Aboriginal Land Rights (Northern Territory) Act 1976

KENBI (COX PENINSULA) LAND CLAIM

FINDING AND REPORT OF THE ABORIGINAL

LAND COMMISSIONER MR JUSTICE OLNEY

OFFICE OF THE ABORIGINAL LAND COMMISSIONER
9-11 Cavenagh Street
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PREFACE

Even before the Aboriginal Land Rights (Northern Territory) Act 1976 came into force on Australia Day 1977, the Larrakia people in the Darwin area had laid claim to the Cox Peninsula and islands to the west of it.

In pre-contact times the region around Darwin on both sides of Darwin harbour was inhabited by the Aboriginal people who are broadly identified through their common language as the Larrakia. The impact of European and Asian migration had a devastating effect upon the Larrakia, the worst effects of which were compounded by factors such as the Second World War and the development of Darwin as a modern, expanding urban area. In the result, the Larrakia all but disappeared as a readily identifiable and coherent group of people. So much so that in the first report of the Aboriginal Land Rights Commission in 1973, the Royal Commissioner (Mr Justice Woodward) said (at paragraphs 157-160):

> A more difficult question is raised by the few remaining members of the Larrakia tribe who, in discussions with me, have laid claim particularly to an area of waterfront land between Bagot and Nightcliff which they call Kulaluk. When I met them I was told that there are some 18 members of the tribe now left. Later information suggests that fewer than this number can trace paternal descent from the Larrakia, but there are more who identify themselves as Larrakia because of maternal links. They have told me that the whole of Darwin is built on Larrakia country and written claims submitted on their behalf include claims to several parts of the city, the Larrakeyah Reserve of 14 square miles south of Darwin and 660 acres of land in Darwin to replace land excised from the Bagot Reserve in 1965. Other Aboriginal groups in Darwin have asked for areas of land at Knuckey's Lagoon, Berrimah and One Mile Dam, Francis Bay where they are presently camping, to be set aside for them as housing areas. These again raise no direct

> questions of traditional rights, although some of these people are descended from neighbouring tribes and their forebears would, no doubt, have had some contact with the Larrakia people and their country. Although such community developments deserve sympathetic consideration, there seems to be no sound reason why such people should be treated any differently from other Aborigines coming from further afield and wishing to live in the Darwin area.
>
> The Larrakia group raise some special problems. Clearly they are entitled to consideration as a group wanting to live as a small community and to do so on some part of the traditional lands of their tribe.
>
> Whether they should be free to choose the particular site in a developing city such as Darwin raises different questions. One question is the length and extent of their attachment to the area in question: it may have belonged to a different clan of their tribe. Another is the effect of town planning considerations and third is the possible effect of rights of other persons acquired in good faith.

I am not privy to the evidence upon which this assessment was made but it is nevertheless indicative of the plight of the Larrakia at that time.

I have not attempted to restate or even summarise the history of the Larrakia people. It is both long and tragic and deserves far greater research and insight than I am able to give it in the context of this report. The anthropologists engaged to assist the claimants in the presentation of their claim have set out in the document known as "Kenbi 1979" (exhibit NLC 1) a detailed and well researched commentary which deserves serious study by Australians of all races.

There has been a continuing Aboriginal presence on the Cox Peninsula since the advent of European contact. In more recent times that presence has been more or less concentrated at the settlement formerly called Delissaville, now Belyuen. In the second and final report

of the Aboriginal Land Rights Commission published in April 1974, Mr Justice Woodward made these comments at paragraphs 151-155 (inclusive):

> I understand that consideration has been given in recent years to declaring the Delissaville area to be an Aboriginal reserve. I think it is clear that this is an appropriate area for Aboriginal ownership . However I do not feel able to make any precise recommendations as to the amount of land which should be covered by such a proclamation.
>
> The position on Cox Peninsula is complicated by several factors. The first is that there are several small areas of freehold land on the eastern side. I am not aware of the use to which these ones are being put. Secondly there is a substantial piece of land reserved for government purposes as a radio booster station, and I understand there is also a forestry reserve and a further area reserved for government purposes.
>
> It seems to me that the area to be handed over to Aboriginal ownership is a matter for negotiation. It is important that Aborigines should own places that are important to them and a reasonable amount of land having economic value.
>
> The necessary negotiations should be conducted by the Northern Land Council. An agreed amount of land should be transferred to Aboriginal ownership as soon as possible, and any area in dispute should be referred in due course to the Aboriginal Land Commission, ...
>
> I would not rule out the possibility that either the forestry reserve or the government reserves should be transferred to Aboriginal ownership subject to appropriate leasing back.

With the advent of the Land Rights Act, an area of 4091 hectares designated as Delissaville became Aboriginal land but the claim to the balance of the Cox Peninsula was left to be dealt with by way of a traditional land claim. This was not what Mr Justice Woodward had contemplated. In the context of his second report, it seems clear that the Royal Commissioner regarded the claim to Cox Peninsula as a "needs based" claim rather than as a traditional land claim. There may be some significance in the fact that

Delissaville was ultimately vested in the Delissaville/ Wagait/Larrakia Aboriginal Land Trust and that three separate areas of land previously separately identified as Delissaville, Wagait Reserve and Larrakia Reserve were thereby brought under common Aboriginal ownership.

The concept of "needs based" land claims which was central to the recommendations contained in the second Woodward report did not survive the change of government in 1975. Although the government which sponsored the bill which became law in the form of the Aboriginal Land Rights (Northern Territory) Act 1976 had publicly accepted and adopted the recommendations of the Royal Commissioner, the end result was a law which failed to address one of the more important aspects of the recommendations.

The original Dum-In-Mirrie Island Land Claim was made on 29 June 1978, and the Kenbi (Cox Peninsula) claim, on 20 March 1979. The inquiry finally commenced on 13 November 1989. In the intervening decade each of the four judges who have held the office of Aboriginal Land Commissioner have been involved in the extensive preliminaries which have preceded the presentation of the claimants' case and the High Court of Australia has been involved in one way or another on four separate occasions.

I have devoted one section of the report to a summary, without comment, of the litigation which preceded the commencement of the inquiry. Over the years, feelings have run high over some of the issues involved. The task of my three predecessors in grappling with novel situations was difficult in the extreme . I have endeavoured merely to record the important events.

With all the preliminary manoeuvring out of the way, the claimants were ultimately able to present their case but by then the ravages of time had severely depleted their numbers.

The report which follows deals with questions touching upon the claim to traditional Aboriginal ownership of the claim area. My task has been to perform the function cast upon me by section 50 (1) (a) (i) of the Land Rights Act, namely, to ascertain whether the claimants or any other Aboriginals are the traditional Aboriginal owners of the land claimed. This function has now been performed within the very limited structure of the Act. I have no authority to bend the rules to make them more apposite to the particular circumstances of the Larrakia people. At the end of the day the wisdom of Mr Justice Woodward's proposals in 1974 can be seen to stand in stark contrast to the very inadequate provision which the Land Rights Act makes for people such as the Larrakia.

A NOTE ON SPELLING OF ABORIGINAL WORDS AND OTHER CONVENTIONS ADOPTED IN THIS REPORT

Representation of Aboriginal language material inevitably poses problems when an attempt is made to express it in the English language. In this case the problem is compounded by the fact that within the claim area a number of distinct Aboriginal languages are used. A perusal of the documents presented in evidence illustrates some of the variations used in spelling the names of places and people, and demonstrates in some instances a process of change over the period the land claim has been pending. A particular example is the word Wagait which seems commonly to be spelt Wagaitj in more recent material but is also spelt Wagaidj.

I have adopted the policy, when quoting from documents, of using the spelling adopted by the author of the document at the time of its creation. This has led to some inconsistency throughout the report but nevertheless the meaning will be readily understood. In the same way references to Delissaville and Belyuen are in most cases interchangeable. The only exception is when Belyuen the ceremonial site is referred to in which case it would be inappropriate to substitute the older name Delissaville.

The reports of the Aboriginal Land Rights Commission prepared and presented by the Royal Commissioner Mr Justice Woodward in 1973 and 1974, are frequently referred to as 'the first Woodward report' and 'the second Woodward report' respectively.

The Aboriginal Land Rights (Northern Territory) Act 1976 as amended is usually referred to as the Land Rights Act or,

where the meaning is clear from the context, simply as 'the Act'.

I have for the most part abbreviated references to the Northern Territory to 'NT', and I have referred to the Attorney-General for the Northern Territory as the Attorney-General.

In 1984, the Australian Government Publishing Service published as part of its series of reports of the Aboriginal Land Commissioner the reasons for decisions on procedural and jurisdictional matters in this claim given by the former Commissioner Mr Justice Toohey and the High Court of Australia up to April 1982. Although it is not strictly a report for the purposes of the Land Rights Act, this publication is numbered as Volume 16 in that series of reports and is referred to in this report as 'Vol. 16'.

PART I

FINDING and RECOMMENDATION

1.0 FINDING CONCERNING TRADITIONAL ABORIGINAL OWNERSHIP

1.1 By application in writing made to the Aboriginal Land Commissioner on 20 March 1979 the Northern Land Council (the NLC) on behalf of certain named Aboriginals (the claimants) claiming to have a traditional land claim to the land referred to in paragraph 1.2 made application for the determination of their claim.

1.2 The land claimed (hereafter referred to as the claim area) is all those pieces of land delineated in Compiled Plan 4623A in the records of the NT Department of Lands. The claimed land is more particularly described in paragraph 3.3.3. A plan of the claim area based upon CP4623A is set out in the schedule to this report.

1.3 Upon inquiry being made into the application I find that there are no traditional Aboriginal owners within the meaning of the Aboriginal Land Rights (Northern Territory) Act 1976 of the claim area or any part of it.

2.0 RECOMMENDATION TO THE MINISTER FOR ABORIGINAL AFFAIRS

2.1 In view of my finding there is no occasion for me to make any recommendation for the granting of the claim area or any part of it to a land trust in accordance with section 50(l)(a)(ii) of the Act.

2.2 Notwithstanding my finding as to traditional Aboriginal ownership and the absence of any recommendation pursuant to section 50(l)(a)(ii) I nevertheless recommend to the Minister for Aboriginal Affairs that in the very special circumstances of the case he use his good offices to negotiate with the government of the NT to obtain for the use and benefit of the descendants of the Larrakia people, sufficient areas of suitable land on Cox Peninsula as may be necessary to satisfy the reasonable aspirations of those people to maintain and enhance the cultural traditions of their ancestors.

PART II

PRELIMINARY MATTERS

3.0 CLAIMS TO COX PENINSULA AND THE ADJACENT ISLANDS

The Kenbi Land Claim is the culmination of a number of claims made by or on behalf of Aboriginal people to obtain some form of title to land on Cox Peninsula and the adjacent islands. The concept of "land rights" is of course one of fairly recent origin and in this section I outline claims made in the context of the lands rights movement. There may have been other claims prior to the establishment of the Aboriginal Land Rights Commission in 1973.

3.1 CLAIMS MADE PRIOR TO THE LAND RIGHTS ACT

3.1.1 Claim made to Aboriginal Land Rights Commission

3.1.1.1 In the preface to this report I have quoted paragraphs 151 to 155 (inclusive) of the second Woodward report and it is unnecessary to do more than refer again to what is there recorded.

3.1.1.2 There is no material before me in this inquiry that would assist in identifying the extent of the land which the Royal Commissioner understood to be encompassed by the description "the Delissaville area" (paragraph 151) but it does seem from what is said in paragraph 152 that it did not extend to the whole of the Cox Peninsula.

3.1.1.3 Nor is there any evidence before me to indicate the identity of the group of Aboriginals on whose behalf the claim to Cox Peninsula was made

although it would seem clear from paragraph 158 of the report that it was made on behalf of the Wagaitj residents of the area. That paragraph sets out in tabular form details of proposed land trusts for a number of areas of land which were not already reserved for Aboriginals. Delissaville is nominated as one such area (paragraph 145) . In paragraph 158 the proposed name of the land trust is "Wagait" and the body named as the "Trustee Nominator" is Delissaville Council.

3.1.1.4 It is a matter of record that an area described under the heading "Delissaville" became Aboriginal land pursuant to section 10 of the Land Rights Act and is vested (together with two other parcels of land described in Schedule 1 of the Land Rights Act) in the Delissaville/Wagait/Larrakia Aboriginal Land Trust established pursuant to section 4 of the Act. The establishment of the land trust was notified in the Commonwealth of Australia Gazette No. S 138 on 21 July 1978.

3.1.2 Claim made to the Interim Land Commissioner

3.1.2.1 On 2 July 1974 the then Prime Minister (Mr Whitlam) announced that the government had accepted in principle the recommendations made in the second Woodward report and had authorised the drafting of appropriate legislation. The government also authorised the appointment of an Interim Land Commissioner for the NT, to ascertain the needs of Aboriginals, either as individuals or communities, for land in the NT outside existing Aboriginal reserves. Mr Justice Ward of the NT

Supreme Court was appointed Interim Land Commissioner in April 1975. It is a matter of record that a number of inquiries were conducted by the Interim Land Commissioner and that various leasehold grants of land were made as a result of his recommendations.

3.1.2.2 Exhibit NTG 3 in this inquiry is a copy of a letter dated 19 May 1975 addressed to "The Secretary, Land Rights Commission, Supreme Court, Darwin, NT" written by the North Australian Aboriginal Legal Aid Service. The text is as follows:

> The writer acts for the Wagait Tribe, represented by Mrs Margaret Rivers.
>
> The tribe claim as their traditional land all that land from the western side of Darwin Harbour, to the Wagait Aboriginal Reserve, and as far south as the northern side of the Daly River.
>
> Please advise the appropriate method of commencing an application in respect of such a claim.
>
> The tribe has appointed Mr H. Twemlow, Solicitor, to act on their behalf.

Although it does not appear in the evidence in this inquiry, I have ascertained from records held in the Australian Archives that the only reaction to this letter was a response from the Interim Land Commissioner's Associate dated 20 May 1975 in the following terms:

> Re: CLAIM BY WAGAIT TRIBE
>
> I have to hand your letter of 19th ultimo (sic).
>
> In answer to your query, it is suggested that you channel your claim through The Secretary, Department of the Northern Territory.
>
> This can be done by you or through the Northern Land Council Secretary, Mr John

Wilders.
The claim will then be referred to this Commission if it is thought necessary.
If indeed the above is the case then you will be advised by me when the hearing will commence.

(I have marked a photocopy of this letter as exhibit ALC 6).

3.1.2.3 On 23 September 1976 the then secretary of the NLC wrote to the Interim Land Commissioner forwarding him minutes of a meeting held at Delissaville on 17 December 1975 and a map indicating the areas of land at Cox Peninsula and nearby islands which were claimed by members of the Wagait tribe.

3.1.2.4 The minutes and the map referred to in the NLC letter are part of exhibit A3 in the proceedings relating to the Town Planning Regulations which commenced before me on 18 October 1988 and to which reference is made elsewhere in this report.

3.1.2.5 The substance of the minutes of the Delissaville meeting held on 17 December 1975 is that a claim should be made to the Interim Land Commissioner to land on the Cox Peninsula and to some islands.

3.1.2.6 The following passage from the minutes is of some interest:

The older men said there were two areas always considered sacred to the Larrakia people; these were three rocks off Point Margaret on the southern headland of Tapa Bay, called War-ring and Knife Island in Bynoe Harbour, known to the Aboriginal people as Willa. Another area of significance, situated in the existing Delissaville township is the water-hole called Belyuen, by which name Delissaville from now

on is to be known.

3.1.2.7 The map accompanying the letter to the Interim Land Commissioner indicates that the claim did not include the coastal area of the peninsula north of a line running approximately south-east from Gilruth Point to the mouth of Woods Inlet, nor did it include the south-eastern portion of the current claim area between West Arm and Middle Arm.

3.1.2.8 I have not been able to locate any information to suggest that the Interim Land Commissioner conducted any inquiry into the claim. Indeed, it appears that by the time the claim was made the Interim Land Commissioner had been requested not to undertake any new inquiries.

3.2 THE DUM-IN-MIRRIE ISLAND LAND CLAIM

3.2.1 In June 1977 the first Aboriginal Land Commissioner (Mr Justice Toohey) formulated a set of practice directions in relation to the conduct of traditional land claims which included a provision enabling interested persons to seek directions for the lodging of an application under the Land Rights Act.

3.2.2 On 19 September 1977 the Commissioner received from Mr S. Falconer a request for directions in regard to Dum-in-Mirrie Island and on 7 October 1977, His Honour heard Mr Falconer and his partner Mr C. Clements in support of an application that a claim be lodged in regard to that island. The NLC was represented at the hearing by counsel.

3.2.3 Messrs Falconer & Clements indicated that they wished to conduct a tourist venture on Dum-In-Mirrie Island but had been told by the Lands Department in October 1976 that no application for a lease would be entertained until any claim under the Land Rights Act had been determined.

3.2.4 Toohey J did not deal with the application immediately but after receiving a letter from the NLC dated 13 October 1977 in which the council indicated that it would not be in a position to proceed with a claim for about one year, His Honour gave directions on 7 December 1977 that any application for a traditional land claim to Dum-in-Mirrie Island or any part of it be made by 30 June 1978.

3.2.5 On 29 June 1978 the NLC on behalf of the then claimants lodged an application seeking determination of the claim. The Aboriginals on behalf of whom the application was made were identified as:

Bobby Secretary
Tommy Lyons
Olga Singh
and Prince of Wales.

3.2.6 The application described the land claimed as follows:

General
The island being south of Beer Eetar Island between the Timer Sea and Port Patterson.
Details
All that piece or parcel of land at Dum-in-mirrie Island at Port Patterson, Northern

Territory of Australia containing an area of 7 square kilometres more or less being all that part of Dum In Mirrie Island above a line along the low water mark surrounding the said island but excluding from the said line those parts along the low water marks of all intersecting streams and estuaries inland from a straight line joining the seaward extremity of each of the opposite banks of each of the said streams and estuaries so that the aforesaid boundary line shall follow that part below low water mark of each of the aforesaid lines across each of the aforesaid streams and estuaries.

3.2.7 The application asserts that the land claimed is unalienated Crown land.

3.2.8 On 8 December 1978, Toohey J fixed 19 February 1979 as the date for the commencement of the inquiry into the claim. As a result of publicity given to the matter and the Commissioner's invitation for interested parties to give notice of their interest, 16 notices of intention to be heard were received.

3.2.9 Late in. January 1979 solicitors for the NLC sought an adjournment of the inquiry and the consolidation of the claim with a foreshadowed claim to Cox Peninsula.

3.2.10 On 7 February 1979 at a public hearing at which the main interested parties were present or represented, after hearing submissions and argument, Toohey J ordered that the commencement of the inquiry be adjourned to a date to be fixed. In reasons delivered on 14 February 1979 he said, inter alia:

> The attitude of those present was that the claim should be heard as soon as possible, but there was no particular magic in 19 February and no specific detriment that would be suffered if the hearing proceeded at some later date, so long as it was not too distant. The basis of the application to adjourn was

twofold. Firstly it was said that despite the length of time that this matter has been under consideration, the anthropological and other field work had not been completed. Secondly it was said that a claim to Dum-In-Mirrie Island, heard in isolation from the broader claim foreshadowed in the respect of the Cox Peninsula, would be artificial in terms of traditional Aboriginal ownership and would lead inevitably to a duplication of evidence at a later stage with a consequent waste of time and money. I do not doubt that this is so. Indeed, the lodging of the claim to Dum-In-Mirrie Island alone was the result of an approach made by Messrs Falconer and Clements, quite properly having regard to their particular interest in the development of that island.

In my view the most compelling consideration is this. Under section 50(1) of the Aboriginal Land Rights Act, when an application is made, the Commissioner's function is to ascertain whether the claimants or any other Aboriginals are the traditional Aboriginal owners of the land. The Act imposes an obligation on the Commissioner faced with application to determine who are the traditional owners. That obligation is one that can only be carried out within the limits of reasonable practicability. But if on 19 February the Northern Land Council presented no evidence or entirely inadequate evidence of traditional ownership, that would not relieve me of my obligation under the Act. The matter would then have to be adjourned anyway, or without the background, information and resources of the Northern Land Council, I would have to embark on an inquiry of my own. Undoubtedly, that would occupy many months. The realities of the situation leave me no alternative but to adjourn the application. I do so without making any order that this claim be consolidated with any other. That aspect was not much pursued during the hearing. (Vol. 16 p.1)

3.2.11 During the hearing of the application counsel for the NLC gave an assurance that the evidence would be ready to proceed in October 1979.

3.2.12 An application in the Kenbi (Cox Peninsula) Land Claim was received by Toohey J on 20 March 1979. The new

application (which is more particularly described hereunder) included a claim to the whole of the land claimed in the Dum-in-Mirrie Island claim.

3.2.13 On 26 June 1979 Toohey J granted leave to the claimants to withdraw the Dum-In-Mirrie Island claim.

3.3 THE KENBI (COX PENINSULA) LAND CLAIM

3.3.1 On 20 March 1979 the NLC on behalf of 57 Aboriginals claiming to have a traditional land claim in the Cox Peninsula, Bynoe Harbour, Port Patterson area of the NT, applied to the Aboriginal Land Commissioner for determination of their claim.

