply infrastructure;*
 - (iv) *drainage facilities;*
 - (v) *cemetery and cemetery related facilities;*
 - (vi) *watering point facilities;*
 - (vii) *recreational facilities;*
 - (viii) *transport facilities; and*
 - (ix) *community facilities; and*
 - (d) *to enter the land for the purposes described in paragraphs 6(a), 6(b) or 6(c) above by their employees, agents or contractors to:*
 - (i) *exercise any of the rights and interests referred to in this paragraph 6;*
 - (ii) *use, operate, inspect, maintain, replace, restore, and repair the infrastructure, facilities and other improvements referred to in paragraph 6(c) above; and*
 - (iii) *undertake operational activities in their capacity as local governments such as feral animal control, erosion control, waste management and fire management.*
7. *The rights and interests of the State of Queensland, Rockhampton Regional Council, Central Highlands Regional Council and Woorabinda Aboriginal Shire Council to access, use, operate, maintain and control the dedicated roads in the Determination Area and the rights and interests of the public to use and access the roads.*
8. *The rights and interests of the State of Queensland in Reserves, the rights and interests of the trustees of those Reserves and the rights and interests of the persons entitled to access and use those Reserves for the respective purpose for which they are reserved.”*

5. *Item 32 – responses on initial draft of s 87 agreement and CD, due by 19 January 2024; and*

No comment

6. *Item 34 – comments on further amended draft s 87 agreement, due by 16 February 2024.*

No comments

Operation of Foley Vale and Woorabinda Pastoral Company

One of the issues is understanding whether the native title determination will impact on the operations of the Woorabinda Pastoral Company Pty Ltd (“WPC”) on Foley Vale.

WPC is an ASIC Corporation which is wholly owned by Council. A copy of the ASIC search is **attached** to this report.

The operation of Foley Vale and the activities of the WPC are governed by the terms of a Master Land Management Agreement between Council and WPC which was entered into on 5 March 2002.

A copy of the Master Land Management Agreement between Council and WPC is **attached** to this report.

This arrangement is unusual as generally pastoral businesses are operated on Pastoral Leases.

On 26 March 2024 a “without prejudice” meeting between the legal representatives for the BKY Applicant and the legal representative of Council took place. The main purpose of the meeting was to understand whether the native title party will seek to involve itself in the operation of Foley Vale and whether there was agreement as to whether the rights under the Master Land Management Agreement were within the scope of the “other interests” clause in the draft determination.

In summary Council is looking for some express recognition of this relationship and continuation of the arrangement in the determination.

On 6 April 2024 an email marked confidential and without prejudice was received from Ms Zuzana Hermaniakova of QSNTS confirming the following:-

- “(a) QSNTS and the Applicant agree that the Master Land Management Agreement dated 5 March 2002 between Woorabinda Aboriginal Shire Council (“Council”) and Woorabinda Pastoral Company Pty Ltd (“WPC”) is within the scope of Schedule 2 clause 5(b)(ii) of the other interests clause which refers to “The rights of Woorabinda Aboriginal Shire Council as the grantor of licenses or other rights and interests which were validly granted before the date on which these orders were made and whether separately particularised in these orders or not.”*
- (b) QSNTS and the Applicant agree that the “other interests” and native title rights (Councils, WPC and the Native title rights) co-exist;*
- (c) Post determination, QSNTS will recommend, as a priority point of business, for the RNTBC to convene a meeting with Council to formalise the arrangement with Council and WPC.”*

The Applicant was requested to provide an “open” email about the issue. On 8 April 2024 a further email was received from Ms Hermaniakova of QSNTS indicating as follows:-

“We confirm that the Applicant’s view is the section 87 agreement preserves the interests of the Woorabinda Aboriginal Shire Council, including its relationship with the Woorabinda Pastoral Company Pty Ltd.

We further confirm that we will recommend that the RNTBC meet with the Woorabinda Aboriginal Shire Council as a priority.

If you have any questions, please do not hesitate to contact me.”

In our view this acknowledgement regarding the section 87 agreement, the interests of the Council and the rights of the WPC adequately protect the Foley Vale operations noting that order 12 of the consent determination which deals with the relationship between the “native title rights and interests” and the “other rights and interests” expressly provides as follows:-

12. *The relationship between the native title rights and interests described in orders 6 and 7 and the other interests described in Schedule 2 (the **Other Interests**) is that:*
 - (a) *the Other Interests continue to have effect, and the rights conferred by or held under the Other Interests may be exercised notwithstanding the existence of the native title rights and interests;*
 - (b) *to the extent the Other Interests are inconsistent with the continued existence, enjoyment or exercise of the native title rights and interests in relation to the land and waters of the Determination Area, the native title continues to exist in its entirety but the native title rights and interests have no effect in relation to the Other Interests to the extent of the inconsistency for so long as the Other Interests exist; and*
 - (c) *the Other Interests and any activity that is required or permitted by or under, and done in accordance with, the Other Interests, or any activity that is associated with or incidental to such an activity, prevail over the native title rights and interests and any exercise of the native title rights and interests.*

Section 87 Agreement:

The State has recently circulated the final draft section 87 Agreement for this matter.