3.2.2 The Aboriginals on whose behalf the application was made were:

Prince of Wales (Midpul) Bobby Secretary (Kooliminyi)
Olga Singh (Gudbilling) Topsy Secretary
Gabriel Secretary Kathleen Secretary
Christopher Shields Jnr. Lynette Shields
Ellen Secretary Anna Secretary
Margaret Rivers Norman Harris
Zoe Singh Raelene Singh
Jason Singh Nipper Rankin
Josephine Rankin Richard Rankin
John Fejo John Bianamu
Mrs Gracie Bianamu Tom Burranjuck
Esther Burranjuck Agnes Lippo
Bob Lane Kay Lane
Rusty Moreen Bette Moreen
Michael Lippo Maudie Bennett

Roy Yarrowin Christine Lippo
Roy Bill Bill Caroline Lippo
Peg Wilson Ruby Yarrowin
Maureen Burr Burr Roy Mutpul
Douglas Rankin Margaret Kudang
Jimmy Singh Billy Bill Bill
Harry Singh Susan Rankin
Ray Burr Burr Lorna Tennant
Lennie Singh Bruce Potts
Brian Singh William Singh
Joseph Singh Lennie Burr Burr
Rosie Cubillo Alice Jorrock
Kitty Moffatt John Gordon
John Singh.

3.3.3 The land claimed was described as follows:
All that piece of land in the Northern Territory containing an area of approximately 800 sq. kilometres commencing at the north-east corner of Section 17452 (in the Hundred of Hughes) and thence northerly along the western border of the Hundred of Ayers to the low water line at Middle Arm, from thence in a generally north-westerly direction and following the line along the low water mark surrounding the land known as Cox Peninsula, but excluding from the said line those parts along the low water marks of all intersecting streams and estuaries inland from a straight line joining the seaward extremity of each of the opposite banks of each of the said streams and estuaries so that the aforesaid boundary line shall follow that part below low water mark of each of the aforesaid lines across each of the aforesaid streams and estuaries, to the south-east corner of Section 11, from thence westerly to the south-west corner of Section 11, from thence northerly to the low water mark, from thence following the low water line in a generally south-west direction to the intersection with Section 4, thence easterly to the north-east corner of Section 4, thence south to the south-east corner of Section 4, thence westerly, southerly, westerly and northerly along the boundary of Section 4 to the low water line at Woods Inlet, thence South-west along the low water line to the north-east corner of Section 3, thence southerly, westerly,

northerly, westerly along the boundary of Section 3 to the border of the Aboriginal Land, thence northerly to the low water mark on the northern bank of Woods Inlet, thence in a generally north-easterly direction following the low water line to the south-east corner of Section 9, thence westerly, northerly, easterly and south-easterly around the boundary of Section 9 to the low water line, thence in a general northerly direction along the low water line to the south-west corner of Section 5, thence westerly and northerly along the boundary of Section 5 to the southern boundary of Section 7, thence westerly to the boundary or Section 6, thence southerly, westerly, northerly and north-easterly along the boundary of Section 6, to the south-western corner of Section 8, thence northerly and north-easterly along the border of Section 8 to the low water line, from thence in a generally west- north-westerly direction along the low water line to the north-east corner of Section 12, thence southerly, westerly and northerly around the boundary of Section 12 to the low water mark, thence turning west and following the low water line around the Cox Peninsula down into Bynoe Harbour until it meets the north-west corner of the Hundred of Hughes, thence easterly to the North-east corner of Section 1752, being the point of commencement, but excluding all that piece of land in the Northern Territory of Australia containing an area of 4036 hectares more or less being Section 25 in the Hundred of Pray County of Palmerston, more particularly shown on plan C.P. 4188 which has been deposited at the Lands Titles Office, Darwin.

All that piece of land containing an area of approximately 33.5 square kilometres commencing at the north-west corner of Section 2561 (in the Hundred of Milne), thence southerly to the South-west corner of Section 2578, thence easterly to the north-west corner of Section 2584, thence southerly to the south-west: corner of Section 2584, thence easterly to the south-eastern corner of Section 2582, thence northerly to the south-west corner of Section 2549, thence easterly to the south-east corner of Section 2549, thence northerly to the south-west corner of Section 2539, thence easterly to the south-east; corner of Section 2541, thence northerly to the north-east corner of Section 2532, thence westerly to the north-west corner of Section 2561, being the point of commencement.

All that piece or parcel of land at Dum-In-Mirrie Island at Port Patterson, Northern Territory of Australia containing an area of 7 square kilometres more or less being all that part of Dum-in-Mirrie Island above a line along the low water mark surrounding the said island but excluding from the said line those parts along the low water marks of all intersecting streams and estuaries inland from a straight line joining the seaward extremity of

each of the opposite banks of each of the said streams and estuaries so that the aforesaid boundary line shall follow that part below low water mark of each of the aforesaid lines across each of the aforesaid streams and estuaries.

All that piece or parcel of land at Beer Eatar Island at Port Patterson, Northern Territory of Australia containing an area of 2-1/2 square kilometres more or less being all that part of Beer Eatar Island above a line along the low water mark surrounding the said island but excluding from the said line those parts along the low water marks of all intersecting streams and estuaries inland from a straight line joining the seaward extremity of each of the opposite banks of each of the said streams and estuaries so that the aforesaid boundary line shall follow that part below low water mark of each of the aforesaid lines across each of the aforesaid streams and estuaries.

All that piece or parcel of land at the unnamed island between Beer Eatar and Grose Island at Port Patterson, Northern Territory of Australia containing an area of 4 square kilometres more or less being all that part of the said island above a line along the low water mark surrounding the said island but excluding from the said line those parts along the low water marks of all intersecting streams and estuaries inland from a straight line joining the seaward extremity of each of the opposite banks of each of the said streams and estuaries so that the aforesaid boundary line shall follow that part below low water mark of each of the aforesaid lines across each of the aforesaid streams and estuaries.

All that piece or parcel of land at Grose Island at Port Patterson, Northern Territory of Australia containing an area of 6 square kilometres more or less being all that part of Grose Island above a line along the low water mark surrounding the said island but excluding from the said line those parts along the low water marks of all intersecting streams and estuaries inland from a straight line joining the seaward extremity of each of the opposite banks of each of the said streams and estuaries so that the aforesaid boundary line shall follow that part below low water mark of each of the aforesaid lines across each of the aforesaid streams and estuaries.

All that piece or parcel of land at Quall Island at Port Patterson, Northern Territory of Australia containing an area of 1 square kilometre more or less being all that part of Quall Island above a line along the low water mark surrounding the said island.

All that piece or parcel of land at Djajalbit

Island at Port Patterson, Northern Territory of Australia containing an area of 1/4 square kilometre more or less being all that part of Djajalbit Island above a line along the low water mark surrounding the said island.

All that piece or parcel of land at Bare Sandy Island at Port Patterson, Northern Territory of Australia containing an area of 1/3 square kilometre more or less being all that part of Bare Sandy Island above a line along the low water mark surrounding the said island.

All that piece or parcel of land at Indian Island at Bynoe Harbour, Northern Territory of Australia containing an area of 29 square kilometres more or less being all that part of Indian Island above a line along the low water mark surrounding the said island but excluding from the said line those parts along the low water marks of all intersecting streams and estuaries inland from a straight line joining the seaward extremity of each of the opposite banks of each of the said streams and estuaries so that the aforesaid boundary line shall follow that part below low water mark of each of the aforesaid lines across each of the aforesaid streams and estuaries.

All that piece or parcel of land at Turtle Island at Bynoe Harbour, Northern Territory of Australia containing an area of 2/3 square kilometre more or less being all that part of Turtle Island above a line along the low water mark surrounding the said island but excluding from the said line those parts along the low water marks of all intersecting streams and estuaries inland from a straight line joining the seaward extremity of each of the opposite banks of each of the said streams and estuaries so that the aforesaid boundary line shall follow that part below low water mark of each of the aforesaid lines across each of the aforesaid streams and estuaries.

All that piece or parcel of land at Knife Island at Bynoe Harbour, Northern Territory of Australia containing an area of 1/4 square kilometre more or less being all that part of Knife Island above a line along the low water mark surrounding the said island but excluding from the said line those parts along the low water marks of all intersecting streams and estuaries inland from a straight line joining the seaward extremity of each of the opposite banks of each of the said streams and estuaries so that the aforesaid boundary line shall follow that part below low water mark of each of the aforesaid lines across each of the aforesaid streams and estuaries.

All that piece or parcel of land at Crocodile Island at Bynoe Harbour, Northern Territory of

Australia containing an area of 1/2 square kilometre more or less being all that part of Crocodile Island above a line along the low water mark surrounding the said island but excluding from the said line those parts along the low water marks of all intersecting streams and estuaries inland from a straight line joining the seaward extremity of each of the opposite banks of each of the said streams and estuaries so that the aforesaid boundary line shall follow that part below low water marks of each of the aforesaid lines across each of the aforesaid streams and estuaries.

All that piece or parcel of land at Simms Reef at Port Patterson, Northern Territory of Australia containing an area of 1/5 square kilometre more or less being all that part of Simms Reef above a line along the low water mark surrounding the said reef.

All that piece or parcel of land at Roche Reef at Port Patterson, Northern Territory of Australia containing an area of 9 square kilometres more or less being all that part of Roche Reef above a line along the low water mark surrounding the said reef.

All that piece or parcel of land at Moira Reef at Part Patterson, Northern Territory of Australia containing an area of 1/5 square kilometre more or less being all that part of Moira Reef above a line along the low water mark surrounding the said reef.

All that piece or parcel of land at Kellaway Reef at Bynoe Harbour, Northern Territory of Australia containing an area of 1/4 square kilometre more or less being all that part of Kellaway Reef above a line along the low water mark surrounding the said reef.

All that piece or parcel of land at Middle Reef at Bynoe Harbour, Northern Territory of Australia containing an area of 3 square kilometres more or less being all that part of Middle Reef above a line along the low water mark surrounding the said reef.

3.3.4 Since the claim was first made some changes have been made to section and portion numbers. It appears also that a small part of the land originally claimed was found to be alienated land. The boundaries of the claim area have been established by the NT Department of Lands and are shown on the map in the records of that department known as CP4623A. The NLC on behalf of the

claimants accepts the boundaries so established as accurately identifying the claim area.

3.3.5 The application asserts that the land claimed is comprised of unalienated Crown land, and includes three exploration licences, numerous mining leases, one residential lease, one business area lease, numerous licences to treat tailings, numerous garden areas, one mining reserve and seven other reserves.

3.3.6 The claim referred to above is commonly known simply as the Kenbi Land Claim, and is the claim giving rise to this report following an inquiry which commenced on 13 November 1989.

3.4 THE KENBI (COX PENINSULA - SECTION 12) LAND CLAIM

3.4.1 On 9 March 1990 the NLC lodged a further application on behalf of Aboriginals having a traditional land claim to land on Cox Peninsula.

3.4.2 The application was made on behalf of:

> the members of the Larrakia language group, the members of the Kiuk-Wadjigan language group, the members of the Aminanggel-Mandayanggel language group, and the members of the Marriamu-Marridjabin language groups being the groups of claimants put forward as traditional owners in the Kenbi Land Claim.

3.4.3 The land claimed (hereafter referred to as section 12) is described in the application as:

> that piece of land on the Cox Peninsula in the Northern Territory to the west of One Fellow Creek being the land contained within former section 12 which is now comprised within section 34 Hundred of Bray County of Palmerston being the land more particularly shown on Survey Plan A 718 which has been deposited at the Lands Titles office, Darwin.

3.4.4 Section 12 is said to be unalienated Crown land owned by the Commonwealth of Australia.

3.4.5 The land is bounded on three sides by the Kenbi claim area and on the fourth by the Timer Sea. It is identified on the map in the schedule by the designation "12"

3.4.6 In a letter dated 8 March 1990 (at a time when the inquiry was temporarily adjourned), the NLC adverted to the fact that section 12 had been excluded from the Kenbi Land Claim upon the mistaken assumption that it was alienated land. The error had only recently been detected and hence the new claim. The NLC also advised that upon resumption of the inquiry an application would be made to consolidate the new claim with the Kenbi claim.

3.4.7 The matter was referred to first on 19 March 1990 when counsel for the Attorney-General pointed out certain difficulties that might be involved by reason of section 12 being within what can conveniently be called the 1979 Planning Act boundaries (to which reference is made later). However, on 23 May 1990, I directed that the new claim (claim 127) be heard contemporaneously with the Kenbi claim (claim 37) and further that the evidence in the inquiry relating to claim 37 be taken as evidence in claim 127. (Ts. p.2730). The question of whether I had jurisdiction in relation to section 12 was left aside for the time being.

3.4.8 By letter dated 8 June 1990 (exhibit NTG 25), the

Solicitor for the NT advanced reasons why it was asserted that section 1.2 was in terms of the Land Rights Act "land in a town" and therefore not unalienated Crown land capable of being the subject of a traditional land claim.

3.4.9 On 13 June 1990, I gave directions requiring other interested parties to make written submissions concerning the status of section 12. The Commonwealth responded by letter dated 22 June 1990 and advised that it did not intend making any submissions with respect to my jurisdiction to hear the claim to section 12. By letter dated 28 June 1990, the NLC advised that it wished to make submissions concerning my jurisdiction to consider the claim to this area and proposed doing so in its final submissions. Notwithstanding the requirement of the practice direction requiring the submission to be made by 22 June 1990, I agreed to the NLC proposal.

3.4.10 In its final submissions on behalf of the claimants, the NLC requests that the application concerning section 12 be adjourned sine die. It is said that it seems practical to adjourn the claim on the basis that the Commonwealth had indicated its intention to negotiate with respect to land in the Point Charles area, which would include section 12. In the event that the negotiations with the Commonwealth prove to be unsuccessful, the NLC would wish to challenge the validity of the 1979 Planning Act boundaries.

3.4.11 The Attorney-General's final submission contains no response to the NLC request to adjourn the claim to

section 12.

3.4.12 In the circumstances, I consider it appropriate that the further hearing of the claim to section 12 be adjourned sine die. The matter can be resurrected if necessary upon the request of any interested party. This report has been prepared on the basis that section 12 is not part of the claim area.

4.0 CONTENTIOUS ISSUES PRECEDING THE COMMENCEMENT OF THE INQUIRY

For something in excess of a decade, the NT government and the NLC were involved in a series of disputes concerning different aspects of the Kenbi Land Claim. On no fewer than 4 occasions the High Court of Australia became involved. My intention in this section is to record the events which occurred during that decade.

4.1 THE TOWN PLANNING LEGISLATION

In order to properly understand much of what follows it is necessary to canvass in some detail relevant statutory provisions contained in the Land Rights Act and in certain NT legislation.

4.1.2 The function of the Aboriginal Land Commissioner to ascertain whether the claimants or any other Aboriginals are the traditional Aboriginal owners of land arises when an application has been made to him by or on behalf of Aboriginals claiming to have a traditional land claim to an area of land, being unalienated Crown land or alienated Crown land in which all estates and interests not held by the Crown are held by, or on behalf of, Aboriginals (LRA s. 50(l)(a)(i)).

4.1.3 The present claim is concerned only with a claim to 'unalienated Crown land'. Section 3(1) of the Act provides that:

> "unalienated Crown land" means Crown land in which no person (other than the Crown) has an estate or interest, but does not include land in a town.

"Crown Land" means land in the Northern Territory that has not been alienated from the Crown by a grant of an estate in fee simple in the land, or land that has been so alienated but has been resumed by, or has reverted to or been acquired by, the Crown, but does not include -

(a) land set apart for, or dedicated to, a public purpose under an Act; or

(b) land the subject of a deed of grant held in escrow by a Land Council;

"town" has the same meaning as in the law of the Northern Territory relating to the planning and developing of towns and the use of land in or near towns, and includes any area that, by virtue of regulations in force under that law, is to be treated as a town;

4.1.4 At the time of the passing of the Land Rights Act (and until its repeal in 1979) there was in force in the NT legislation known originally as the Town Planning Ordinance 1964, but after self-government (that is, from 1 July 1978), the Town Planning Act.

4.1.5 By its long title the Town Planning Act was:

An (Act) relating to the planning and development of towns and the use of land in or near towns.

4.1.6 Section 3 of the Town Planning Act as amended and in force at the time of the passing of the Land Rights Act, defined 'town' to mean:

(a) a municipality; or

(b) a place that is a town within the meaning of section 5 of the Crown Lands Ordinance 1931-1971 but is not part of a municipality;

(For present purposes nothing turns upon the meaning of the term 'municipality' nor upon the provisions of section 5 of the Crown Lands Ordinance).

4.1.7 Sections 73 and 5 of the Town Planning Act provided respectively:

> 73. The Administrator in Council may make regulations, not inconsistent with this Ordinance, prescribing all matters required or permitted to be prescribed, or necessary or convenient to be prescribed, for carrying out, or giving effect to this Ordinance.

(An irrelevant amendment was made by the Town Planning Ordinance 1977, s. 34).

> 5. The regulations may prescribe that a specified area of land -
>
> (a) shall be subject to the provisions of this Ordinance, but not including the provisions of sub-section (4) or (5) of section eight or sub-section (2) of section eleven of this Ordinance, as if it were a town and may be referred to as a town by such name as is prescribed; or
>
> (b) being land adjacent to a town, shall be subject to the provisions of this Ordinance, but not including the provisions of sub-section (4) or (5) of section eight or sub-section (2) of section eleven of this Ordinance, as if it were part of that town.

(The provisions of sections 8(4), 8(5) and 11(2) are not presently relevant).

4.1.8 On 22 December 1978 the Administrator of the NT made regulations under the Town Planning Act (Regulations 1978 No. 53) which were notified in the NT Government Gazette on 29 December 1978. These regulations are referred to hereafter as the Town Planning Regulations.

4.1.9 Regulation 3 of the Town Planning Regulations provided that specified areas of land, each said to be adjacent to a named town, be prescribed under section 5(b) of the Town Planning Act to be subject to the provisions of the Act (section 8(4) and (5) and section 11(2) excepted) as

if it were part of the relevant town.

4.1.10 The schedule to the regulations described 4 separate areas of land said to be adjacent respectively to the towns of Darwin, Alice Springs, Tennant Creek and Katherine. It is unnecessary to make further reference to the latter 3 areas.

4.1.11 The description of the area of land said to be adjacent to the town of Darwin was said to contain an area of 4350 square kilometres more or less. The detailed description of the area was lengthy and need not be repeated here . It is sufficient to observe that the area in question includes the portion of the claim area referred to as Cox Peninsula but not the off-shore islands.

4.1.12 The Town Planning Act was repealed by the Planning Act 1979 which came into force on 3 August 1979.

4.1.13 The provisions of the Planning Act which correspond to sections 73 and 5 of the Town Planning Act are respectively sections 165 and the definition of "town" in section 4(1) which reads:

> "town" means -
>
> (a) a town within the meaning of the Crown Lands Act;
>
> (b) a municipality; or
>
> (c) land specified by the regulations to be an area which is to be treated as a town.

4.1.14 Contemporaneously with the coming into force of the Planning Act, regulations (the Planning Act Regulations) were made which specified several areas of land to be

areas which are to be treated as towns for the purpose of section 4 of the Act. One of the areas so specified is, with some minor but irrelevant amendments, identical to the corresponding area described in the schedule to the Town Planning Regulations as being land adjacent to the town of Darwin.

4.2 THE EFFECT OF THE REGULATIONS ON THE LAND CLAIM

4.2.1 The Kenbi Land Claim was received by the Aboriginal Land Commissioner on 20 March 1979. By that time the Town Planning Regulations were already in force and there immediately arose the question of whether the Cox Peninsula component of the claim area was "land in a town" for the purposes of the definition of "unalienated Crown land" in the Land Rights Act.

4.2.2 The Commissioner (Toohey J) convened a hearing on 26 June 1979 to deal with the application. The hearing was confined to the question of whether any of the land claimed was not unalienated Crown land, being land in a town.

4.2.3 Counsel for the claimants sought to tender in evidence an affidavit of Peter Dickson Heathwood, but the tender was objected to, as being irrelevant to the inquiry.

4.2.4 The purpose of the tender of the affidavit was to support a submission that as the area contained in the Town Planning Regulations (4350 square kilometres) was so large, especially when compared with the existing town of Darwin (142.4 square kilometres) there had been no proper exercise of the regulation-making power for

the purpose of s.5(b) of the Town Planning Act.

4.2.5 The NT government argued that the regulation-making power in s.73 extended to the making of regulations, not inconsistent with the Act, prescribing inter alia all matters permitted to be prescribed for carrying out or giving effect to the Act and that one of the matters permitted to be prescribed was the making of regulations to give effect to s.5. It was said that when regulations were made to give effect to paragraph (b) of s.5, the only issue was whether the specified area of land answered the description of 'land adjacent to a town'.

4.2.6 The claimants also attacked the validity of the Town Planning Regulations on the ground that having regard to the size of the land specified it was apparent, or could be demonstrated, that some purpose, other than a town planning purpose, motivated the making of the regulations.

4.2.7 For the NT government it was argued that the regulations were protected from any inquiry as to the true purpose for which they were made and the motives that led to them being made. In particular, it was said that the regulations were not open to attack on the ground of bad faith or improper motive.

4.2.8 The Commissioner held that the affidavit was inadmissible. In his reasons, he distinguished between the motive and the purpose for which a regulation may be made. He concluded that the motives of the

Administrator could not be called in question. Whether or not the regulations were valid depended upon a consideration of whether or not the area could fairly be described as adjacent to the town of Darwin.

4.2.9 In response to an application made on behalf of the claimants seeking an order pursuant to s.54(1) of the Land Rights Act for the production of documents, the Commissioner refused to make any order on the ground that the documents sought to be produced were not relevant to the question of whether the area prescribed in the Town Planning Regulations as being adjacent to the town of Darwin was truly adjacent to that town.

4.2.10 At a subsequent hearing Toohey J had occasion to deal again with the question of whether any of the land claimed was land in a town, but on this occasion in a slightly different context by reason of the fact that by then the Planning Act 1979 had come into force, as had the new regulations made under it.

4.2.11 It is unnecessary to canvass the differences between the provisions of the Planning Act corresponding with those under which the former Town Planning Regulations were made. It is sufficient to say that there were differences which required different matters to be considered.

4.2.12 At the conclusion of his reasons handed down on 2 November 1979, Toohey J said:

> When the Land Rights Act came into operation, s.5 of the Town Planning Act empowered regulations to prescribe that a specified area of land shall be subject to the provisions of

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that Act as if it were a town and may be referred to as a town or, being land adjacent to a town, shall be subject to the Act as if it were part of that town.

The concluding words of the definition in the Land Rights Act recognise the existence of some such provision and the wheel has turned full circle with the Planning Act picking up the language of the Land Rights Act.

But it is not enough to say that because on paper there is a law relating to the planning and development of towns - the Planning Act - and because Regulations 1979 No. 13 were made pursuant to that Act, the regulations are part of that law. The reference in the definition in the Land Rights Act to 'the law of the Northern Territory' and to 'regulations in force under that law' presuppose something that has an effective operation. If regulations made with reference to para. (c) of the definition of town in the Planning Act are shown to be invalid, the land so specified does not answer the description of 'town' in the law of the Northern Territory and cannot answer that description in the Land Rights Act.

Again, as to onus of proof, it is for the claimants to show that the land claimed is unalienated Crown land. They cannot succeed if the land is in a town. Part of the land claimed is within the apparent operation of regulations made under the Planning Act. It is for the claimants to displace the ordinary presumptions of validity and regularity which, in my opinion, they may do if they can show that the land specified is not reasonably capable of fulfilling a town planning purpose. (Vol. 16, p.15)

4.2.13 In summary, the Commissioner came to the following conclusions:

1. If regulations are made pursuant to s.165 (the regulation-making section) of the Planning Act 1979 purporting to give effect to para. (c) of the definition of town, their efficacy depends upon the land specified having some connection with a town planning purpose.
2. The efficacy of the exercise of power reflected in reg. 5 and schedule 3 of Regulations 1979 No. 13 depends upon the existence of a town planning purpose.

3. It is for the claimants to demonstrate that the exercise of power is not reasonably capable of fulfilling a town planning purpose.
4. If regulations made with reference to para . (c) of the definition of town in the Planning Act are shown to be invalid, the land so specified does not answer the description of town' in the law of the Northern Territory and cannot answer that description in the Aboriginal Land Rights (Northern Territory) Act 1976.
5. It is for the claimants to show that the land claimed is unalienated Crown land.
6. Part of the land claimed is within the apparent operation of regulations made under the Planning Act, hence on its face is land in a town. The claimants may displace the ordinary presumptions of validity and regularity if they can shown that the land specified is not reasonably capable of having some connection with or fulfilling a town planning purpose.

(Vol. 16, pp.15-16)

4.2.14 Subsequent to handing down his reasons on 2 November 1979, Toohey J heard evidence and argument touching upon the question of whether the Planning Act Regulations could not reasonably be capable of having some connection with or fulfilling a town planning purpose.

4.2.15 In reasons handed down on 20 December 1979, Toohey J said:

> If a regulation in force under the law of the Northern Territory relating to the planning and developing of towns and the use of land in or near towns and purporting to treat an area as a town is a valid exercise of power, the land so treated is within the definition of 'town' in the Land Rights Act.
>
> The Planning Act is such a law and the regulation has not been shown to be an invalid exercise of power. The land specified is therefore in a town and is not unalienated land.
>
> This does not mean that the Government of the Northern Territory has an unbridled power by

regulation to treat land as a town. The criterion of town planning purpose discussed in the earlier reasons and in these reasons stands as some control.
(Vol. 16, p.23)

4.2.16 Specifically, his conclusions were:

1. It has not been shown that the Darwin land specified in Regulations 1979 No . 13 is not reasonably capable of having some connection with or fulfilling a town planning purpose.
2. The regulation specified that land to be an area to be treated as a town for the purposes of the Planning Act 1979.
3. The land is land in a town within the Aboriginal Land Rights (Northern Territory) Act 1976 hence not unalienated Crown land within that Act.
4. The land is not available to be claimed as unalienated Crown land under s. 50(1)(a) of that Act.
(Vol. 16, p.23)

4.3 THE STATUS OF THE ISLANDS

4.3.1 In reasons given on 27 June 1980, Toohey J (Vol. 16, pp.25-30) dealt with issues which had arisen concerning the question of whether Bare Sand, Quall, Indian and Dum-In-Mirrie Islands were unalienated Crown land. It was not suggested that the remaining islands and reefs claimed were other than unalienated Crown land.

4.3.2 The Commonwealth had asserted that neither Bare Sand Island nor Quall Island was Crown land. It argued that the land had been set apart for a public purpose, in the case of Quall Island under the NT (Self Government) Act 1978, and in the case of both islands under the Air Force Act 1923 or the Defence Act 1903.

4.3.3 Toohey J was of the opinion that both islands, which had been part of an area declared to be a bombing area under regulations made in 1957 pursuant to either the Air Force Act or the Defence Act, became vested in the NT by virtue of section 69(2) of the NT (Self Government) Act 1978 on 1 July 1978, and thereupon became unalienated Crown land. The subsequent acquisition by the Commonwealth of Quall Island on 28 June 1979 pursuant to s. 70 of the NT (Self Government) Act did not amount to a setting apart of the land for a public purpose under an Act. Both islands therefore remained unalienated Crown land for the purpose of the Land Rights Act and were available to be claimed.

4.3.4 Two questions arose in regard to Indian Island. First, part of the island known as the Indian Island Forest Reserve (comprising 2600 hectares) had been entered on the Register of the National Estate pursuant to s. 23(4) of the Australian Heritage Commission Act 1975 by notice dated 21 March 1978. The entry of the land on the Register did not affect the status of the land as unalienated Crown land.

4.3.5 Second, the island had been reserved as a forest reserve under section 10 of The Woods and Forest Act 1882 of South Australia by notice published in the South Australian Government Gazette on 26 December 1889. Although the South Australian act was part of the law of the NT, the Commissioner held that, in terms of the Land Rights Act, land must be set aside for a public purpose under an act of the Commonwealth (in contradistinction

to a law of the NT) before the setting aside can affect its status as unalienated Crown land.

4.3.6 Parts of Dum-In-Mirrie Island are subject to two occupation licences. Toohey J affirmed his earlier opinion expressed in the Borroloola Land Claim report that an occupation licence does not amount to an estate or interest in the land so as to render it alienated Crown land.

4.3.7 In summary Toohey J found each of Bare Sand, Quall, Indian and Dum-In-Mirrie Islands to be unalienated Crown land and thus available to be claimed under the Land Rights Act.

4.4 THE FIRST HIGH COURT APPLICATION - R v Toohey ex parte Northern Land Council (151 CLR 170)

4.4.1 Following the decision given by Toohey J on 20 December 1979 the NLC obtained in the High Court of Australia orders nisi for certiorari and mandamus which were made returnable before a Full Court. The matter was argued before the Full Court on 11 and 12 September 1980 and the decision given on 24 December 1981.

4.4.2 The NLC sought writs of certiorari quashing the decision of Toohey J made on 20 December 1979 and for mandamus directing the Commissioner to exercise his jurisdiction under the Land Rights Act and hear the claim.

4.4.3 Although a number of arguments were advanced, the issue which ultimately was decisive was outlined by Gibb CJ (at p. 182) in these terms:

> The final submission made on behalf of the prosecutor raises important issues. It was submitted that the Commissioner was wrong in holding that the Administrator was the representative of the Crown in the Northern Territory, and that it was not permissible to inquire into the reason why the Administrator made the regulations or to impute bad faith to him. It was submitted that the Commissioner should have inquired into the question whether reg . 5 of the Planning Regulations was made for the purpose of defeating the claim by the Aboriginals to the land described in Sch. 3, or of converting that land into land that was not within the description contained in s. 50(1)(a) so that the Commissioner could not entertain the application made with respect to it .

4.4.4 The conclusion reached by Gibbs CJ (at p.193) was expressed:

> In the present case, the appellant was in my opinion entitled to challenge the Planning Regulations, and if necessary also the Town Planning Regulations, on the ground that they were made for a purpose which was not a planning, or a town planning, purpose . The challenge might be made either on the ground that the regulations were invalid on their face, or on the ground that evidence would show that they were in fact designed to defeat the traditional land claims of Aboriginals. It was necessary for the Commissioner to decide on the validity of the Planning Regulations to enable himself to determine whether the application was made in respect of land to which s. 50(l)(a) of the Land Rights Act applied. If the regulations were invalid, there was no justification for him to fail to continue to exercise his function under s. 50(l)(a). For the reasons given the Commissioner has not exercised his functions in accordance with law and the case is a proper one for mandamus.

4.4.5 Although expressed in different terms, 4 of the other 5 judges comprising the Full Court were of the same opinion.

4.4.6 The Court ordered that a writ of mandamus issue to Toohey J, as Aboriginal Land Commissioner, directing him

to deal in accordance with law with the NLC application known as the Kenbi Land Claim.

4.5 THE OBLIGATION TO PRODUCE DOCUMENTS

4.5.1 Subsequent to the High Court decision of 24 December 1981 the NLC sought an order that the NT government and the Administrator give discovery of documents relating to the relevant parts of the Planning Act Regulations and the Town Planning Regulations.

4.5.2 The order was sought pursuant to the Commissioner's power under s. 51 of the Land Rights Act to "do all things necessary or convenient to be done for or in connection with the performance of his functions"

4.5.3 For the NT government it was argued that s. 51 did not authorise the Commissioner to make an order of the type sought.

4.5.4 In reasons given on 2 April 1982 (Vol. 16, pp.135-137), Toohey J held that in the circumstances of the case, a direction or order aimed at eliciting an answer to the question of whether the land claimed is unalienated Crown land was incidental to the execution of the specific provisions of the Act.

4.5.5 On 2 April 1982, Toohey J made an order directing the NT government to make and deliver to the NLC a list verified by affidavit of the documents then, or which had been, in its possession, custody or power relating to or incidental to the making and bringing into force of the relevant regulations under the Planning Act and

the former Town Planning Act, and further directing that the NLC or its representative be permitted to inspect and take copies of such documents as the NT and the Administrator did not object to producing.

4.5.6 Subsequently affidavits were filed on behalf of the NT government listing the documents in its possession or power relating to the matters the subject of the orders referred to above . The production of certain of the documents was objected to on the ground:

> ... that those documents contain confidential communications passed between officers of the Northern Territory Department of Law who are legal practitioners and Northern Territory Ministers or servants of the Northern Territory for the purposes of giving legal advice or assistance or for the purpose of assisting the Northern Territory in proceedings before the Aboriginal Land Commissioner.

4.5.7 The documents for which legal professional privilege was claimed were identified in the following manner:

> Correspondence, memoranda, opinions and other documents by or to the Department of Law or officers thereof or relating to same, comprising -
>
> (a) instructions for, and advice on, preparation and forwarding of the Regulations in question, including the various drafts of the Regulations;
>
> (b) instructions for, and advice on, preparation and forwarding of the new Planning Bill, including the various drafts of the Bill;
>
> (c) the provision of legal advice concerning the Regulations or proposed Regulations in question;
>
> (d) preparation of the Northern Territory Government's case before the Aboriginal Land Commissioner in the land claim on matters arising out of the Regulations in question;

(e) advice to a Northern Territory Minister by officers of the Northern Territory in conveying the terms of legal advice received from the Department of Law or officers thereof.

(The reference in para . (a) to "the Regulations" was intended to refer to the Town Planning Regulations while the reference to "the Regulations" in para. (c) was intended as a reference to the Planning Act Regulations).

4.5.8 Subsequently, the NT government filed further affidavits identifying by number and title each departmental file which contained documents for which legal professional privilege was claimed and giving some particulars of those documents.

4.5.9 The NLC applied to Toohey J's successor (Sir William Kearney) for an order for production to it of the documents for which legal professional privilege had been claimed on the ground that the claim had no sufficient foundation. The matter was argued before Kearney J who held (after inspecting some of the contested documents) that there was prima facie evidence that the communications with the legal advisers came into being as part of a plan to defeat the land claim. The Commissioner made orders on 3 and 6 February 1984 directing the NT government to produce all the documents for which legal professional privilege had been claimed and to permit the NLC to inspect and peruse the same and to take copies thereof.

4.5.10 An application was then made by the Attorney-General to the Federal Court seeking orders calling upon the

Commissioner to show cause why writs of prohibition and certiorari should not issue.

4.5.11 Later, an application was made to review the Commissioner' s decision pursuant to the Administrative Decisions (Judicial Review) Act and the two matters were heard together by a Full Court of the Federal Court on 12-14 June 1984.

4.5.12 The Court gave its decision on 14 September 1984 (reported in 55 ALR 545) when it discharged the orders nisi for prohibition and certiorari and dismissed the application for judicial review.

4.6 THE SECOND HIGH COURT APPLICATION

Attorney-General (NT) v Kearney (158 CLR 500)

4.6.1 The Attorney-General appealed to the High Court from the decision of the Full Court of the Federal Court given on 14 September 1984. The appeal was argued on 6 and 7 February 1985 and the decision given on 25 September 1985 when (by a majority) the appeal was dismissed.

4.6.2 In the course of his reasons Gibbs CJ (with whom Mason and Brennan JJ expressly agreed) said (at p. 515):

> In my opinion the present case comes within the principle which forms the basis of the rule that denies privilege to communications made to further an illegal purpose. It would be contrary to the public interest which the privilege is designed to secure the better administration of justice - to allow it to be used to protect communications made to further a deliberate abuse of statutory power and by that abuse to prevent others from exercising their rights under the law. It would shake public confidence in the law if there was reasonable ground for believing that a regulation had been enacted for an unauthorised purpose and with the intent of

frustrating legitimate claims, and yet the law protected from disclosure the communications made to seek and give advice in carrying out that purpose.

4.6.13 Wilson J expressed the relevant principle in these terms (at p. 525):

> if the advice is sought in the deliberate pursuit of a purpose which is known to be beyond power, then in those circumstances the public interest cannot concede to a government any right to withhold relevant material from the scrutiny of the courts.

And later, at pp. 525-6 he said:

> Applying these principles to the present case, I think the appeals must be dismissed . The appellant does not challenge the Commissioner's prima facie finding that "there is a bona fide and reasonably tenable charge that the law was being evaded by the making of regulations not contemplated by the Act". He spoke of the communications coming into being "as part of a scheme to defeat the land claim". With some hesitation, I conclude that the prima facie finding is that the communications were undertaken with the knowledge that the planning legislation was being resorted to otherwise than for a bona fide planning purpose. That this is so is borne out by the fact that counsel's argument was directed strongly to the point that the only recognised exception to the privilege is in respect of communications in furtherance of crime or fraud and that that exception has no application to an abuse of statutory power even if that abuse be deliberate . For the reasons I have given, the submission fails, with the consequence that the appeals must fail also. I think it wholly inconsistent with the reason for the privilege that it should protect a government's deliberate abuse of its statutory powers. In this regard, the exception for fraud should be understood in the broad manner described By Goff J in Crescent Farm ((1972) Ch, at p. 565). It includes all forms of dishonesty, including "trickery and sham contrivances"

4.7 TESTING THE VALIDITY OF THE REGULATIONS

4.7.1 An Aboriginal Land Commissioner (Maurice J) commenced hearings on 30 March 1989 to determine the issue which

had been the subject of proceedings in the High Court, namely, the validity of the regulations made under the Planning Act.

4,7.2 In a statement of the claimants' case filed on 9 October 1986 it was said, inter alia, that the regulations were not made bona fide and for the purposes of the Planning Act, but for the ulterior purpose of defeating a claim pursuant to the Land Rights Act.

4.7.3 The hearing of this aspect of the claim had the potential to involve some Ministers in the NT government who had been in office at the time the regulations were made, being called to give evidence.

4.7.4 Because of some comments made by the Commissioner (in the course of hearing another land claim) which were thought to be critical of the NT government, the Attorney-General sought and obtained in the Federal Court an order for a writ of prohibition prohibiting the Commissioner from further proceeding with the hearing of the claim and from exercising any of his powers or functions under s. 50 of the Land Rights Act in relation to the claim.

4,7.5 The Full Court of the Federal Court, in reasons given on 13 April 1987 (reported in 73 ALR 123), took the view that because the issues arising would involve the Commissioner inquiring into the reasons why the regulations were made and into any question of bad faith on the part of the NT government in recommending to the Administrator that the regulations be made, and because

the remarks of the Commissioner which led to the proceedings were made at a time when a political campaign was being fought in the context of an election for the NT parliament, the public awareness of the Commissioner's remarks was heightened by the publicity necessarily attached to the election and as the remarks related to questions that became politically sensitive in the milieu of NT politics, it might reasonably be apprehended by a fair-minded person that the Commissioner might not resolve the questions before him in the Kenbi claim relating to the validity of the Planning Act Regulations with a fair and unprejudiced mind.

4.7.6 Special leave to appeal against the decision of the Federal Court was refused by the High Court on 12 June 1987.

4.7.7 In the circumstances, no further action could be taken until the appointment of a new Commissioner which did not occur until my appointment on 25 May 1988.

4.7.8 The preliminary question concerning the validity of the Town Planning Act Regulations came on before me in Darwin on 18 October 1988.

4.7.9 The emphasis had shifted away from the Planning Act Regulations back to the original Town Planning Regulations as a result of the decision of the High Court in R v Kearney; exparte Northern Land Council (158 CLR 365) in which the principle was established that as long as land answered the description contained

in s. 50(1) of the Land Rights Act at the time an application was made, a subsequent change in the status of the land did not deprive the Commissioner of jurisdiction over the land. It followed, therefore, that if the Town Planning Regulations were invalid, the land sought to be affected by those regulations was unalienated Crown land at the time of the claimants ' application in March 1979 and thus the subsequent Planning Act Regulations could not affect the status of the land for the purpose of the application.

4.7.10 I heard evidence on 18, 19 20, 21, 24 and 25 October 1988, carried out an inspection of the land by helicopter and road on 26 October 1988 and heard argument from counsel for the NLC and the Attorney-General on 22, 23 and 24 November 1988.

4.7.11 On 8 December 1988 I published reasons for my conclusion that the regulations did not represent a valid exercise of power under the Town Planning Act.

4.7.12 On 23 December 1988 the Attorney-General made application to the Federal Court of Australia pursuant to the Administrative Decisions (Judicial Review) Act 1977 for the review of my decision.

4.7.13 The application was heard by the Full Court of the Federal Court in Darwin on 18, 19 and 20 April 1989 and was dismissed on 28 June 1989.

4.7.14 On 18 July 1989 the Attorney-General filed an application in the High Court seeking special leave to appeal against the decision of the Full Court of the

Federal Court. The application came on for argument on 15 September 1989 and leave was refused.

4.8 THE COMMENCEMENT OF THE INQUIRY

4.8.1 In October 1988 in settling a draft program for land claim hearings during 1989 I agreed to allocate a period of 3 weeks commencing 19 June 1989 for the taking of evidence in relation to that part of the land claimed in the Kenbi Land Claim as related to the offshore islands adjacent to Cox Peninsula. It was contemplated at the time, with some justification as it turned out, that the litigation concerning my jurisdiction to deal with the mainland component of the claim area would not be concluded by June 1989 and as the NLC was concerned that many of the claimants were elderly, I agreed to deal with the claim in so far as there was no dispute as to my jurisdiction to do so.

4.8.2 Those representing the claimants were not in a position to proceed with the presentation of the claim on 19 June 1989 and after a series of short adjournments the matter was adjourned until 13 November 1989. It was thought (again with some justification) that by that date the High Court would have dealt with the application for special leave to appeal and that if the decision was favourable to the claimants' case it would be possible to then proceed with the whole claim and not just the claim relating to the islands.

4.8.3 I commenced the inquiry at Belyuen on Cox Peninsula on 13 November 1989.

5.0 THE STATUS OF THE LAND CLAIMED

5.1 The question of the status of the claim area was the subject of protracted litigation culminating in the ruling given by me on 8 December 1988 to the effect that the part of the claim area generally referred to as Cox Peninsula (that is, the mainland component of the land claimed) was not at the time of the lodging of the claim "land in a town" within the meaning of the Land Rights Act, and was not excluded from the scope of the definition of unalienated Crown land.

5.2 The subsequent review of my decision by the Federal Court supported my conclusion. Special leave to appeal from the Federal Court to the High Court was refused.

5.3 For the purposes of this report, at the request of the NLC, the claim made to section 12 (Claim No. 127) is treated as having been adjourned sine die and no findings contained herein relate to that parcel of land.

5.4 The status of the offshore islands was considered by Toohey J in 1980. No reason has been advanced for me to take a different view from that reached in 1980 and to which reference is made at paragraph 4.3 of this report.

5.5 On 13 June 1990 senior counsel for the Attorney-General stated (Ts. p.2869) that, with one reservation, as between the NT government and the claimants, it was agreed that the claim area as detailed on NT Lands Department plan CP4623A (part of exhibit NLC 9) correctly shows the area of unalienated Crown land in respect of which I as Commissioner have jurisdiction

under the Land Rights Act. The plan referred to does not include section 12 as a portion of the claim area.

5.5.1 The reservation to which counsel referred has to do with certain defence practice areas centred upon Quall Island.

5.5.2 The position in relation to Quall Island and Bare Sand Island as at June 1980 was dealt with by Toohey J and the reasoning which led him to the conclusion that both islands remained unalienated Crown land for the purposes of the Land Rights Act is referred to at paragraph 4.3.3.