A copy of the final draft section 87 Agreement is **attached**.

The Applicant held an authorisation meeting on 7 April 2024 to authorise the section 87 Agreement.

Please see below our review and advice on the section 87 Agreement.

Description of Native Title Holders:

The Native Title Holders are described in Schedule 1 of the Determination as follows:

- “1. *The native title holders are the Barada Kabalbara Yetimarala People. The Barada Kabalbara Yetimarala People are the descendants (including through adoption or raising up) of one or more of the following people:*
 - (a) *Unnamed Barada Woman (spouse of Johnny and Charlie Budby);*
 - (b) *Lucy and/or Jimmy Barber;*
 - (c) *Kitty (aka Kitty Eaglehawk);*
 - (d) *Yatton Boney;*
 - (e) *Maggie (mother of Jack Mack and Gypsy Tyson); and*
 - (f) *King Boco.”*

Proposed Determination:

The proposed determination seeks to declare both exclusive and non-exclusive native title rights and interests in the Determination Area.

Exclusive Native Title Rights and Interests Determination (Lot 1 on LR 146)

The exclusive native title rights and interests to be recognised over Foley Vale are as follows:-

- “6. Subject to orders 8, 9 and 10 below the nature and extent of the native title rights and interests in relation to the land and waters described in Schedule 3 are:*
- (a) other than in relation to Water, the right to possession, occupation, use and enjoyment of the area to the exclusion of all others; and*
 - (b) in relation to Water, the non-exclusive right to take the Water of the area for personal, domestic and non-commercial communal purposes.”*

Non-Exclusive Native Title Rights and Interests Determination (Lot 5 on LR 146)

The non-exclusive native title rights and interests to be recognised are as follows:-

- “7. Subject to orders 8, 9 and 10 below, the nature and extent of the native title rights and interests in relation to the land and waters described in Part 2 of Schedule 4 are the non-exclusive rights to:*
- (a) access, be present on, move about on and travel over the area;*
 - (b) camp on the area and for that purpose, erect temporary shelters on the area;*
 - (c) take Natural Resources from the land and waters of the area for any purpose;*
 - (d) use Natural Resources of the land and waters of the area that are not taken, for any purpose;*
 - (e) take the Water of the area for personal, domestic and non-commercial communal purposes;*
 - (f) bury Native Title Holders within the area;*
 - (g) maintain places of importance and areas of significance to the Native Title Holders under their traditional laws and customs on the area and protect those places and areas from physical harm;*
 - (h) teach on the area the physical and spiritual attributes of the area;*
 - (i) hold meetings on the area; and*
 - (j) light fires on the area for cultural, spiritual or domestic purposes, including cooking, but not for the purposes of hunting or clearing vegetation.”*

Orders 8, 9 and 10 of the Determination deals with restrictions/qualifications on the exclusive and non-exclusive native title.

In summary these are as follows:-

- (a) The exclusive and non-exclusive native title rights and interests are subject to and exercisable in accordance with the “laws of the State and the Commonwealth” and traditional laws acknowledged and traditional customs observed by the Native Title Holders;

- (b) The definition of the phrase “Laws of the State and Commonwealth” expressly includes all State and Commonwealth Acts, Councils Local Laws and planning scheme;
- (c) The native title rights in relation to water (order 6(b)) and the non-exclusive native title rights and interests (order 7) do not confer exclusive possession, occupation, use and enjoyment on the Native Title Holders;
- (d) There is no native title rights and interests in or in relation to “minerals” as defined in the *Mineral Resources Act 1989 (Qld)* and “petroleum” as defined in the *Petroleum Act 1923 (Qld)* and the *Petroleum and Gas (Production and Safety) Act 2004 (Qld)*.

Determination Area:

The Determination areas relevant to Council are Lot 1 on LR 146 and Lot 5 on LR 146.

Schedule 4 Part 1 of the Determination details the lots over which exclusive native title are to be recognised and Schedule 4 Part 2 details the lots over which non-exclusive native title rights and interests are to be recognised.

Schedule 6 of the Determination contains maps of the Determination Area. The areas of the determination relevant to Council are depicted on Sheets 17 and 20.

Schedule 5 of the Determination sets out the areas which do not form part of the Determination Area.

The areas which do not form part of the Determination are described in a generic way and broadly cover the following areas:-

- (a) Areas where “Previous Exclusive Possession Acts” as defined in the *Native Title Act 1993 (Cth)* (“NTA”) have occurred; and
- (b) Land and waters on which “Public Works” as defined in the NTA have been established including the section 251D area; and
- (c) Areas where native title has been extinguished under section 24JA of the NTA; and
- (d) Areas that were subject to “Pre-Existing Rights Based Acts” as defined in the NTA.

Council Interests:

Council interests include Foley Vale and the Foley Vale Airstrip and the ability of the Woorabinda Pastoral Company Pty Ltd to continue its activities on Foley Vale.

Schedule 2 of the Determination sets out the extent of “other interests” in the Determination Area. Importantly the “other interests” prevail over any native title rights and interests which are suppressed to the extent of any inconsistency otherwise the other interests and the native title rights and interests co-exist.

Council’s interests are acknowledged in a generic but comprehensive way as follows:

- “3. *The rights and interests of Rockhampton Regional Council, Central Highlands Regional Council, Isaac Regional Council, Livingstone Shire Council and Woorabinda Aboriginal Shire Council (Councils):*

- (a) *under their local government jurisdiction and functions under the Local Government Act, under the Stock Route Management Act 2002 (Qld) and under any other legislation, for that part of the Determination Area within the area declared to be within their respective Local Government Area;*
 - (b) *as the:*
 - (i) *lessor under any leases which were validly entered into before the date on which these orders are made and whether separately particularised in these orders or not;*
 - (ii) *grantor of any licences or other rights and interests which were validly granted before the date on which these orders were made and whether separately particularised in these orders or not;*
 - (iii) *holder of any estate or interest in land, including as trustee of any Reserves, under access agreements and easements that exist in the Determination Area;*
 - (c) *as the owner and operator of infrastructure, structures, earthworks, access works and any other facilities and other improvements located in the Determination Area validly constructed or established on or before the date on which these orders are made, including but not limited to any:*
 - (i) *gravel pits operated by Councils;*
 - (ii) *undedicated but constructed roads except for those not operated by Councils;*
 - (iii) *water pipelines and water supply infrastructure;*
 - (iv) *drainage facilities;*
 - (v) *cemetery and cemetery related facilities;*
 - (vi) *watering point facilities;*
 - (vii) *recreational facilities;*
 - (viii) *transport facilities; and*
 - (ix) *community facilities; and*
 - (d) *to enter the land for the purposes described in paragraphs 5(a), 5(b) or 5(c) above by their employees, agents or contractors to:*
 - (i) *exercise any of the rights and interests referred to in this paragraph 5;*
 - (ii) *use, operate, inspect, maintain, replace, restore, and repair the infrastructure, facilities and other improvements referred to in paragraph 5(c) above; and*
 - (iii) *undertake operational activities in their capacity as local governments such as feral animal control, erosion control, waste management and fire management.*
4. *The rights and interests of the State of Queensland, Rockhampton Regional Council, Central Highlands Regional Council, Isaac Regional Council, Livingstone Shire Council and Woorabinda Aboriginal Shire Council to access, use, operate, maintain and control the dedicated roads in the Determination Area and the rights and interests of the public to use and access the roads.*
5. *The rights and interests of the State of Queensland in Reserves, the rights and interests of the trustees of those Reserves and the rights and interests of the persons entitled to access and use those Reserves for the respective purpose for which they are reserved.”*

As detailed above Council has also received an acknowledgement from the Applicants through their legal representative that the interests of the Council including the relationship with the WPC under the Master Land Management Agreement is within scope of Schedule 2 paragraph 5(b)(ii) and are preserved.

Recommendation:

Council resolves as follows:-

1. The material provided in support of section 47A of the NTA being the Affidavit of Mr Randolph Powder and Ms Davina Tilberoo (Snr) is noted. Council further notes the State's acceptance of occupation evidence in relation to Lot 1 on LR 146 (Foley Vale). Council accepts the occupation evidence provided.
2. Council accepts that the standard generic public works exclusion as detailed in Schedule 5 of the Determination is sufficient.
3. Council agrees to the final tenure positions specifically the recognition of exclusive native title over Lot 1 on LR 146, subject to reliance on section 47A of the NTA, and the recognition of non-exclusive native title over Lot 5 on LR 146.
4. Council seeks to have its interests recorded consistent with the "other interests" clause included for Rockhampton Regional Council, Central Highlands Regional Council, Isaac Regional Council and Livingstone Shire Council.
5. Council accepts the acknowledgements from the Barada Kabalbara Yetimarala Applicant regarding the operation of Foley Vale and the activities of the Woorabinda Pastoral Company Pty Ltd under the Master Land Management Agreement are preserved in the s87 Agreement.
6. Council agrees to enter the section 87 Agreement and resolves to authorise Moray & Agnew Lawyers to sign the section 87 Agreement on its behalf.
7. Council authorises the Mayor and Chief Executive Officer to agree to any minor amendments to the section 87 agreement if required prior to the making of the Determination by the Federal Court.



Recommended:

Andrew Kerr
Moray & Agnew Lawyers

Endorsed:

Kristine Smith
Chief Executive Officer

Attachments:

1. Unsworn Affidavit of Randolph Powder
2. Unsworn Affidavit of Davina Tilberoo
3. ASIC Search of Woorabinda Pastoral Company
4. Master Land Management Agreement between Woorabinda Aboriginal Shire Council and Woorabinda Pastoral Company Pty Ltd
5. A copy of the final draft s87 Agreement.