5.5.3 During the inquiry, counsel for the Attorney-General foreshadowed that submissions would be made concerning the availability of Quall and Bare Sand Islands to be claimed. Later, at my request, the Attorney's submissions were reduced to writing and set out in a letter to my Associate dated 8 June 1990 (exhibit NTG 25).

5.5.4 The argument relies upon a declaration made by the Minister of State for Defence made on 5 July 1985 and published in the Commonwealth of Australia Gazette No. S 289 on 25 July 1985. The declaration was made pursuant to sub-regulation 49(1) of the Defence Forces Regulations and, inter alia, set aside certain areas of sea, air and private land in or adjacent to Australia to be defence practice areas for carrying out certain specified Royal Australian Air Force operations.

5.5.5 Item 16 of the schedule to the declaration identifies

the area described generally as "Quall Island" as:

> All those areas of land and water being as to the land the islands known as Quall Island, Little Quall Island, Bare Sand Island and the northern tip of Grose Island and as to the water being part of the Timer Sea adjoining bounded by the circumference of a circle of radius 5500 metres the centre of which circle is the centre point of Quall Island which point is located at 12 degrees 31 minutes 19 seconds south and longitude 130 degrees 25 minutes 48 seconds east.

The kind of practice specified for the area so defined is "high explosive bombing"

5.5.6 By a further declaration pursuant to sub-regulation 49(1) of the Defence Forces Regulations published in Commonwealth of Australia Gazette GN16 on 19 August 1987, the Minister for Defence, inter alia, revoked the declaration of 5 July 1985 and declared certain areas of land, sea or air in or adjacent to Australia, including "Quall Island" which is described in terms identical to those set out above. The kind of practice specified for the area is "air to surface weapons firing"

5.5.7 The Attorney-General argues that by the declaration of 5 July 1985 Quall Island (as described in detail) became "land set apart for ... a public purpose under an Act" and thus ceased to be "Crown land" within the definition of that term in section 3(1) of the Land Rights Act . The Attorney reaches this conclusion by adopting the same reasoning as was followed by Toohey J in the portion of his decision of 27 June 1980 dealing with the status of the islands prior to the Northern Territory (Self Government) Act coming into force.

5.5.8 The argument followed by the Attorney-General is that the subsequent declaration published on 19 August 1987 amounted to an "instantaneous revocation and redeclaration" of the same land which left no scope for the operation of sections 67A(3) or (4) of the Land Rights Act.

5.5.9 In order to follow this reasoning it is necessary to look at the relevant parts of section 67A which are as follows:

> 67A (1) ....
>
> (2) ....
>
> (3) Where an application referred to in paragraph 50(1)(a) in respect of an area of land was made before the day of commencement of this section any reservation, dedication or setting aside of that area of land, or a part of that area of land, that was purportedly effected on a day before that traditional land claim, in so far as it relates to the area of land so reserved, dedicated or set aside, is finally disposed of, being the day of commencement of this section or a later day shall be of no effect.
>
> (4) Where an application referred to in paragraph 50(1)(a) in respect of an area of land is made on or after the date of commencement of this section, any reservation, dedication or setting aside of that area of land, or a part of that area of land, that is purportedly effected on a day before that traditional land claim, in so far as it relates to the area of land so reserved, dedicated or set aside, is finally disposed of, being the day on which the application is made or a later day, shall be of no effect.
>
> (5) A traditional land claim shall be taken not to have been finally disposed of in so far as it relates to a particular area of land until -
>
> (a) the claim, or the claim, in so far as it relates to the area of land, is withdrawn;
>
> (b) the Governor-General executes a deed of grant of an estate in fee simple in the

area of land, or in an area of land that includes the area of land, under section 12;

(c) the Commissioner informs the Minister, in the Commissioner's report to the Minister in respect of the claim, that the Commissioner finds that there are no Aboriginals who are the traditional Aboriginal owners of the area of land; or

(d) where the Commissioner finds that there are Aboriginals who are the traditional Aboriginal owners of the area of land, or of an area of land that includes the area of land the Minister determines, in writing, that the Minister does not propose to recommend to the Governor-General that a grant of estate in fee simple in the area of land, or in an area of land that includes the area of land, be made to a Land Trust.

5.5.10 Section 67A of the Land Rights Act commenced on 5 June 1987. The application was clearly made before the commencement of the section but the land was "set apart for a public purpose" also prior to that date and hence subsection 67A(3) had no effect upon the operation of the declaration of 5 July 1985.

5.5.11 The critical point of the Attorney-General's argument is its assertion that the revocation and redeclaration in August 1987 in effect did not amount to a new setting apart of the land but rather was merely a continuation of what had previously been the situation. As it happens it does not appear to me that it is necessary to answer that question.

5.5.12 By Statutory Rules 1985 No. 88 made on 30 May 1985 the Defence Forces Regulations were amended with effect from 1 July 1985 by the insertion of a new Part XI headed Defence Practice Areas. The following regulations in

Part XI are presently relevant:

48. In this Part, unless the contrary intention appears -

Commonwealth land ' means land belonging to, or in the occupation of, the Commonwealth or a public authority under the Commonwealth but does not include land the subject of a lease from the Commonwealth unless that lease is subject to the condition that the land may be used by the Defence Force or an arm of the Defence Force for carrying out a defence operation or practice of a kind specified in a notice under sub-regulation 49(1);

.....

'defence operation or practice' means a naval or military, or an air force, operation or practice;

'defence practice area' means any area of land, sea or air declared by the Minister under regulation 49;

'private land' means land that is not Commonwealth land;

.....

Declaration of defence practice area

49. (1) The Minister may, by notice published in the Gazette, declare any area of land, sea or air in or adjacent to Australia to be a defence practice area for carrying out a defence operation or practice of a kind specified in the notice.

(2) The Minister shall not make a declaration under sub-regulation (1) in respect of private land unless -

(a) the consent in writing of the occupier of the land has first been obtained; or

(b) it is necessary or expedient in the interests of the safety or defence of the Commonwealth to carry out on that land a defence operation or practice of a kind specified in the notice without that consent.

(3) The Minister shall not, in a notice under sub-regulation (1), declare an area of sea or air to be a defence practice area unless it is an area of sea or air in which it is necessary or expedient in the interests of the safety or defence of the Commonwealth to

carry out a defence operation or practice of the kind specified in the notice.

5.5.13 Although it has not been the subject of evidence in this inquiry, it is a matter of public record (the details of which appear in Toohey J's decision at Vol. 16 pp. 25-29) that from and after 28 June 1979 Quall Island was vested in the Commonwealth pursuant to section 70 of the Northern Territory (Self Government) Act. It follows therefore that at the date of the regulations of 5 July 1985 Quall Island was "Commonwealth land" and "not private land" for the purposes of Part XI of the Defence Forces Regulations.

5.5.14 As the regulations of 5 July 1985 specifically declare "the areas of sea, air and private land" (emphasis added) to be defence practice areas, those regulations could have had no effect in relation to the land known as Quall Island.

5.5.15 The regulations of August 1987, having been made subsequent to 5 June 1987, are by operation of section 67A(4) of the Land Rights Act, of no effect in so far as they purport to set apart Quall Island for a public purpose.

5.5.16 There is in my opinion no basis upon which it can be said that Quall Island is not unalienated Crown land for the purpose of the Land Rights Act.

5.5.17 The other land referred to in the regulations of 5 July 1987, namely Little Quall Island, Bare Sand Island and the tip of Grose Island were not the subject of a notice

of acquisition pursuant to section 70 of the Northern Territory (Self Government) Act and remained Crown land vested in the Northern Territory.

5.5.18 In my opinion, the regulations of 5 July 1985 had the effect of setting apart the land in question for a public purpose, namely as a defence practice area for carrying out high explosive bombing. However, the regulations were revoked by the regulations of August 1987, whereupon the earlier setting apart for that purpose ceased to be of any effect.

5.5.19 On a perusal of the regulations of August 1987 it seems that they may be deficient for the purpose of declaring the areas of land, sea and air referred to in them to be defence practice areas pursuant to regulation 49(1)

5.5.20 The text of the declaration (omitting the schedule) as published in the gazette is as follows:

> Pursuant to sub-regulation 49(1) of the Defence Force Regulations, I, Kim Christian Beazley, Minister of State for Defence hereby revoke that part of the declaration dated 5 July 1985 in relation to Royal Australian Air Force operations and practices published at Annex C to Gazette No. S289 dated 25 July 1985, and further revoke the declarations dated 15 January 1986 and 8 April 1986 and published in Gazettes Nos. G8 of 25 February 1986 and G18 of 6 May 1986 respectively and hereby declare the areas of land, sea or air in or adjacent to Australia described in the Schedule hereto being areas in which it is necessary or expedient in the interests of the Safety or defence of the Commonwealth to carry out Royal Australian Air Force operations and practices of the kinds specified in the schedule opposite the description of each area of land, sea or air.
>
> (Underlining added)

5.5.21 Regulation 49(1) contemplates that areas of land, sea or

air in or adjacent to Australia may be declared to be defence practice areas for carrying out either a defence operation or practice of a kind specified in the notice. Unlike the declaration of 5 July 1985, the declaration of August 1987 does not; declare the land, sea and air in question to be a " defence practice area " . It may be said that simply to "declare" the relevant land, sea and air is sufficient for the purpose of the regulation, but I would have some reservations about such an approach. The regulation contemplates two possibilities which are expressed in the alternative, namely a defence practice area for carrying out a defence operation or a defence practice area for carrying out practice of a specified kind. To merely "declare" the land etc. leaves open the purpose for which the declaration is made.

5.5.22 Assuming for present purposes that the declaration of August 1987 is effective for the purposes of regulation 49, there is no doubt that in so far as the declaration purports to "set apart" the islands for a public purpose, it is a public purpose different from that referred to in the declaration of 5 July 1985. The August 1987 declaration sets the land apart for the public purpose of a defence practice area for carrying out air to surf ace weapons firing whereas the declaration of July 1!)85 described the purpose as high explosive bombing. The descriptions of the two kinds of practices are sufficiently different as to suggest, in ordinary English usage, that different purposes were being contemplated.

5.5.23 In my opinion the provisions of section 67A(4) of the Land Rights Act render of no effect the declaration of August 1987 in so far as it purports to set the islands apart for a public purpose.

5.5.24 The NLC: has advanced a number of other arguments in support of its assertion that the islands are available to be claimed under the Land Rights Act. Some of these arguments depend upon asserted facts which have not been the subject of evidence. I have reached a conclusion favourable to the claimants without pursuing those other arguments and find it unnecessary to do so.

5.6 Although the Commonwealth had indicated in correspondence in January 1990 that the declaration of Quall Island as a defence practice area may affect my jurisdiction to hear the claim in relation to that island and the surrounding area , when given the opportunity to do so, it declined to make any submissions on the question.

5.7 I find that the whole of the claim area is unalienated Crown land within the meaning of the Land Rights Act and is available to be claimed.

PART III

THE INQUIRY

6.0 THE HEARING

6.1 FORMAL SITTINGS

6.1.1 The inquiry commenced at Belyuen on Cox Peninsula on 13 November 1989. The NLC and the Attorney-General appeared through their respective counsel. I was assisted by counsel and by a consultant anthropologist, Dr John Avery, who I engaged pursuant to section 60(1) Particulars of legal representatives appearing during the inquiry are set out in appendix B. From time to time during the inquiry Mr Max Baumber attended in person and on 23 May 1990 gave evidence on his own behalf on matters touching upon the issue of traditional ownership.

6.1.2 I set out below details of the dates on which I heard either evidence or submissions, and where appropriate, I indicate the general nature of the activity on each particular day.

13 November 1989 - Opening address by counsel for claimants.

14 to 17 November 1989) - Evidence taken on site
20 to 24 November 1989) - visits on Cox Peninsula.

27 November 1989 - Evidence taken on site visits near Darwin.

28 to 30 November 1989)
and 1 December 1989) - Evidence taken at Belyuen.
12 to 16 February 1990)
20 February 1990)
19 to 21 March 1990)
21 to 23 May 1990) - Evidence taken at Darwin.
12 to 13 June 1990)

8 December 1990) - Final Submissions at Alice Springs.

6.1.3 The names of witnesses who gave evidence during the course of the inquiry are set out in the appendix C.

6.1.4 Particulars of exhibit!; tendered during the inquiry are set out in appendix D.

6.2 THE INTERIM REPORT

6.2.1 On 19 March 1990 (Ts. p.2166) I first raised the idea of preparing an interim report dealing only with the question of whether there are traditional Aboriginal owners of the claim area or any part of it. At that stage I had not made any firm decision about the matter but it seemed to me that the complexity of some of the issues with which r would be required to deal pursuant to section 50(3) in the event of a finding of traditional ownership being made was such that I could best perform my functions under the Act by first making the relevant findings before proceeding to consider other issues.

6.2.2 I was particularly concerned about the position of the Belyuen residents (sometimes referred to as the Wagaitj people). Their circumstances were quite peculiar in that for the most part they are not Larrakia people but are resident on aboriginal land within an area generally accepted to be Larrakia country. They were not originally put forward as claimants but their inclusion as claimants at a late stage tended to confuse the position more. It was clear to me that any finding that there were traditional owners of any part of the claim

area would inevitably raise issues upon which comment is called for under s.50(3)(a) and (b) and the issues to be considered would vary depending upon the number and language group affiliation of the traditional owners and on the part or parts of the claim area recommended for grant.

6.2.3 The matter was further canvassed on 23 May 1990 (Ts. p.2717-8) when I indicated that what I had in mind was to

> (a) determine if there are traditional Aboriginal owners,
>
> and (b) if so, determine what part or parts of the claim area are potential areas for recommendation.

On the same occasion I raised, but did not attempt to answer, the question of whether a recommendation pursuant to section 50(1)(a)(ii) should inevitably follow a finding that there are traditional Aboriginal owners of land capable of being claimed under the Act. I did however comment that I thought it would be undesirable in an interim report to actually make a recommendation for a grant without having heard all of the evidence the parties wish to tender.

6.2.4 I subsequently gave serious thought to just how far it would be appropriate for me to proceed with the exercise of my statutory functions in an interim report. There is no question that my initial obligation under s.50(1)(a)(i) is to ascertain whether the claimants or any other Aboriginals are the traditional Aboriginal

owners of the claimed land. My next obligation under s.50(1)(a)(ii) is to report my findings to the Minister and the Administrator. As I have been unable to find that there are Aboriginals who are the traditional Aboriginal owners of the claim area or part of it, I have no function to make recommendations to the Minister for the granting of the land or any part thereof in accordance with sections 11 and 12 of the Act. In the circumstances any further consideration of the question of whether I should proceed to make recommendations is irrelevant. Accordingly, this report is the only report to be submitted pursuant to the Act.

6.2.5 It is perhaps appropriate that I should record that the evidence heard in Darwin on 21-23 May 1990 did not relate to the question of traditional ownership but rather to some aspects of the matters for comment pursuant to s.50(3). The reason for proceeding with this evidence was that the original program of hearings was disrupted by the decision of the NLC on 1 December 1989 to include the Wagaitj people as claimants. The Attorney-General, in reliance on the original program, had made arrangements in advance for the attendance of counsel and witnesses and I was not prepared to cause unnecessary inconvenience and expense by delaying the hearing of the evidence sought to be tendered until after the delivery of an interim report.

6.3 THE "DISSIDENT" GROUP

6.3.1 The decision by the NLC during the course of the inquiry to broaden the basis of the claimant group to include

not only the Larrakia but also the Wagaitj people at Belyuen did not have the universal support of all of the Larrakia claimants.

6.3.2 In February 1990 my office received a copy of a letter dated 18 February 1990 written to the then Minister for Aboriginal Affairs, the Hen. Gerry Hand MP, and signed by 4 :individual claimants namely T. Quall, 8. Raymond, D.W. Mills and M. Williams purporting to represent, respectively, 4, 6, 7 and 9 families. The thrust of the letter was that the signatories did not agree with or consent to the NLC including as claimants other Aboriginal groups.

6.3.3 On 19 March 1990 the issue raised by the letter to the Minister was discussed at the inquiry for the first time (Ts. PP ·2168-70). The spokesperson for the group, Mr Kevin (Tibby) Quall was not present. However, in view of the attitude revealed by the letter (and a similar letter sent to the NLC) counsel for the NLC said that the land council could no longer act for Mr Quall. The NLC's position in relation to the other signatories was uncertain.

6.3.4 Mr Quall was present on 23 May 1990 when the matter was raised again (Ts. pp.2711-3). At that stage Mr Quall's concern was to obtain the assistance of a lawyer. The following is an extract from the transcript (pp. 2712-3):

> HIS HONOUR: Thank you, Mr Coulehan. Now, Mr Quall, I wonder if you would just like to come a little bit closer, you see, so we do not have to shout so much, and maybe if that microphone is put just near where you are.

KEVIN QUALL:
HIS HONOUR: Now, I understand the position Mr Coulehan has explained to me the position: you are not satisfied with the way the case has been put by the Land Council, and you want to get another lawyer's advice about this matter .
KEVIN QUALL: Yes.
HIS HONOUR: Right. Now, that is quite right, and you are entitled to do that, but I just want to point out to you that this claim has been going on a long time now, and, in a few weeks time, I will be finished hearing the evidence to do with the question of traditional owners, and I will be coming back here on 12 June and listening to anthropologists , and people like that. So it is important that you see your lawyers get your legal aid straight away; no more delay, because I believe this has been going on for some months now, and so it means doing something straight away. Now, if you have any problems about getting legal aid - you are going to see the Aboriginal Legal Aid Service; is that right?
KEVIN QUALL: Yes.
HIS HONOUR: Well, I suggest to you - tell them that Mr Coulehan, who you know, is counsel assisting me in this matter, and they should get in touch with him as soon as possible to let them know exactly what you propose, and how you want your objections to be heard, and listened to by me and the other people concerned, but it is only I am not sure how many weeks - is it two or three weeks to 12 June, so it does not give you much time, and I just remind you that it is important that this be done as soon as possible.
KEVIN QUALL: Yes, I think - - -
HIS HONOUR: If you have got any problems, you talk to Mr Coulehan again.
KEVIN QUALL: We have written out a few statements that we have put together, if need be.
HIS HONOUR: It would be best if you could get a separate lawyer, because Mr Coulehan is here to help me rather than the claimants, but if you cannot get a lawyer, well, he will do his best to help you, but I think Legal Aid would be a better way to go. Right? OK. Well, you will need to be back here at this place on 12 June with your lawyer, and with all the people

who have got the same ideas as you . Right?
OK, then. There is nothing more, is there, Mr Parsons?
MR PARSONS: No, thank you, your Honour.
HIS HONOUR: Nothing from you Mr Pauling?
MR PAULING: No, Your Honour.
HIS HONOUR: Mr Coulehan - - -
MR COULEHAN: No, thank you, your Honour.
HIS HONOUR: - - - that covers it all?
MR COULEHAN: Yes.
HIS HONOUR: Well, thank you, Mr Quall. That is all for now.

6.3.5 On 12 June 1990, Mr Quall and two others who supported his position gave evidence to the inquiry. They did not have separate legal representation but they were assisted by counsel assisting (Ts. pp.2733-54). The transcript records the following exchange between myself and Mr Quall at the conclusion of his evidence (pp.2748-9):

HIS HONOUR: Well, thank you, Mr Quall. All I can say is that what you have put before me is recorded in the evidence, and I will be taking that into account, along with all of the other evidence when I come to prepare my report.
TIBBY QUALL: Well, I would just like to add to that: if I had the legal representation and the finance, I would have had people - old people from other countries who agree with us, and that they would give evidence.
HIS HONOUR: OK, well, look, let me just say this again, and]: want it to be quite clear: that if there is any further evidence that you think should be put before me, well then it is time now - and the time is getting a bit late, but you have the chance of putting it before me right up until any time - until I put in my report. And if anything important comes up, and it needs to be the hearing needs to be reopened, it will be reopened.
I cannot go out - up and down the length and

breadth of the Northern Territory looking for people. It is really for you to identify who the people are, and bringing them forward, or get; written statements, and show us what the story is . And if necessary , well, then , we will go and talk to those people.
But there is some responsibility on you if you feel that there is other evidence that I have not; heard, that I should hear, to somehow or other tell me what it is all about. Now, if you get legal. representation I think that would be the best way of doing it because it can be done in a better - more organised way. And I just urge you to follow that up if you wish me to be better informed than I am now. OK. Thank you, very much, you can stand down now .

6.3.6 During November 1990 my office received (presumably from Mr Quall) copies of letters sent to a number of people including the Minister for Aboriginal Affairs. The question of legal aid was a major feature of this correspondence. In a letter dated 23 October 1990 written by Quall to the Minister the assertion is made that at the last hearing (which would have been 12 June 1990) counsel assisting had said it was "too late" and that he could not act on Quall's behalf. Further, in a letter dated 30 October 1990 addressed to Mr Warren Snowdon MP, Quall wrote:

> We have not been legally represented during the Land Commissioner's hearing and have been ignored .

6.3.7 From inquiries made from counsel assisting I have ascertained that he has a record of no fewer than 15 attendances on Quall. during the period 23 October 1989 to 17 August 1990. Counsel denies that he has ever told Quall, or anyone else, that it was "too late" as alleged in the letter to the Minister.

6.3.8 I am satisfied that Quall and his supporters have had every opportunity to put their case to the inquiry and have in fact done so effectively, albeit without being separately represented by counsel. It is a matter of some concern that once the NLC found itself unable to represent Quall it failed to provide him with appropriate legal assistance. I believe that the spirit if not indeed the letter of section 23(1)(f) of the Land Rights Act required as a matter of basic fairness that this should be done.

6.4 THE FINAL SUBMISSIONS

6.4.1 In accordance with established practice I requested the participants in the inquiry to make their final submissions in writing. A program was agreed between the parties involved which I approved, although some extension of the agreed time limits was later sought and agreed to.

6.4.2 The NLC presented a very substantial submission on 26 August 1990 (which I have marked as exhibit NLC 58) The submission on behalf of the Attorney-General was presented on 2 November 1990 (exhibit NTG 24). The NLC made written reply to the Attorney-General which I received on 29 November 1990 (exhibit NLC 59) Solicitors now acting for Mr Baumber advised by letter dated 13 November 1990 (exhibit BMB 2) that their client did not wish to make any submission in relation to the question of traditional ownership.

6.4.3 At the request of senior counsel for the Attorney-

General I agreed to convene a final hearing to give the parties the opportunity to speak to their respective final submissions. III order to fit in with my other commitments and those of counsel this hearing was held in .Alice Springs on 8 December 1990.

7.0 THE CLAIMANT GROUPS

7.0.1 In this section of the report I deal with the various documents prepared on behalf of the claimants which seek to identify the claimants on whose behalf the claim is made.

7.0.2 There are 4 main documents which can be conveniently described as follows:

1. The claim book - exhibit NLC 1, referred to during the hearings and in this report as Kenbi 1979;
2. Ten Years On - exhibit NLC 2;
3. Supplement to Ten Years On exhibit NTG 1; referred to herein as the Supplement;
4. The Wagaitj in Relation to the Kenbi Land Claim Area - exhibit NLC 27.

7.0.3 Kenbi 1979 was prepared by Dr Maria Brandl, Ms Adrienne Haritos and Dr Michael Walsh and is the result of extensive research carried out over an extended period. It is a very substantial work replete with references to historical documents and the work of other anthropologists. It was published late in 1979 and received by the then .Aboriginal Land Commissioner on 3 December 1979.

7.0.4 Ten Years On is described as a supplement to the 1979 Kenbi Land Claim Book. It was prepared in April 1989 by Dr Michael Walsh with assistance from Dr Frank McKeown and Ms Elizabeth Povinelli and was forwarded to me on 4 May 1989 at a time when it was anticipated that the hearing of the claim in respect of the islands would commence on 19 June 1989.

7.0.5 The Supplement was prepared by Dr Michael Walsh and is dated 21 June 1989. It was forwarded to me on 22 June 1989 at a time when the commencement of the inquiry had been adjourned at the request of the NLC for one week from 19 June 1989 to 26 June 1989. On 29 June 1989 the commencement of the inquiry was further adjourned to 13 November 1989. On 9 November 1979 the NLC advised that the claim was to be presented as the Larrakia language group as set out in Ten Years On and that the Supplement should be disregarded. The NLC did not seek to tender the Supplement as part of the evidence but it was nevertheless tendered by counsel for the Attorney-General .

7.0.6 Exhibit 27 was prepared by Dr Michael Walsh and is dated 12 December 1989. It was forwarded to my office in Darwin on 13 December 1989 and tendered as an exhibit on 12 February 1990.

7.0.7 In the following 4 paragraphs of this section I have attempted to summarise relevant portions of each of the documents referred to above.

7.1 KENBI 1979

Chapter 2 of Kenbi 1979 asserts that there is a local descent group fitting the definition of traditional Aboriginal owners in the Land Rights Act, which is acknowledged by all Aboriginals in and near the claim area. As precise genealogical links are not known the authors prefer to refer to this group as a clan rather

than a lineage. They identify the members of the clan, whose principal dreaming or durlg is the crocodile (danggalaba) as :

Bobby Secretary
Topsy Secretary
Gabriel Secretary
Prince of Wales
Olga Singh
Rachel (or Paula) Thompson
Kathleen (or Dolphin) Minyinma.

7.1.2 Topsy and Gabriel Secretary and their now deceased brother Bobby are children of the late Frank Secretary, whose father's putative brother King Miranda was the paternal grandfather of Prince of Wales. Bobby Secretary died without issue and neither Gabriel Secretary nor Prince of Wales have (or are likely to have any children. Topsy Secretary has no male issue.

7.1.3 Olga Singh is also now deceased. She was the daughter of the later Tommy Lyons (Imabulg) whose paternal grandfather is said to have been a putative brother of King Tommy, father of King Miranda. Olga Singh is survived by 3 children Raelene, Jason and Zoe, who are not identified as danggalaba clan members.

7.1.4 Rachel (or Paula) Thompson has also since died. She was a daughter of the late Tommy Lyons (but not by the same mother as Olga Singh). She grew up away from the claim area and stayed with her mother, an Oenpelli woman. She expressly disclaimed any interest in the claim.

7.1.5 Kathleen (or Dolphin) Minyinma (also sometimes referred to as Kathleen Presley) is the daughter of the late Billy Minyinma whose father was Crab Billy Belyuen. The

latter's father is said to have been an adopted or putative son of Tommy Lyons' grandfather. She has grown up away from the claim area with a foster family.

7.1.6 Another person often said to be a danggalaba clan member is Josephine Rankin , whose father was a Chinese Aboriginal and whose husband, a man of the Kiyuk language group, is related to Maudie Bennett, widow of Tommy Lyons. Josephine Rankin has said she has no interest in the claim.

7.1.7 Although the authors of the claim book identify in Chapter 2 a number of persons said to have "an interest" in the claim area, the claim to traditional Aboriginal ownership is asserted only on behalf of the members of the danggalaba clan as particularised above.

7.1.8 At page 155 the authors conclude a review of a variety of historical writings with the observation:

> The evidence from Parkhouse, Wildey, Crauford and others makes it clear that members of the Larrakia linguistic, group were organised into patrilineally-oriented descent groups, as they are today.

The authors then observe that the early descriptions of Larrakia social organisation, and their own findings , conform to the definition of local descent group given by Professor Stanner during the Walpiri land claim, namely:

> a small association of persons of both sexes and any ages each of whom is kin to every other person in the group through the paternal and grand-paternal line from a common ancestor or founder. It is characteristically localised or territorially-based in that it is publicly identified with 1) a natural species or phenomenon of its "totem" and 2) a tract or tracts of land, or with one or more places,

distinguishable from any and every other such tract(s) and p].ace(s) . Each and every Aboriginal person "belongs" in a full sense, and can "belong" in that sense, to one and to one only such group, to which he owes major allegiance.

(Warlpiri and Kartangarurru-Kurintji Report, p.24)

The authors say that this conforms to the way in which the living members of the danggalaba clan see themselves and the way in which they are publicly identified.

7.2 TEN YEARS ON

7.2.1 In Kenbi 1979 the danggalaba clan was proposed as the local descent group for the Kenbi claim. In discussing how this group would constitute a local descent group for the purpose of the definition of traditional Aboriginal owners in the Land Rights Act the authors of Kenbi 1979 relied upon principles identified by Stanner in the Warlpiri land claim. The principle of descent was said to be patrifiliation. A person is recruited by birth into his father's group and the members of this group are linked through a shared patri-spirit.

7.2.2 In Ten Years On an alternative model of local descent group, and one said to be already present in parts of Kenbi 1979, is advanced, namely the Larrakia language group. Whatever the situation in 1979, 10 years later the primary basis for constituting a local descent group in, the claim area is said to be affiliation through the language label, Larrakia. It is asserted that Larrakia language group .is 'local' in that it is generally acknowledged as being associated with a publicly recognised and fairly clearly defined tract of country,

being the present bull. t up area of Darwin, the Kenbi islands and Cox Peninsula. The mode of recruitment to the group is said to be filiation. The principle of descent may be matrifiliative , patrifiliative or both . The notion of filiation is intended to include adoption. The authors believe that the members of the group share common spiritual affiliations to sites on Larrakia land including the Kenbi islands which place them under a primary responsibility for those sites and islands, and further that they have rights as members of the Larrakia language group to forage on Larrakia land, including the claimed islands.

7.2.3 It was already evident to the authors in 1979 that people associated with the claim recognised more generalised connections to country than those of patriliation. Moreover, they say that it became very clear to them during the research that, while no-one disputed the danggalaba clan as owners, both the members of that clan and others were anxious that all people with ties to land in the claim area be considered. On one occasion at Belyuen it was said, "We wish we could make this claim as a community". (The source of this statement is not identified). It is further said that the traditional owners have always been at pains not to exclude others who have been exercising rights and responsibilities in the area. (Kenbi 1979, p.169)

7.2.4 The active involvement in, and understanding of, the land claim process on the part of Darwin based people of Larrakia descent has grown significantly from the early

1980s. Among the most active have been members of the Fejo family, the Roman family, the Cubillo family, the May family, the Quall family and the Raymond family. In 1983 the Larrakia Association was formed. This association, open to people of Larrakia descent , includes land rights issues among its aims but has provided a focus for any issues affecting Larrakia people. Around the same time (August 1983) a group of urban Larrakia wrote to the NLC seeking to be added to the list of claimants (exhibit NLC 15)

7.3 THE SUPPLEMENT

7.3.1 The Supplement to Ten Years On was not relied upon by the NLC as the basis of the claim as presented to the inquiry. It was nevertheless a document prepared by the claimants' senior anthropological advisor at a time when the hearing of the evidence relating to traditional ownership was about to commence. It is not without significance that the author is the only anthropologist who had a part in producing each of the four documents presently under review.

7.3.2 Since 1979 when intensive research on the Kenbi Land Claim began the danggalaba clan has been acknowledged as the pre-eminent land-owning group. In Ten Years On (chapter 3) it was said that the relevant local descent group for the Kenbi area could be put forward at differing levels of inclusiveness. The basis for membership in the danggalaba clan has been through patrifiliation and at June 1989 as so constituted it consisted of:

Topsy Secretary
Gabriel Secretary
Prince of Wales
Kathleen Presley or Minyinma.

Of these Topsy Secretary continued to have responsibility for Larrakia territory in the Darwin area while Prince of Wales had responsibility for Larrakia territory on the Cox Peninsula and for the Kenbi islands . Unfortunately Prince of Wales had recently suffered a stroke and was no longer able to pursue his responsibilities very actively. Gabriel Secretary also has health problems which limit his participation. Kathleen Minyinma, a young woman of twenty, had lived nearly all her life disconnected from Larrakia people and territory.

7.3.3 It is obvious that the danggalaba clan constituted through patrifiliation is headed for extinction given that the two surviving male members are childless and very unlikely to have issue. However, as noted in Kenbi 1979, when members of the Belyuen community were asked to specify how people could be bosses for country, they agreed that inheritance through one's father is important, but that next in importance is a link through one 's mother. Topsy Secretary has expressed the same view. In other words, as the clan was declining, Aboriginal opinion was shifting to a point where filiation was accepted as tying people to country. It is said that the descent principle has shifted from patrifiliation to filiation. On this basis a more inclusive group could be defined as:

surviving members of the danggalaba clan, and,
all people with a filiative link to some

member of the danggalaba clan.

7.3.4 As it happens the only surviving member of the danggalaba clan who has issue is Topsy Secretary. All other people with a filiative link to some member of the danggalaba clan derive their membership in the group from a member of the danggalaba clan who is now deceased. According to these principles there is a local descent group which could be considered presumptive claimants (Ten Years On p.27). The actual claimants are a subset of this group, namely:

(a) surviving members of the danggalaba clan, and

(b) all those people with a filiative link to some member of the danggalaba clan who

(i) have not self-disqualified, and

(ii) have activated their rights to Larrakia country within the overall Kenbi claim area.

7.3.5 The pre-eminence of the danggalaba clan means that all surviving members of the danggalaba clan automatically have a publicly recognised entitlement to Larrakia country but for those with a filiative link to some member of the danggalaba clan two conditions should be satisfied: they must accept their birthright and they must demonstrate an active interest in that country. The Kenbi claim is somewhat unusual in that the knowledge holders for this country publicly acknowledge that t-hey are not themselves the land owners but hold that knowledge for and on behalf of the land owners. Of special importance here are the children of John Singh from his now deceased first wife:

Raelene Singh

Jason Singh
Zoe Singh.

Knowledge of their country is now being passed on to this group by very knowledgeable non-claimants such as their mother's mother, Maudie Bennett and their father, John Singh. The eldest, Raelene, was only born in 1970 but could be expected to become a senior traditional owner as she acquires the appropriate level of knowledge. In this case the transfer of knowledge across generations is going from non-Larrakia to Larrakia which can be found in many other situations in Aboriginal Australia where intergenerational traditional knowledge transfer is between land owning groups. In the Kenbi situation it would actually be quite surprising if the knowledge transfer was taking place within the Larrakia group given that the Larrakia have been dislocated from the Kenbi area and there has been a significant presence of non-Larrakia for around one hundred years . The transfer of traditional knowledge across groups and between generations focuses on a relatively small subset of the presumptive claimants and could be considered as one of the ingredients for membership on the list of actual claimants.

7.3.6 Accordingly, the actual claimant group consists of:

(a) Topsy Secretary
Gabriel Secretary
Prince of Wales
Kathleen Presley or Minyinma

(b) Raelene Singh
Jason Singh
Zoe Singh
Josephine Rankin
Billy Risk
Lorna Lee Talbot
Barbara Tapsell.

This group is quite exclusive, many of the set of presumptive claimants being excluded because they have not yet activated their rights to country. In total there are about 350 presumptive claimants. Any of the presumptive claimants has the potential to activate this interest but the special circumstances of the Larrakia mean that most have not.

7.3.7 In considering this more exclusive group of actual claimants, it must be borne in mind that a much larger group of Aboriginal people stand to be advantaged:

all the other members of the group made up of the danggalaba clan and their descendants who have not disavowed their birthright;

all those people who identify as Larrakia and are accepted as such;

all those Aboriginal people who currently use and enjoy the cultural and economic resources of the claim area.

7.4 EXHIBIT NLC 27

7.4.1 Unlike the other documents presently under view, The Wagaitj in Relation to the Kenbi Land Claim Area was prepared after the commencement of the inquiry, and indeed after the completion of the evidence-in-chief of the Aboriginal witnesses called to support the claim based upon the Larrakia language group model. The likelihood that a new approach would be taken to the issue of traditional Aboriginal ownership was raised by counsel for the claimants on 1 December 1989, the last day on which evidence was taken from the Larrakia claimants. At the head of the document the author makes this comment:

*The term, Wagaitj, has a range of applications (see Kenbi 1979: 6). It is sometimes used to refer to the Wadjigiyn-Kiyuk and sometimes more widely to include such groups as the Ami. Here we are referring to all those coastal groups (wagaitj = "beach") who have close connections with Kenbi country. These groups will be specified by their own names in this document.

7.4.2 Aboriginal people associated with the claim area are linked through a "coastal connection" . Larrakia territory extends along a coastal are from around Gunn Point in the east up to and beyond Bynoe Harbour on the north-west coast. To the south is the territory of the Wadjigiyn and Kiyuk extending down to Anson Bay. South of them are the Ami and Manda, also on the coast. Further south are the Marridjabin, Marriamu and Murrinh-Patha. All these Aboriginal groups living along the coast are closely linked through marriage, intervisitation and ceremony. Most are also tied together by sharing a common dreaming track. In the past it seems that this "coastal connection" extended to the east as well linking Larrakia people to coastal Aboriginal groups such as the Wulna, Limilngan/Minitja and people of the East Alligator River and Cobourg Peninsula areas . There were ceremonial links between the Larrakia and these groups as well as intermarriage.

7.4.3 The devastating effects of European contact have been amply documented elsewhere (see Kenbi 1979, especially Chapter 4). Darwin attracted Aboriginal groups from the immediate area: the Wulna, Limilngan/Minitja and people of the East Alligator River as well as Larrakia from both sides of the harbour. These people became the NT's

first fringe dwellers and by the 1870s Europeans had already started to "intermarry" with the local Aboriginal people. To the west of the Darwin harbour a territorial vacuum was being created: Larrakia people who had lived in the claim area since time immemorial were now spending more and more time on the eastern side of the harbour. The coastal neighbours of the Larrakia to the south - the Wadjigiyn and Kiyuk - started to move into the claim area around 100 years ago. They were attracted by the fine hunting and foraging country of their northern neighbours and by the new goods and services available in Darwin. These southern neighbours who call themselves the Wadjigiyn-Kiyuk came to occupy a pivotal role in the claim area. The Wadjigiyn and Kiyuk were formerly two separate language groups but they have come to see themselves as one group , the Wadjigiyn-Kiyuk. The Kiyuk language has fallen into disuse so that the collective group now tend to speak Wadjigiyn (sometimes called Bachamal or Batjamal). They have lived in the claim area for around 100 years; they have intermarried with the Larrakia and they have taken a major part in ceremonial activity. To the south of them are people who form part of the "coastal connection" but are beyond the Wadjigiyn-Kiyuk: the Ami and Manda, the Marridjabin and the Marriamu. The effects of European contact diminish the further one heads south along the coast from the claim area . At the same time the closeness of association with the claim area tends to become less the further south one goes. The people of Wadeye (or Port Keats), for instance, have ties with the

claim area through intermarriage, intervisitation and ceremony but these links are not so strong as those of the Wadjigiyn-Kiyuk. Not surprisingly there is a continuum of connectedness between particular Aboriginal groups and the claim area. This continuum can be considered in terms of such factors as:

descent principles
residence in the Kenbi land claim area
geographical proximity to the claim area
extent of European contact
predominant marriage patterns.

7.4.5 The most important consequence of this continuum is that Wadjigiyn- Kiyuk as well as the Larrakia have very substantial interests in the claim area. This joint interest is the result of the unique circumstances of contact history and geography which surround the claim area. The contact history of the Wadjigiyn-Kiyuk is also of primary importance . One can assume that they have been in contact with their nearest neighbours, the Larrakia, for numerous generations but they have also had long term contact with Europeans mainly as a result of their residence in the claim area. But the geographical barrier of Darwin Harbour has insulated the Wadjigiyn-Kiyuk against some of the more destructive consequences of white settlement. Concomitant with this relative insulation is relatively little intermarriage with non-Aboriginal people. While they have resided in the claim area for 100 years their original lifestyle has not been disrupted nearly so much as the Larrakia. Consistent with this continuing orientation is an assertion that they are not the "traditional owners " the Larrakia are.

7.4.5 The Wadjigiyn-Kiyuk are advanced as a local descent group. From a consideration of the genealogies, it seems clear that the principle of descent is one of presumptive patrifiliation. People identify as Wadjigiyn-Kiyuk through their father and are accepted as Wadjigiyn-Kiyuk on that, basis unless the father is non-Aboriginal or an Aboriginal who is not seen to be closely allied to the Wadjigiyn-Kiyuk social network . On the basis of presumptive patrifiliation a Wadjigiyn-Kiyuk local descent group can be formed where each member of the Wadjigiyn-Kiyuk local descent group is recruited by presumptive patrifiliation through a Wadjigiyn-Kiyuk parent (usually male).

7.4.6 The Wadjigiyn - Kiyuk have a long term local association with It he claim area. It is true that they say of themselves that they are not traditional owners of the claim area but this does not detract from their close connection with it. Consistent with their long term association to coastal country, the south-eastern portion of the claim area is not much used by the Wadjigiyn-Kiyuk, As it happens the claim area roughly coincides with that territory which the Wadjigiyn-Kiyuk began to move into 100 years ago and continue to use today.

7.4.7 The Wadjigiyn - Kiyuk are a language group in much the same way as the Larrakia are. That is to say they are a group of Aboriginal people who identify as a group in terms of a language label and identify their country in terms of that language label. This group say of

themselves, "We are Wadjigiyn-Kiyuk people and our land is Wadjigiyn-Kiyuk country". But they differ from the Larrakia language group in two important respects. First, they are a fusion of two language groups which were at one time separate. Second, they are connected to country in two ways: they have a traditional allegiance to Wadjigiyn-Kiyuk territory but for the most part they now have stronger ties to the country to the north of their own, which includes the claim area.

7.4.8 The Wadjigiyn-Kiyuk connection to country in the claim area derives not only from long term residence and use of the land but also from the responsibilities for sites on that land which have been provided to them by the Larrakia. The Wadjigiyn-Kiyuk have been transmitting that knowledge not only to their own children but also to the Larrakia.

7.4.9 The Wadjigiyn-Kiyuk also relate to their own Wadjigiyn-Kiyuk country at the level of small scale patrician estates. Within Wadjigiyn-Kiyuk country the Wadjigiyn-Kiyuk identify with country at the language group level - that is, to the entirety of Wadjigiyn-Kiyuk territory and they may also identify with their own specific patrician estate . However, when identifying with Kenbi country the Wadjigiyn-Kiyuk relate to it solely in terms of the language-group level: the Wadjigiyn-Kiyuk. The same is true of the other non-Larrakia local descent: groups which are put forward as claimant groups for the claim area.

7.4.10 The Ami and Manda began to move into the claim area

around eighty years ago. By now the bulk of the Ami and Manda have moved out of their traditional territories and live at Belyuen or have very close ties to Belyuen. They are "migrants" like the Wadjigiyn-Kiyuk; the difference is that they are more recent arrivals. Unlike the Wadjigiyn-Kiyuk nearly all the Ami-Manda now reside in and use the claim area on a day-to-day basis.

7.4.11 It is submitted that the Ami-Manda form a local descent group. Like the Wadjigiyn-Kiyuk they are a language group which is a fusion of two formerly separate groups. The Ami-Manda are a language group in that they use the language label, Ami-Manda , to identify themselves as a discrete group. A person is recruited to the Ami-Manda local descent group usually by virtue of having a father who is Ami or Manda. Again the principle of descent is one of presumptive patrifiliation. The Ami-Manda local descent group numbers approximately 140, the majority of whom live at Belyuen. Ten family groups are involved.

7.4.12 Only some of the Marridjabin and Marriamu groups began to move into the claim area around the same time as the Ami and Manda. The fact that some of the Marridjabin and Marriamu stayed behind in Marridjabin-Marriamu country is consistent with them being the most distant. Like the Ami and Manda these two groups are spoken of as being "all the same now". As for the Ami and Manda, some Marriamu or Marridjabin individuals have taken on a prominent role in using and looking after country in the claim area. One of the most important roles for these

people is passing on knowledge of country to their children and (where appropriate) their grandchildren.

7.4.13 In proposing a fourth local descent group, the Marriamu-Marridjabin, there are obvious similarities to the Wadjigiyn-Kiyuk and the Ami-Manda but there are also very significant differences . Again the basis of membership in this group is that the father would usually be Marriamu or Marridjabin. So the principle of descent is one of presumptive patrifiliation. Again they are a language group which is a fusion of two formerly separate groups . However, only some of the Marriamu-Marridjabin have moved into the claim area. The remainder, who form the majority mainly live at Wadeye (Port Keats) and connect with their own Marriamu-Marridjabin country more strongly than they do with the claim area. Therefore, only a portion of the Marriamu-Marridjabin language group is put forward as a local descent group in connection with the claim area.

7.4.14 The Kenbi land claim poses unusual difficulties in determining traditional ownership because of the unique circumstances of contact history, geography and the role of neighbouring Aboriginal groups. From 1979 land-owning groups of differing levels of inclusiveness have been proposed as appropriate for the claim area. This reflects what Aboriginal people in the area have said about traditional ownership and continue to say. The Kenbi situation arose out of particular historical circumstances whereby most Larrakia no longer occupied Kenbi country and their southern neighbours moved in.

The Larrakia continued to be acknowledged as owners of Kenbi country while the Wadjigiyn-Kiyuk, Ami-Manda and Marriamu -Marridjabin come to take on a caretaker role for Kenbi country which can be viewed as analogous to the role that managers have elsewhere. These roles are complementary but not conflicting and are mutually acknowledged. It is asserted that there are four local descent groups who are traditional Aboriginal owners of the claim area:

the Larrakia language group
the Wadjigiyn-Kiyuk language group
the Ami-Manda language group
that subset of the Marriamu-Marridjabin language group who have moved into Kenbi country and established stronger ties with it than to their own original Marriamu-Marridjabin territory.

It is said that the four groups collectively claim the country and , in addition, that each individual group also claims it.

8.0 THE DEFINITION OF 'TRADITIONAL ABORIGINAL OWNERS '

8.1 The Land Rights Act has now been in force for 14 years. In that period some 37 traditional land claims have been reported on by successive Aboriginal Land Commissioners. The constitutional validity of the Act itself and many other issues arising in its interpretation and administration have been questioned and ruled upon in the High Court of Australia and in the Federal Court.

8.2 It is therefore surprising with all that has gone before, that the real issues in this claim demand that for the first time an exhaustive examination be made of the policy and purpose of the Act in order to assist in the construction of what is perhaps the most fundamental concept in the legislation, namely the definition of the term 'traditional Aboriginal owners'

8.3 The Acts Interpretation Act 1901 (Commonwealth) provides that in the interpretation of a provision of an act, a construction that would promote the purpose or object underlying the act (whether that purpose or object is expressly stated in the act or not) shall be preferred to a construction that would not promote that purpose or object (Acts Interpretation Act 1901 s.l5AA). I propose therefore to examine the Act as a whole and to consider such other material which may be capable of assisting in the ascertainment of the meaning of the provisions of the Act to the extent contemplated by s.l5AB of the Acts Interpretation Act.

8.4 To set the framework for the following discussion I quote the definition of 'traditional Aboriginal owners'

as it appears in section 3(1) of the Land Rights Act:

> "traditional Aboriginal owners", in relation to land, means a local descent group of Aboriginals who -
>
> (a) have common spiritual affiliations to a site on the land, being affiliations that place the group under a primary spiritual responsibility for that site and for the land; and
>
> (b) are entitled by Aboriginal tradition to forage as of right over that land;

In the context of the present claim the particular aspect of the definition which requires special consideration is the term 'local descent group'. This combination of words is used but once in the Act, in the definition. It is not specifically defined and in my opinion its meaning is obscure. It is not a term that can be defined by reference to any standard dictionary, nor indeed have I been referred to any standard anthropological work otherwise than in the context of the Land Rights Act itself.

8.5 In these circumstances it is permissible that I consider inter alia, the two Reports of the Aboriginal Land Rights Commission, the speech made by the then Minister for Aboriginal Affairs (Mr Viner) to the House of Representatives on the occasion of the moving of the motion for the second reading of the Bill which later became the Land Rights Act and certain other relevant material in the Votes and Proceedings of the House of Representatives and the official records of debates in the House of Representatives . Included in the latter category of material are the Aboriginal Land (Northern Territory) Bill 1975 and the speech made by the then

Minister for Aboriginal Affairs (Mr Johnson) in moving the second reading of that Bill in the House of Representatives on 16 October 1975.

8.6 The fact that in this claim the claimants, or some of them, rely upon a novel construction of the Act was adverted to by counsel for the claimants (Mr Parsons) in his opening address at Belyuen on 13 November 1989. The following extract appears at p.79 of the transcript:

> Now, sir, in explaining this land claim, what I want to do firstly is contend for an interpretation of the Land Rights Act, which is novel in the sense that it has not been advanced before, :but we do so for the reason that we say that this land claim, in particular, will be a test of the adequacy of the act, not a test of the adequacy of the claimants .
>
> The Land Rights Act has been sorely tested on a number of occasions before, and whilst it has not been found wanting, it is certainly not the answer, or the cure-all for the kind of positions that Aboriginal people have found themselves in, in the Northern Territory, and that is certainly so for the Aboriginal people who have suffered most as a result of the arrival of not only European peoples, but Malays and other Asian peoples for some time.
>
> Anti, indeed, the presentation of land claims on behalf of people Aboriginal people who live near or in places where there has been a lot of interference from whites and Asian people have had their claims presented in what is called the language group model and, particularly, of course, in this area there is the Malak-Malak claim, and the Finniss River claim and the Alligator Rivers claim, and each of those claims deals with the position where there are claims on behalf of language groups in areas where they are near towns, or there has been very high mortality, and even the situation in Finniss River where, as a result of those kind of things there were competing claims between Aboriginal groups.
>
> Now, Kenbi really draws all those threads together and more. So what I want to do, firstly, is to review the history of the act and to examine the definition of traditional ownership in order to set the context for, as

I say, a novel interpretation but one which we believe is perfectly consistent with the operation of the act in the way that it was actually thought of operating by Mr Justice Woodward and those who were responsible, in a sense, for the drawing of the act.
We say what we are about to suggest is something that is; sensible, it is practical, and it enables some life to yet remain in the Land Rights Act in situations where it becomes more and more difficult to accommodate what Aboriginal people say about country with the notion of what is in the Land Rights Act which really reflects, as we believe, a situation which was believed at the time to operate in Arnhem Land and places like that where there has really been fairly modest contact.

8.7 On 8 February 1973 the Australian government established the Aboriginal Land Rights Commission and appointed Mr Justice (now Sir Edward) Woodward as a Commissioner to inquire into and report upon:

The appropriate means to recognise and establish the traditional rights and interests of the Aborigines in and in relation to land, and to satisfy in other ways the reasonable aspirations or the Aborigines to rights in or in relation to land, and, in particular, but without in any way derogating from the generality of the foregoing:

(a) arrangements for vesting title to land in the Northern Territory of Australian now reserved for the use and benefit of the Aboriginal inhabitants of that Territory, including rights in minerals and timber, in an appropriate body or bodies, and for granting rights in or in relation to that land to the Aboriginal groups or communities concerned with that land;

(b) the desirability of establishing suitable procedures for the examination of claims to Aboriginal traditional rights and interests in or in relation to land in areas in the Northern Territory of Australia outside Aboriginal reserves or of establishing alternative ways of meeting effectively the needs for land of Aboriginal groups or communities living outside those reserves;

(c) the effect of already existing commitments, whether in the nature of

Crown leases, Government contracts, mining rights or otherwise, on the at alignment of the objects of recognising and establishing Aboriginal traditional rights and interests in or in relation to land:

(d) the changes in legislation required to give effect to the recommendations arising from (a), (b) and (c) above; and

(e) such other matters relating to rights and interests of the Aborigines in or in relation to land as may be referred to the Aboriginal Land Rights Commission by the Minister for Aboriginal Affairs.

8.8 On 18 July 1973 the Commissioner received a reference from the Minister for Aboriginal Affairs in accordance with sub-paragraph (e) of his Commission on the following matter, namely:

> possible arrangements for vesting title to land in the adjoining Aboriginal reserves in South Australia (North West Reserve), Western Australia (Central Australian, Warburton and Balwina Reserves) and the Northern Territory (Reserve No. R1028, comprising the reserves known as the Petermann, Haasts Bluff and Lake Mackay Reserves) in an appropriate body or bodies and for granting rights in or in relation to that land to the Aboriginal groups or communities concerned with that land, taking into account existing legislation in those two States.

8.9 The first report of the Aboriginal Land Rights Commission was forwarded to the Governor-General on 19 July 1973 and tabled in the House of Representatives on 22 August 1973.

8.10 The report contained in paragraphs 20-65 (inclusive), a description of what the Commissioner understood to be the traditional relationships between Aborigines and their land. However, in this context the Commissioner qualified his description when he said (at paragraph

19):

> Some of what follows may be open to dispute among experts anti there will necessarily be some oversimplification of complex situations. I believe it to be a fair summary for present purposes.

8.11 The second and final report of the Aboriginal Land Rights Commission was forwarded to the Governor-General on 3 May 1973 and tabled in the House of Representatives on 17 July 1974.

8.12 In paragraphs 13-15 (inclusive) of the second report the Royal Commissioner said:

> I made a first report on July 19th 1973 in which the relevant facts were set out, problems were identified and a number of suggestions made about possible solutions to those problems. The only positive recommendation in that report was for the establishment of two Land Councils, one based on Darwin and the other on Alice Springs. The Councils were to be supplied with independent legal advice and asked to make submissions on the various points raised in the first report and on any other relevant matters which they wished to raise.
>
> Such submissions have now been made, both in writing and orally at public hearings. They have been of the greatest assistance to me in my task.
>
> In addition, the report was widely circulated among interested persons and organisations (some 2500 copies have been sent out) and it produced a number of helpful responses. With the exception of a few unimportant matters of detail, the facts set out were not challenged. In particular the description of the traditional relationship between Aborigines and their land seems to have been accepted by Aborigines and by others who have studied the subject. As a matter of convenience that description is reproduced at the end of this report as Appendix A.

(Appendix A to the second Woodward report is reproduced as appendix A to this report)

8.13 In dealing with the question of legislation required to give effect to his recommendations the Royal Commissioner said in paragraphs 735 to 737 of the second report:

> Since both the Land Councils have provided me with suggestions concerning the necessary legislation to put their claims into effect, I have thought it proper to append to this report some tentative drafting instructions. Their purpose is to set out in a concise and convenient form some of the more detailed and technical recommendations which I wish to make. In this sense the appendix is an integral part of this report. The exercise has served the very useful purpose of throwing up some of the practical difficulties which can arise when general recommendations are put into practical form.
>
> To the extent to which the recommendations in this report are accepted , the appendix may also help to lighten the burden of Parliamentary Counsel, but I hasten to add that neither counsel for the Land Councils nor I claim any special skill in parliamentary drafting and it must not be thought that I am trying in any way to dictate the actual terms in which any resulting legislation may be couched.
>
> I have based my draft substantially on that of the Northern Land Council because it was more detailed and produced later than that of the Central Council. It was thus possible to incorporate in it many of the points which arose during the final hearings.

8.14 The drafting instructions referred to in paragraph 735 of the second report took the form of a draft Bill. It was by its long title to be a Bill for an act:

> To provide for the acquisition and administration of land for Aboriginal people in the Northern Territory of Australia and for other purposes.

8.15 It is unnecessary to examine in detail the contents of the draft Bill, rather, it is sufficient to observe that it contemplated first that certain identified reserves

and other land (described in Schedule 3 to the draft) should be vested in fee simple in land trusts established under the act, second that provision would be made upon application being made by or on behalf of any of the traditional owners for vesting in a land trust other lands "which do not lie within the boundaries of a town or municipality or within the boundaries of any land described in Schedule 3 or vested by the Crown in an approved corporation .. or granted by the Crown in fee simple", and third that the Aboriginal Land Commission proposed under the bill have the function, inter alia, to ascertain the needs of Aboriginals in the NT for land to be used for residential, employment and other purposes.

8.16 The draft Bill contained a definition of the term 'traditional Aboriginal owners' in these terms:

> 'Traditional Aboriginal owners ' means in respect of an area of land, a local descent group of Aborigines who have common spiritual affiliations to a site or sites within that area of land, which affiliations place the group under a primary spiritual responsibility for that site or sites and for that land, and who are entitled by Aboriginal tradition to forage as of right over the land.

(The term 'traditional Aboriginal owners ' does not appear in the draft Bill other than in the definition section, although elsewhere the term 'traditional owners' is used)

8.17 On 16 October 1975 the then Minister for Aboriginal Affairs (Mr Johnson) introduced into the House of Representatives , and moved the second reading of the Aboriginal Land (Northern Territory) Bill 1975.

(Hansard, p.2222)

8.18 In the course of his second reading speech the Minister said (at p.2223):

> Specifically the Government is pledged to legislate to establish a system of Aboriginal tenure based on the traditional rights of clans and other tribal groups for land which is reserved for Aboriginal use and benefit and to vest such land in Aboriginal communities.

After referring to the two reports of the Royal Commissioner he said (at p.2223):

> The Prime Minister announced on 2 July 1974 that the Government had accepted in principle the recommendations made in this second report, and had authorised the drafting of the Bill to which I am now speaking.

and concluded the speech (at p.2225) with the statement:

> Since the recommendations of the Woodward report have been accepted in principle by all major political parties, and this Bill gives effect to those recommendations, I have every confidence that it will be acceptable to the House and have no hesitation in commending the Aboriginal Land (Northern Territory) Bill to honourable members.

8.19 The Aboriginal Land (Northern Territory) Bill 1975 substantially followed both the form and substance of the draft Bill contained in the second Woodward report.

8.20 The definition of 'traditional Aboriginal owners' in the Aboriginal Land (Northern Territory) Bill varied only in minor respects from that contained in the draft Bill. The form adopted was:

> "traditional Aboriginal owners ", in relation to land, means a local descent group of Aboriginal who
>
> (a) have common spiritual affiliations to a site on the land, being affiliations that place the group under a primary spiritual responsibility for that site and for the

land; and

(b) are entitled by Aboriginal tradition to forage as of right over that land;

8.21 The Aboriginal Land (Northern Territory) Bill 1975 lapsed with the dissolution of Parliament on 11 November 1975.

8.22 On 4 June 1976 in the House of Representatives the then Minister for Aboriginal Affairs (Mr Viner) moved the second reading of the Aboriginal Land Rights (Northern Territory) Bill 1976. This Bill, with some minor amendments, became the Aboriginal Land Rights (Northern Territory) Act 1976.

8.23 The long title of the Bill (and the Act) asserts that it is:

> An Act providing for the granting of Traditional Aboriginal land in the Northern Territory for the benefit of Aboriginals and for other purposes.

8.24 In moving the second reading the Minister said (at Hansard, p.3081):

> This Bill will give traditional Aborigines inalienable freehold title to land on reserves in the Northern Territory and provide machinery for them to obtain title to traditional land outside reserves. The coalition Parties' policy on Aboriginal affairs clearly acknowledges that affinity with the land is fundamental to Aborigines' sense of identity and recognises the right of Aborigines to obtain title to lands located within the reserves in the Northern Territory. The Bill gives effect to that policy and, further, will provide Aborigines in the Northern Territory with the opportunity to claim and receive title to traditional Aboriginal land outside reserves. The Government believes that this Bill will allow and encourage Aborigines in the Northern Territory to give full expression to the affinity with land that characterised their

traditional society and gave a unique quality to their life.

Most of us now appreciate more sensitively than in the past that traditional Aborigines think, feel and act about land according to a plan of life a world apart from ours. Traditional Aborigines associate identifiable groups of people with particular ' countries ' or tracts of territory in such a way that the link was publicly reputed to express both spiritual and physical communication between living people and their 'dream time' ancestors and between the 'country' as it now is and the 'ancestral' country which had been given its names, its physical features, its founding stocks of food and water, and its owners and possessors by the ancestors themselves. It is believed that ancestors left in each 'country' certain vital powers that, used properly by the right people, make that 'country' fruitful and ensure a good life for people forever. Everywhere there was a plan of life - a good and satisfying life - based on an identifiable and unmistakable group of people forming a descent group or 'clan', living with relation to an identifiable territory publicly recognised as the 'country' of the group because of the actions of ancestors who had left in each 'country' sacred memorials - the totems and totemic sites of which we hear so much as proof of entitlement for, and to guide and discipline, their descendants. The depth of appeal that an Aboriginal's 'country' has for him can be gauged by the pictures he may paint, the songs he may sing, the stories he may tell and the dances he may perform. His 'country' no matter how stricken a wilderness it may seem to others - is to him a Canaan, from which his spirit came and where he wants his bones to rest. In the Northern Territory Aboriginal communities still wanting to maintain and live by their culture and social forms involving land in the sense I have described will be enabled by this Bill to do so.

(Underlining added by Land Commissioner)

8.25 The Aboriginal Land Rights (Northern Territory) Act 1976 defines the term 'traditional Aboriginal owners' in terms identical to those used in the Aboriginal Land (Northern Territory) Bill 1975 which for all relevant purposes were the same as used in the corresponding

definition in the draft Bill. The form of this definition has remained unaltered throughout the life of the Act.

8.26 Using the extrinsic aids to construction to which reference has been made I am of the opinion that the words 'local descent group' used in the definition of 'traditional Aboriginal owners' have the meaning which Mr Justice Woodward assigned to them in the first report of the Aboriginal Land Rights Commission.

8.27 In reaching this conclusion I have had regard to the following:

(a) Although in paragraph 19 of his first report he indicated that some of what was to follow may be open to dispute among experts, in his second report, after an extensive process of consultation, he was able to say of the first report:

> With the exception of a few unimportant matters of detail, the facts set out were not challenged. In particular the description of the traditional relationship between Aborigines and their land seems to have been accepted by Aborigines and others who have studied the subject.
> (Second Woodward report, para. 15)

(b) The Royal Commissioner's commitment to his original description of the traditional relationship was reaffirmed by the inclusion of that description as an appendix to the second report.

(c) In his description of the traditional relationships of Aborigines and their land, the Royal Commissioner equated the term 'clan' with 'a local descent group' which he defines as:

a sub-division of a dialect group larger than a family but based on family links through a common male ancestry, although those links may be back beyond living memory.
(First Woodward report, para. 37)

(d) The drafting instructions in the second report used the phrase 'local descent group' in defining the term 'traditional Aboriginal owners'.

(e) In 1975 the government of the day expressly accepted the recommendations of the second report and adopted in its Bill a definition of 'traditional Aboriginal owners' substantially in the terms used in the drafting instructions.

(f) In 1976 the Bill which became the Act used the same definition as was used in the 1975 Bill.

(g) The portion of the Minister's second reading speech which I have underlined in paragraph 8.24 indicates that the intention was to enact legislation based upon an understanding of Aboriginal relationship to land identical to that expressed by the Royal Commissioner.

8.28 It is now fashionable in some quarters to suggest that Mr Justice Woodward was mistaken in his understanding of the traditional relationship between Aborigines and their land, or that his understanding whilst appropriate in some areas of the NT was and is inapplicable elsewhere. Whilst it is no part of my function to enter that debate, the fact remains that the Royal Commissioner set out his understanding in the first report, invited comment upon it, and received no response that would suggest he was mistaken. Whatever

might be current anthropological theory, what is set out in Appendix A to the second Woodward report clearly indicates the context in which the Royal Commissioner's recommendations were made. And this is particularly important in view of his major recommendation having been presented in the form of a draft bill, the key provisions of which were later adopted by parliament.

8.29 I have no hesitation in concluding that 'local descent group' should be construed in the terms used in paragraph 37 of the first Woodward report.

8.30 Counsel for the claimants referred in his opening address to section 15AA of the Acts Interpretation Act 1901. In this context he said (Ts. P.80):

> ... one is striving at all times to give meaning to this act and, in particular, the definition of traditional ownership that provides for the granting of traditional lands, not an interpretation which makes it more difficult, or not an interpretation which relies on technical descriptions from anthropologists

Reference was also made to a number of observations made by members of the High Court concerning the construction of the Act.

8.31 In his address counsel said in relation to a number of expressions of judicial opinion (Ts. P.81):

> Justice Lionel Murphy put the broad proposition that the Land Rights Act should be interpreted and applied beneficially towards land rights claims . And, more specifically, the former Chief Justice, Chief Justice Gibbs, with whom Mr Justice Brennan, Deane and Dawson agreed, said that the definition of traditional owners, section 50 of the act, pursuant to which traditional land claims are made, should be given a broad construction so as to effectuate the beneficial purpose which it is intended to serve . And, further, Mr

> Justice Murphy said that the purpose of section 50 is to open up the possibility of a grant of land which has traditional Aboriginal ownership, not to close it.

8.32 The statement attributed to Gibbs CJ is misquoted. His Honour in fact said:

> If the section (50(1)(a)) is ambiguous it should, in my opinion, be given a broad construction, so as to effectuate the beneficial purpose which it is intended to serve.

(re Kearney; ex parte Julama 52 ALR 24 at p.28)

8.33 This proposition is equally applicable to the construction of all other sections of the Act and says no more than section 15AA of the Acts Interpretation Act 1901 other than to establish that the purpose of the Act is "beneficial"

8.34 The need to look to the purpose or object of an act will only arise where there is some ambiguity or uncertainty as to the meaning that should be attributed to the words used. Section 15AA contains no warrant for varying the wording of the legislation so as to better satisfy the aspirations of a somewhat broader group of persons than those for whose benefit it was enacted. This seems to be what counsel for the claimants seeks in the present claim.

8.35 There can be no doubt that one major thrust of both the second Woodward report and the proposals contained in the Aboriginal Land (Northern Territory) Bill 1975 was to make provision for the satisfaction of the needs of Aboriginal people for land, and this without reference to traditional attachment to the land. But the Land

Rights Act of 1976 contains no such provisions.

8.36 The underlying purpose of the Land Rights Act, albeit beneficial, is a limited purpose in so far as it relates to the granting of title pursuant to sections 11 and 12. The purpose or object of the Act in this respect is limited to the granting of land in respect of which the Aboriginal Land Commissioner has found there are traditional Aboriginal owners. Once granted however, the land is held by the land trust for the benefit of Aboriginals entitled by Aboriginal tradition to the use and occupation of the land, whether or not the traditional entitlement is qualified as to place, time, circumstance, purpose or permission (LRA. ss. 11(1)(b), 11(1)(c), 11(4), 12(1)0.

8.37 If the Aboriginal Land Commissioner is unable to find that there are any traditional Aboriginal owners of an area of land claimed pursuant to section 50(1)(a), there can be no occasion for that land to be granted to a land trust, notwithstanding that there may be a large number of "relevant Aboriginals" (as defined by section 11(4)).

8.38 In this context it is perhaps not out of place that I should comment on the provisions of sub-section 50(4) which provides:

> In carrying out his functions a Commissioner shall have regard to the following principles:
>
> (a) Aboriginals who by choice are living at a place on the traditional country of the tribe or linguistic group to which they belong but do not have a right or entitlement to live at that place ought, where practicable, to be able to acquire secure occupancy of that place;

(b) Aboriginals who are not living at a place on the traditional country of the tribe or linguistic group to which they belong but desire to live at such a place ought, where practicable, to be able to acquire secure occupancy of such a place.

8.39 On other occasions I have indicated that I have some difficulty in understanding how this subsection fits into the scheme of the Act. Obviously it has no relevance in the task of determining whether there are any traditional Aboriginal owners of claimed land, although it may indirectly suggest considerations which are relevant in assessing the strength of traditional attachment of claimants.

8.40 It is a provision which more appropriately could be directed to the Minister in the exercise of his discretion to recommend a grant of land under section 11, and some support for this proposition is found in the history of the provision which dates back to the second Woodward report in which it played a quite different role from that given it in the Land Rights Act.

8.41 Although the subsection as such has no real relevance to matters presently in issue, the terms used in it are of assistance in construing the Act.

8.42 The paragraphs from the first Woodward report which are reproduced as appendix A to this report draw a clear distinction in Aboriginal social organisation between a 'tribe' or 'linguistic group' on the one hand, and a 'local descent group' on the other. Given that the form of subsection 50(4) has its origin in clause 27 of the

draft Bill in the second Woodward report, there is a strong inference to be drawn that the meaning to be attributed to 'tribe' or 'linguistic group' was quite different from the idea of a 'local descent group'.

8.43 It is also of some significance that clause 27 of the draft Bill directed that the principles stated should guide the proposed Aboriginal Land Commission in its functions under clause 26 of the Bill. That clause was intended to confer certain specific functions on the Aboriginal Land Commission, but none of those functions had to do with matters of traditional ownership. Rather they related to the ascertainment of and satisfying the needs of individual Aboriginals or of Aboriginal groups or communities for land to be used for residential, employment or other purposes.

8.44 I do not accept that the inherent justice of a claim to land, however strong the moral basis for the claim may be, can justify the redefinition of the concept of 'local descent group' to accommodate a factual situation which was not within the contemplation of the legislature.

8.45 In his opening address, counsel for the claimants spoke of the hope:

> ... that everybody could, with goodwill and with the best advice, be able to constantly elasticise the definition to accommodate the growing problems,
> (Ts. p.83)

and later (on the same page) he referred to:

> ... the stretching of the definition I have spoken of in order to accommodate,

particularly, claims by language groups.

8.46 Whether or not a group of claimants can establish its status as "the traditional Aboriginal owners" of land in the statutory sense is ultimately a question of applying the statute to the set of facts found from the evidence. If, on the proper construction of the statute, the capacity to establish that status is more restricted than current anthropological theory thinks appropriate, the remedy lies in the hands of Parliament, not the Aboriginal Land Commissioner. However eloquently the case is put, and however unjust the result might be, I reject the notion that in this or any other claim, the status of traditional Aboriginal owner can be proved merely by the assertion (as counsel would have it), or even the proof, of the fact that individual members of the claimant group have an ancestor who was a member of a language group, which in pre-contact times was associated with and used a substantial area of land, of which the claim area is but a small part.

8.47 Some of the submissions made in this claim have drawn attention to the appropriateness or otherwise of different methods of fact finding adopted in other land claim inquiries for the purpose of determining the question of traditional Aboriginal ownership. Although it is probably an oversimplification there are two main approaches which can be adopted. First, the Commissioner can analyse the evidence of the individual witnesses to ascertain which of them can fairly be said to have spiritual affiliations to a particular site

which place that person under a primary spiritual responsibility for the site and the land and then proceed to assess whether those spiritual affiliations are "common" to the persons concerned and to the extent that they are, whether the persons with those affiliations are members of a local descent group. The alternative approach is to identify a local descent group and then to ascertain whether the members of the group have common spiritual affiliations of the type referred to in the definition. It seems to me that neither approach is without difficulty and how the Commissioner may approach the exercise of his function may in some cases be determined by the manner in which the claim is presented.

8.48 The first thing that can be said about the statutory definition of "traditional Aboriginal owners" is that it initially directs attention to a local descent group of Aboriginals. It may be that had the definition stopped there, no different result would have been achieved. It is arguable that the particular characteristics which are by paragraphs (a) and (b) attributable to the members of a local descent group are no more nor less than the characteristics which Mr Justice Woodward understood to be associated with membership of a local descent group. In my view this appears to be the case when regard is had to paragraph 45 of the first Woodward report:

> The spiritual connection between a clan and its land involves both rights and duties. The rights are to the unrestricted use of its natural products; the duties are of a ceremonial kind to tend the land by the

performance of ritual dances, songs and ceremonies at the proper times and places.

8.49 In the practical application of the statutory definition of "traditional Aboriginal owners" it has been my policy on most occasions to first identify a group of people who have relevant links both to the locality of the land claimed and by descent who can fairly be thought to comprise a local descent group, and then to examine the evidence relating to the spiritual affiliations of those individuals to determine whether they are such as to conform with the wording of paragraphs (a) and (b) of the definition. In this latter exercise I have construed the opening words of section 50(3), namely

> (in) making a report in connection with a traditional land claim a Commissioner shall have regard to the strength or otherwise of the traditional attachment by the claimants to the land claimed

as requiring me to consider the traditional attachment of individual claimants who form part of the local descent group, and if no such attachment is demonstrated, or if it is shown to be only nominal, I have not treated the individual as having a "common spiritual affiliation" to a site on the land and thus have excluded any such individual from the group identified as the traditional Aboriginal owners. On this basis I have consistently excluded young children about whom the only evidence is that they are a child of their father or their mother and other claimants who are shown in other ways to have no actual traditional attachment to the land. The view I have taken, and with which I persist, is that section 50(3) put a gloss on

the definition of traditional Aboriginal ownership which limits its application to those local descent group members who have some demonstrable traditional attachment to the land. I think that there is a very significant difference between on the one hand, a "spiritual affiliation" which as Mr Justice Woodward suggests is determined at birth (first Woodward report para.39), and on the other hand, a strong traditional attachment to land which involves a subjective assessment of an individual clan member's attachment to the land at the time the assessment is made.

8.50 The foregoing reasoning explains the basis upon which I have reached my conclusions in this claim.

9.0 IDENTIFYING A LOCAL DESCENT GROUP

9.1 My first task in exercising my function to determine whether the claimants or any other Aboriginals are the traditional Aboriginal owners of the claimed land is to identify a local descent group having the qualities referred to in the statutory definition.

9.2 Upon the view I have taken of the meaning of the Act, the claims to traditional ownership advanced on behalf of the four language groups identified in paragraph 7.4.14 cannot succeed. None of those groups of individuals can properly be regarded as a 'local descent group'.

9.3 As far as the three Wagaitj groups are concerned, that is the Wadjigiyn-Kiyuk, the Ami-Manda and the Marriamu-Marridjabin, I think that it is fair to say they do not seriously advance themselves as traditional owners in any sense. It is clear from the evidence given during the first three weeks of the hearing (that is between 13 November 1989 to 1 December 1989) that the senior Belyuen residents, both male and female, acknowledged that the claim area was traditionally Larrakia land and remains such, and that no claim was being made to it on behalf of the three other groups now being advanced. The decision to expand the claimant base appears to have been made by the NLC. The evidence subsequently given both by the Wagaitj witnesses and by some Larrakia demonstrated very little enthusiasm for the changed basis of the claim and generally lacked conviction.

9.4 In my view the expansion of the claim to include the

various Wagaitj groups was an expedient adopted in an endeavour to boost the claim at a time when the evidence taken thus far to support the Larrakia claim appeared to have fallen short of what was required to establish traditional Aboriginal ownership.

9.5 This is not to say that many of those advanced as claimants do not have a detailed knowledge of spiritual matters associated with sites on and near the claim area and exercise significant spiritual responsibility in relation thereto. Indeed, it is patent that with the possible exception of Topsy Secretary, no surviving Larrakia claimant has any real knowledge of the sites and the spiritual traditions associated with them except through information passed on by non-Larrakia Aboriginals. Furthermore, the Wagaitj residents of Belyuen, over an extended period, have acted as custodians of the Larrakia land on Cox Peninsula and the islands, acting where necessary to protect important sites. But it is their role as custodians on behalf of the Larrakia traditional owners which they emphasise rather than claiming ownership rights themselves.

9.6 The claim advanced by the NLC on behalf of the three Wagaitj groups is expressly put forward on the basis of their respective language-group affiliations. It is not said that individual local descent groups within the overall language-groups have the necessary qualities to be regarded separately as traditional Aboriginal owners of the claim area or any part of it and the evidence suggests the contrary, namely that the various family

groups who are put forward in this claim have common spiritual affiliations with sites elsewhere than on or near the claim area and in some cases continue to actively maintain those links by visiting their own countries.

9.7 Consistent with what has been said before, I reject the assertion that the Larrakia language group can be regarded as a local descent group within the meaning of the Act . Clearly, in pre-contact times, there would have been one or more local descent group or groups of Aboriginals with the necessary common spiritual affiliations which, if nothing had changed, would have met the criteria of the statutory definition in respect of the whole of the claim area. And further, that those groups would have been Aboriginals of the Larrakia language group. But those facts do not sustain the proposition that all contemporary descendants of all Larrakia speaking Aboriginals now comprise a local descent group of the type contemplated by the Act.

9.8 If there are any traditional Aboriginal owners of the claim area they must of necessity be found amongst the surviving descendants of the original land owning clan, and on all the evidence that means the survivors of the danggalaba clan.

9.9 Had it not been for the dislocation and disruption caused by the European occupation of the claim area and other relevant areas adjacent to it, and the exercise by the newcomers of dominion over both the land and its inhabitants, it is likely that the normal process of

succession would have ensured that the claim area remained occupied and used by the Aboriginal clan or clans generally recognised by Aboriginals as having the rights and responsibilities attaching to that land. As it has happened however, not only were the pre-contact occupiers of the land disturbed in their occupation, but other Aboriginal groups established a presence on the land, not as successors to the original inhabitants, but simply as residents . The new arrivals, who have now been established in their relocated home for upwards of a century, have not sought to oust the original inhabitants nor to usurp their rights and responsibilities, but it does appear that the remnants of the original clan or clans have tended to focus their attention and concern on the land on the eastern side of Darwin harbour, that is, in and around the Darwin area, leaving the migrant Aboriginal groups to "look after" Cox Peninsula and the nearby islands.

9.10 The recurring theme of Kenbi 1979 is that the appropriate local descent group for the claim area is (or at least was, at the time the report was written) the danggalaba clan. The interests of other Larrakia people and of the Wagaidj in the land and the sites and ceremonies associated with it are of course also outlined in considerable detail, but it is clear that the result of the authors' research is summed up by the subheading on p.173, "Danggalaba clan have the final word". As originally formulated the claim was made on behalf of a local descent group comprising the 7 individuals named in paragraph The members of

the local descent group presented were clearly related patrilineally.

By the time Ten Years On was written (April 1989) Bobby Secretary and Paula Thompson had died. It was said (at p.23) that the danggalaba clan was then comprised of Topsy Secretary, Gabriel Secretary, Prince of Wales, Olga Singh and Kathleen Minyinma. The principle of descent was again asserted to be one of patrifiliation (p.23). However, in Ten Years On an alternative model of local descent group, namely the Larrakia language group, is advanced. This change in approach is explained (at pp.25-6) in these terms:

> In the Kenbi claim members of the danggalaba clan had always been very accepting of the inclusion of other Larrakia. But the progress of the land claim made it clear to these Larrakia themselves that the acceptance they had always expected and received from the Danggalaba clan might well be forthcoming from the land claim process.
>
> The association of all Larrakia to Larrakia land had been readily acknowledged by other Aborigines in 1979: it was less clear how non-Aborigines would react. In Kenbi 1979 a new relatively narrow interpretation of the requirements of the Act was adopted: the patrilineal clan. In the intervening period the land claim process has demonstrated that a wider range of social and cultural phenomena may fall within the purview of the Act. This recognition by non-Aborigines encouraged more Larrakia to come forward as claimants for the Kenbi area by 1989. This is the outcome of a continuing and widely accepted recognition of the rights of Larrakia people to Larrakia country.
>
> Members of the Danggalaba clan are very willing to have this larger group listed as claimants. Moreover this acceptance is not inconsistent with the course taken in 1979: the urban Larrakia continue to acknowledge the pre-eminent status of the Danggalaba clan and refer to them as the "traditional owners" of the claim area. But this is not "traditional owners" in the sense of the Aboriginal Land Rights Act in which the usage is much broader,

recognising anyone as traditional owners who satisfies certain conditions. The local, non-Act sense of "traditional owners" is more restrictive referring only to members of the Danggalaba clan, particularly Topsy Secretary, Olga Singh and Prince of Wales. However, the larger group can be shown to form a local descent group with responsibility for sites on the land and to satisfy the requirements of the Aboriginal Land Rights Act . This local descent group expresses its connection to country at a higher level of generality and, of course, includes as a small but very significant subset members of the Danggalaba clan.

9.12 I do not accept the proposition contained in the final paragraph of the passage quoted above. The fallacy lies in a misunderstanding of the sense in which the term 'local descent group' is used in the Act. Nor do I accept the proposition that traditional owners either as individuals or as a group have the right to vary the composition of the land owning group.

9.13 No legitimate argument is advanced in Ten years On as to why the results of the research which led to the conclusions expressed in Kenbi 1979 were no longer valid.

9.14 I do not need to comment on the arguments advanced in the Supplement to Ten Years On. The NLC did not seek to rely upon the document nor did the Attorney-General,

9.15 The final claim document (exhibit NLC 27) propounds a claim which on my construction of the Act cannot be supported . Furthermore, apart from the difficulty in identifying a local descent group, the evidence of those on whose behalf the claim was advanced lacked any real enthusiasm and I was left with the feeling that those

involved did not really understand the propositions upon which those advancing the claim sought to support it.

9.16 The death of Olga Singh in April 1989 further depleted the ranks of the danggalaba clan. By the time the claim was heard the only surviving clan members were Topsy Secretary, Gabriel Secretary, Prince of Wales and Kathleen Minyinma. The clan is obviously doomed to extinction. Neither Gabriel Secretary nor Prince of Wales has any children nor is likely to have any. It is however appropriate that I should refer again to the genealogical connections between the surviving clan members.

9.17 The genealogical evidence shows that Prince of Wales is the great-grandson through patrilineal descent of King Tommy. His grandfather (King Miranda) is said to have had a putative brother named Madjalimba who was the father of Frank Secretary (the father of Topsy and Gabriel). Kathleen Minyinma's paternal grandfather was Crab Billy Belyuen and his father is said to be a putative son of one Djalanim who in turn is shown as a putative brother of King Tommy. Assuming for present purposes that all of the putative links are valid then it can be said that the four surviving clan members have a common ancestor in the father of King Tommy. In terms of genealogical relationship it could be said that the clan members comprise a local descent group.

9.18 I turn now to consider whether the members of the clan have common spiritual affiliations to a site on the land that place the group under a primary spiritual

responsibility for that site and for the land. It will be necessary to refer briefly to the evidence.

9.19 Gabriel Secretary did not give evidence although he was present at 2 sessions when evidence was taken at Kalalak. My understanding is that he is incapacitated in some way. His sister Topsy said of him, "He do not know anything about the laws" (Ts. p.869). I am unable to draw any inferences as to Gabriel's spiritual affiliations.

9.20 Topsy Secretary did give evidence . She is clearly a leader among the Larrakia people in the Darwin area as were her brother Bobby and her father Frank before her. She lived at Belyuen for a short period during the Second World War, apparently having been evacuated there as a result of the Japanese bombing of Darwin. After the war she returned to Darwin. She demonstrated a spiritual affiliation to several sites on the Darwin side of the harbour but said virtually nothing about the claim area except that she had lived at Belyuen during the war and as a child had visited Kunggul (site 85), Mica Beach and Mandorah on the Cox Peninsula during fishing trips with her father. She made no mention of the crocodile dreaming. In the course of her evidence the following exchange occurred between counsel for the claimants and Topsy:

> MR PARSONS: Well, what about the mob who are trying to get that country back over the other side now?
>
> TOPSY SECRETARY: I leave it to all the Wagaitj people.
>
> MR PARSONS: Yes.

TOPSY SECRETARY: But I still be there, you know. When I need something they might send me something, all that.
MR PARSONS: Yes. Why do they send you something?
TOPSY SECRETARY: I need some seafood.
MR PARSONS: But what reason Wagaitj people going to send you something?
TOPSY SECRETARY: Because they was born and brought up there.
MR PARSONS : Yes. And when you talk about those Wagaitj people, which mob are you talking about?
TOPSY SECRETARY: Well, it is up to Johnny Singh now to look after the place because he got the children out of my young sister.
MR PARSONS: Yes. And who else? There is Johnny - - -
TOPSY SECRETARY: The rest of them the Belyuen mob.
MR PARSONS: Yes. Can you - - -
TOPSY SECRETARY: They grow up there.
MR PARSONS: Yes.
TOPSY SECRETARY: And they know more than me.
MR PARSONS: Yes. Were they - well, that mob now I just want to get clear when you reckon that mob who are there, which mob are you talking about? Can you call their names?
TOPSY SECRETARY: See, a lot of people who was in the list all - they all died now.
MR PARSONS: Yes.
TOPSY SECRETARY: Some of them, they getting old, and you get the young people now.
(Ts. p.847-8).

There is nothing in the evidence of Topsy Secretary that would justify a finding that she has any common spiritual affiliation with any other member of the

danggalaba clan to any site on or relevant to the claim area. I am of course aware of the decision of the High Court in re Kearney; Ex parte Jurlama 158 CLR 426, and acknowledge that the absence of any evidence of spiritual affiliation to a site on the claim area is not fatal to the claim. However, the following passage from the judgement of Wilson J in re Toohey; Ex parte Stanton 44 ALR 94 quoted by Gibbs CJ at p.434 in Jurlama is particularly relevant to the present circumstances:

> Presumably the land in respect of which the Aboriginal group are the traditional owners will often extend beyond the area of the actual site or sites to such adjacent land as is sufficiently connected with those sites. In those circumstances, it may happen that such ownership will extend to an area of unalienated land notwithstanding that the relevant sites are located on alienated land. However, this line of thought cannot be taken too far. The existence of sites on the land which is the subject of the claim will always, in a practical sense, retain primary significance in proving traditional ownership. If that ownership has to be proved by reliance on sites located elsewhere, then cogent evidence would no doubt be required in the form of dreaming tracks or other material to link the land, the subject of the claim, to those sites and so establish a primary spiritual responsibility for it.

9.21 Prince of Wales suffers a severe physical disability due to having suffered a stroke. Unfortunately he has extreme difficulty in expressing himself and although he was present throughout virtually all of the sessions held on the Cox Peninsula he gave only very short evidence. At p.428 of the transcript the following exchange is recorded:

> MR PARSONS: Prince, what is that dreaming belong you? What is that dreaming for you?
> PRINCE: Danggalaba.

MR PARSONS: And what that mean in English?
PRINCE: Crocodile.
MR PARSONS: Yes, good on you. Can someone perhaps just explain a bit about Prince? Billy Risk? Billy, why do you not grab that thing? This old man, Prince, now what can you tell the judge about Prince?
BILLY RISK: Well, this old man, he is one of the elders left from the Danggalaba clan. He has had a stroke, and he is not as well and fit as he used to be. When he was younger, he was active in dancing and corroborees, and also the didgeridoo. He used to play the didgeridoo at corroborees and at songs.

On 20 March 1990 counsel assisting called Prince for cross-examination. Given his physical disability he acquitted himself rather well. He identified his father as King George, his language as Larrakia and his dreaming as "danggalaba, crocodile". When asked where his country was he indicated the waterhole at Belyuen and called two other sites, Milik (site 52) and Djibung (site 57).

There is evidence that Prince's grandfather King Miranda was the acknowledged leader of the local Larrakia people in the early period of contact following European settlement, and given the almost universal recognition that he enjoys amongst local Aboriginal people as an "owner" of the claim area I am satisfied that there is evidence from which I can infer that he has a very real spiritual affiliation to many sites on the claim area. There is however, no evidence that he shares those spiritual affiliations with any other member of the relevant local descent group.

9.22 The remaining surviving danggalaba clan member is Kathleen Minyinma. In the transcript she is also

referred to as Kathleen Presley which I understand to be the name by which she is commonly known.

9.22.1 Kathleen is a young woman (born 1968) whose father died when she was a baby. For the most part she has lived with foster parents, a European man married to an Aboriginal woman from Queensland. She has maintained contact with her mother, a Maranunggu woman who has for the last 5 or 6 years lived at Humpty Doo with Kathleen and her foster family. About 10 years ago Kathleen was shown a copy of Kenbi 1979 but at the time did not understand much about the land claim. However, when she was 18 or 19, at the urging of her foster parents, she went to the NLC office and was shown her genealogy. She attended all sessions of the claim hearing held at Cox Peninsula during November 1989. On 28 November 1989 she gave evidence of her life history from which the above summary has been extracted. On other occasions she was asked whether she had previously visited particular sites, or heard stories that had been recounted by other witnesses.

9.22.2 When she was young her mother told her that her grandfather had been an important man among the Larrakia people . There seems to be no doubt that the person referred to was Crab Hilly Belyuen, her father's father, who from other evidence, was clearly a prominent member of the danggalaba clan. She was also told as a child that she was related to the Secretary family, but did not visit them.

9.22.3 Kathleen has obviously a growing interest in things

Larrakia. During the hearing she indicated her desire to use the name Minyinma (her father's name) rather than Presley, a name which I gather she acquired from the European man with whom her mother lived after her father's death.

9.22.4 During site visits Kathleen confirmed that she had been to Gurrman (site 71) on one previous occasion and on the same day when asked if she had been learning about the sites visited said that she had been talking about them with John Singh, Maudie Bennett and the Wagaitj people. On 16 November 1989 she confirmed that she had previously heard a story about a dog dreaming that John Singh had just recounted and on 17 November 1989 during a visit to Wariyn (site 49) she wore white paint on her face in accordance with the traditional practice of young women who had not previously visited that site. When asked about this she said she had been told by Auntie Agnes, Bilawuk, and Uncle John Singh, "that young women have to go to that site painted up so they can be recognised." She said she had been told that failure to do so could result in something happening to you, and she believed this to be so. On 20 November 1989 at Kidjerikidjeri (site 35) she said she knew of the Aboriginal tradition of not calling the name of a deceased person or the name of a place such a person had been named after. When Buwambi (site 42) was visited on 21 November 1989 it was the second occasion she had been there. When asked on 23 November 1989 why she had been attending the land claim hearing she responded, "To learn about our knowledge and how to protect the land

and sacred sites" (Ts. p.780).

9.22.5 I have no doubt as to the sincerity of Kathleen Minyinma's desire to become more knowledgeable concerning the traditions of her forebears. It is no fault of hers that she has been denied, until recently, access to that knowledge. She strikes me as a quiet but impressive person who may one day take up the mantle of her grandfather and be a leader among the Larrakia, but however generous a view one takes of her evidence, there is nothing upon which I can base a finding that she has any spiritual affiliation to any relevant site in common with any other member of the danggalaba clan.

9.23 In paragraphs 9.19 to 19.22 I have examined the evidence in relation to the spiritual affiliation of the danggalaba clan members and am forced to the conclusion that only one of them, Prince of Wales, has any demonstrated spiritual affiliations to relevant sites . The requirement of the Act is that the members of a local descent group have "common spiritual affiliations" (emphasis added). Throughout the operation of the Act successive Commissioners have taken the view that a single person cannot be regarded as a "local descent group". I adhere to this view. It would be contrary to the ordinary meaning of the language used in the definition to conclude that an individual could have common spiritual affiliations to a site. Section 23(b) of the Acts Interpretation Act 1901 is in my view inapplicable. The general rule that words in the plural number include the singular, is subject to a contrary

intention appearing in the statute being construed. Here the term defined is expressed in the plural, i.e. traditional Aboriginal owners; the first criterion to be met is in the plural, i.e. a group of Aboriginals; and the qualifications, i.e. having common spiritual affiliations to a site, can only be met by a plurality of persons.

9.24 Before her death in April 1989 Mrs Olga Singh was a very prominent leader of the Larrakia people and a member of the danggalaba clan as had been her father the late Tommy Lyons (Imabulg). Had she survived it is likely that the criteria of the statutory definition of traditional Aboriginal owners may have been met. She is however survived by three children Raelene, Jason and Zoe, whose ages (at the time of the hearing) ranged from 20 to 13. Their father John Singh is one of a family of siblings who are prominent in the affairs of the Belyuen Community and whose extensive knowledge of the sacred sites and Larrakia traditions in the claim area has been derived from a lifetime of association with it. The Singh family are Wadjigiyn-Kiyuk people whose traditional country includes the Peron Islands and Balgal. The 3 Singh children identify as Larrakia and are generally recognised as such by other Aboriginal people, although at one stage their father said that they will be able to choose whether to take his country or their mother's. I have given serious consideration as to whether these 3 young people should be regarded as members of the danggalaba clan and have concluded that they should not be. The claim documents do not at any

stage put them forward as clan members. Indeed, it is not questioned that the principle of patrilineal descent is the appropriate means of identifying membership of the clan. Conceivably, in some circumstances, such as the absence of a continuing patri line, this principle may well have been departed from but in the present context there is no evidence to suggest that the Singh children have taken over the role of their mother and grandfather in relation to danggalaba. This is not surprising due to their respective ages.

IMAGE 4001.PCX
SCHEDULE KENBI (COX PENINSULA) LAND CLAIM

APPENDIX A

Extract from the First Report of the Aboriginal Land Rights Commission republished as Appendix A to the Second Report presented by Command 17 July 1974:

ABORIGINES AND THEIR LAND

(Taken from first report, paras. 20-65)

In the first place, it is accepted that, wherever else man may have evolved, it was not on this continent. The Aborigines came here from the north and came to an uninhabited land.

The origins of these people who found their way here are obscure. But they must have come, over a period of time, by way of what are now Indonesia and New Guinea. In doing so, they must have covered at least forty miles of water in what can only have been bark canoes.

What is clear is that the Aborigines are genetically a unique people and that they have been here for a very long time. The small parties which landed initially must have taken many hundreds of years to spread, as they did, over the mainland. In spite of some dissimilarities between the Tasmanian Aborigines and those of the mainland, there seems to be no cogent evidence to suggest that the Aborigines of Australia did not have a common origin. As to the length of time over which Aborigines occupied Australia before 1788, it can only be said that recent archaeological work has established a period of upwards of 30,000 years.

The Aborigines lived entirely by food gathering and hunting. They tended no herds and planted no crops. In good seasons they lived well; in bad years they suffered. Anthropologists are agreed that different groups of Aborigines claimed identifiable areas of land as their own. There was no part of the continent left unclaimed, although higher mountainous regions may have been seldom visited. It has been estimated that, in 1788, the Aboriginal population of Australia may have been in the order of 300,000. So far as the Northern Territory is concerned, it has been suggested that a typical population density for semi-desert country would have been one person to thirty or forty square miles. In the more productive areas closer to the coast, six or eight square miles per person would have been more likely.

This then is the background against which the social organisation of the Aborigines must be considered, and, in particular, meaning given to the 'traditional rights and interests of the Aborigines, in and in relation to land'.

On enquiry, it soon becomes clear that the social organisation of the Aboriginal people is highly complex. The problem of understanding it is made worse by a number

of factors. These include, firstly, the difficulty of expressing many Aboriginal ideas and arrangements in English terms. Even simple words such as 'owner' and 'tribe' can be misleading. Some words used by anthropologists such as 'horde' , 'clan' , and 'band' have been given more precise meanings in their writings on the subject, but they have not always been used in the same way and so require definition each time they are used.

Further, some Aboriginal concepts related to land-owning have no parallel in European law. The most important and widespread of the rights in land that lie outside European arrangements is the managerial interests of a nephew in the country of his maternal uncle. Everywhere the religious rites owned by a clan were the "title deeds" to the land and could only be celebrated by clan members. Such rites, however, could not be held without the assistance of the managers whose essential task it was to prepare the ritual paraphernalia, decorate the celebrants and conduct the rite. The agreement of managers had to be secured for the exploitation of specialised local resources such as ochre and flint deposits and for visits by the clan owners to their own sacred sites.

Yet another difficulty arises from disagreement among anthropologists as to the exact nature of the relationship between Aboriginal organisation for land holding and for land usage. These disagreements may be mainly matters of emphasis, but they are still quite important.

It may be that much of this professional disagreement stems from the lack of reliable information as to the situation which existed before white contact. In almost every case, detailed study by trained anthropologists has occurred a number of years after Aboriginal ways of life have been influenced, if not radically changed, by contact with Europeans. Much recorded information comes from older men and women talking of the past - often at some distance from the scene of the events being discussed.

A further difficulty arises from the fact that Aboriginal social organisation differs from one area to another. What is true of north-east Arnhem Land may not even be true of the Daly River area south of Darwin, let alone the Macdonnell Ranges, Western Australia or Queensland.

In spite of the difficulties referred to, the following statements can be made with some confidence that they are generally true of the Northern Territory and likely to be true of many other parts of Australia.

It is common to speak of Aboriginal 'tribes' and this is a useful description of people such as the Aranda and Pitjantjatjara. The distinguishing marks of such a group are a common language, a commonly used name for that language and thus for the people speaking it, and an identifiable tract of country where those people live or used to live.

The term has also been used for a group of related people,

speaking different languages but living in adjacent areas. However, to avoid confusion, I shall refer to such a grouping as an ethnic bloc.

In neither of these cases - the tribe or the ethnic bloc- is there any attempt to achieve political or social unity. The relationship between the different segments of a tribe are often no closer than those between such segments and groups from other tribes. In no sense can the tribe be regarded as the basis of Aboriginal social organisation. Smaller groups have to be identified for this purpose. The sub-divisions of a tribe can usually be identified by dialectic variations. Although sharing a common language, some words will be different, sentence construction may not be the same and differences in pronunciation will usually be noticeable also.

In some cases this dialect group within the tribe does represent the key social unit. In other cases this is to be found one step lower down the scale - at the level of the clan. I use this expression to mean a local descent group a sub-division of a dialect group larger than a family but based on family links through a common male ancestry, although those links may be back beyond living memory.

Since the clan appears to be more commonly the key unit, I now turn to consider it in more detail.

Membership of such a clan is determined at birth, since, for land-owning purposes, the child automatically becomes a member of the father's clan. (The word 'father' is used throughout although it would be more correct to speak of the mother's husband. This presented no problems to the Aborigines because conception was believed to be the work of spirits.)

Mother and father will come from different clans, for a child cannot marry within the clan, but must marry a member of another clan . The rules or preferences which decide that clan vary from place to place, but can be quite strict. They have had to be relaxed in some areas as clans have dwindled in size or disappeared.

The members of a clan retain that membership throughout their lives and, indeed, thereafter. The link between an Aborigine's spirit and his land is regarded as being timeless. The land-owning clan is merely a group of people who share the same links with the same land.

Thus these clans have close spiritual associations with particular tracts of land. Their religion or mythology teaches them that particular areas were given to them, or claimed on their behalf, by their spirit ancestors in the Dreamtime . For this reason there are specific stories, songs and ceremonies linking these spirit ancestors with particular places. The more important the place is to the legend, the more sacred it is.

These spirit ancestors were in some cases part animal, bird, insect or plant. They could also, for example, be related to rain, wind or stars. But in all cases they had human characteristics, whatever their outward form may have been.

Some country, because of these legends or of its natural resources (which are frequently linked together) is more important than other country. But, although boundaries may be blurred, all country is of some importance and is identified with some clan or other grouping.

The spiritual connection between a clan and its land involves both rights and duties . The rights are to the unrestricted use of its natural products: the duties are of a ceremonial kind - to tend the land by the performance of ritual dances, songs and ceremonies at the proper times and places.

One further point remains to be made. It is apparent that a clan, being of only moderate size, can die out. This must have happened on occasions even in the days before white contact . With the coming of the white man, such instances must have occurred more frequently even in the Northern Territory. Since the produce of all land is important and, in Aboriginal belief good seasons depend on ritual observances, it was normal for the sacred objects and ceremonies of that clan to be taken over or cared for by another closely related clan. Since, as I have said, the connection of Aborigines with their land is timeless, commencing before birth and continuing after death, this taking over should be seen as a form of trusteeship rather than a transfer of rights.

All that has been said above about the clan is equally true of the dialect group referred to earlier except that, being larger, marriage within the group is likely to be quite common. It will still be governed by strict rules as to kinship which will determine which members are acceptable as spouses.

It may help to clarify the complicated position I have been describing if the situation is considered from the point of view of a typical Aborigine of Arnhem Land in the years before white contact.

Let us assume the case of a mature man. His immediate family consists of one or more wives and their respective children together, in all probability, with some older people perhaps one of his or his wife's parents or an elder brother or brother-in-law. Even when food is scarce, this family unit is likely to be added to by relatives or friends. The father and his children, of course, belong to one clan along with his father, brothers and sisters (who may not be in the group).

The wife or wives come from, and still belong to, a different clan. If there are several wives, they may not belong to the one clan, although it is quite likely that they will. The mother, if she is present, will almost

certainly belong to a third clan. Because of the intricate kinship systems observed, it is unusual for a man to take a wife from his mother's clan. Friends and other relatives could come from any one of a group of neighbouring clans with which there are friendly relations. In the group the dialect of the central clan will predominate, but other clans will use their own dialects and will be understood.
The other members of the central clan in this example will be scattered among a number of similar family groups. They will all be related by patrilineal descent but the exact relationship may have been forgotten with the passage of time. In several other cases, as in this one, the clan will provide the nucleus of the group. In other instances, some other clan will provide the nucleus and members of this clan will be present as wives, relatives or guests.
The total membership of the clan - men, women and children, may be about 30 to 50.
The family group which has been described may move about by itself, or, particularly when food is relatively plentiful, may join with other groups to constitute quite a large band perhaps 30 to 40 people. Whether large or small, this band constitutes the hunting and food gathering social unit. It moves over the country in a predictable but not rigid pattern which depends on the availability of food resources at particular places and particular times. It varies in numbers as groups or individuals join and leave.
In doing so, it will probably spend a good deal of time on the country which is held by the clan, but the head of the family will certainly expect to be welcome in the country of his mother's clan. He will also visit freely his wife's country or that of any other member of his group. Indeed he may decide to go to any of the neighbouring areas except, perhaps, those where some ill-feeling has arisen or is traditional between his clan and the local landholding group.
The trouble he takes to obtain express or tacit permission will depend upon the strength of his claim to hospitality, arising from personal ties of relationship, traditional clan affiliations or totemic relationships (which are explained below).
Where the band is a large one, it may be difficult to say that it has any one clan as a nucleus. This is particularly true when large groups gather at a special time and place for ma j or ceremonies of ritual songs and dances. On these occasions several related clans will have special responsibilities to perform or to manage the ceremonies, but many other clans will also be represented.
The head of the family will know exactly where his clan's land begins and ends. If circumstances take him away from it for any length of time, he will make a point of returning for major ceremonies if and when he can and, in particular, for the initiation of his sons.
This is his country in the dearest sense of that term. He may however speak of some other place or places as being

his country, either because he was born there, or because his mother first became aware of her pregnancy there and so believed that the spirits conceived him there, or because the place is associated in mythology with a totemic or spirit figure which is either his personal totem also or the totem of his clan. The clan, for example, may have the bandicoot as a totemic figure, but the head of this family may have been born at a 'honey-bee Dreaming' place, which is imbued with the spirit essence of a mythical honey-bee man. He will then have a special relationship with other Aborigines sharing the same totemic figures. Each of his relationships with these spirit ancestors will be substantiated by stories and songs which include their doings in the Dreamtime on the clan's land and at the place of his birth.

The picture so far painted is, I believe, accurate for North Eastern Arnhem Land. Even here there is some doubt as to just how much time, before white contact, a typical clan member spent on his own land.

In other parts of the Northern Territory, some different considerations apply. Thus on Melville and Bathurst Islands the Tiwi people, largely cut off from outside contact developed some rules of their own. In some parts of the Territory, clan social membership was inherited from the mother, although landholding seems always to be inherited from the father. In others, where the landholding clans or dialect groups were larger and their country more extensive, they seem to have lived almost entirely on their own land except in times of severe drought . Even so, their wives had to come from other groups and this led to a good deal of visiting, sometimes for protracted periods.

Up to this point I have concentrated on the situation which existed before white contact. In those days of intimate association between men and their land there would, I believe, have been no difficulty experienced in recording the allocation of country between landholding clans or dialect groups. Today the degree of difficulty will vary from place to place.

Because of the spiritual beliefs of the Aborigine about his land, his connection with it is not broken by the fact that the may have lived away from it for many years. Certainly traditional ways of life have, to varying extents in different places, been departed from. Missions and settlements, with their assured food supplies, medical attention and other material advantages, have attracted Aborigines to settle, more or less permanently, in one place. Very often this is miles from their own country and, as older men die, accurate information becomes harder to obtain. Rituals are observed less often and not at the traditional sites.

For the present-day enquirer, the problem is made much worse by the fact that Aborigines had no need, in the past, to be specific in their use of names for clans or other groups. Perhaps the most commonly used description was the

name of the language or dialect spoken by a particular people. However, as I have said, it seems clear that the larger language group was never a social or political unit and so never a land-holding group. In some cases the dialect group would constitute the land-holding unit and in other cases land would be held by a sub-division of that dialect group - a clan. In either case its membership was determined by common patrilineal descent.

But even if the land-holding group was identical with the dialect group, it was not in its capacity as a dialect group that it held the land. It did so as a descent group and, usually, by another name. This name might well be the same as, or derived from, the particular totem of the group. In fact there could be several different names, some of them sacred and used only in ceremonies, for the same people.

Common usage complicated the position further because the people themselves would have little use for a group name, speaking only of 'us'; and neighbouring groups might refer to them by reference to totemic relationships or to the name of a leading figure in the group or to a particular place frequented by the group. Indeed in some cases it is hard to discover whether a sub-group of a particular dialect group holds a piece of country to the exclusion of the other sub-group, or whether they are merely specially associated with that area, which is nevertheless held by the whole group. Aborigines further afield might well group a number of clans together and refer to them as 'the people of the north' or 'the people of the desert'. Such a description could easily be mistaken for a tribal name.

I have no doubt that, even today, the necessary information is available to divide much, if not all, of the Northern Territory into dialect group or clan regions. If the right people could be taken out to the right places, to demonstrate the position on the ground, I believe that there would be little disagreement. I have so far come across no case in which ownership of land has been disputed among full-blooded Aborigines. But the task of obtaining the necessary information from different informants, having different degrees of knowledge, and then converting it into clear terms for record purposes, could undoubtedly be a very long and difficult one. Since detailed surveying would be necessary, the job would certainly take a number of years and expense would be very great.

APPENDIX B

LEGAL REPRESENTATIVES APPEARING AT THE INQUIRY

Mr David Parsons and Mr Ian Gray (instructed by the Northern Land Council) appeared for the claimants.

Mr T. Pauling QC and Mr Vance Hughston (instructed by the Solicitor for the Northern Territory) appeared for the Attorney-General for the Northern Territory in relation to the question of traditional Aboriginal ownership.

Mr R.A. Conti QC and Mr Vance Hughston (instructed by the Solicitor for the Northern Territory) appeared for the Attorney-General for the Northern Territory in relation to matters arising under section 50(3).

Mr N. Henwood (instructed by Messrs Cridlands) appeared for Mr M. Baumber in relation to matters arising under section 50(3).

Mr T.F. Coulehan appeared as counsel assisting the Aboriginal Land Commissioner.

APPENDIX C
WITNESSES

Aboriginal Witnesses

Ada Bailey
Agnes Lippo
Alan Shepherd
Alexander Ninnal
Alice Briston
Alice Waynbirri Djarrug
Alison Mills
Andrew Henda
Angela Lippo
Ann Timber
Annabelle Benton (aka Rachel Costello)
Anthony Devine
Arnold Cubillo
Audrey Lippo
Barbara Tapsell
Barbara Raymond
Barbara Mills
Barry Nilco
Basil Gordon
Bernie Devine
Betty Bilawuk
Bill Risk jnr.
Billy Risk
Bobby Lane
Bobby Bigfoot
Brendan Singh
Brian Singh
Bruce Morgan
Caroline Moreen
Catherine Bigfoot
Christine Wilson
Christine King
Christopher Lee
Clifford Scrubby
Colin Ferguson
Cyril Frith
Daniel Lane
Darryl Lane
David Mills
David Woodie
David Moreen
David Mills
Denise Quall
Derek Lippo
Diane Biyanamu
Didi Quall
Don Cubillo
Douglas Rankin
Edward Fejo
Elaine Henda
Eric Martin
Esther Barradjap
Florence Devine
Frances May

Frank Biyanamu Frank (Basho) Fejo
Gall Williams Gary Lee
Gary Lang Glen Morgan
Gloria Singh Grace Moreen
Gracie Binbin Harry Singh
Henry Djarrug Henry Moreen
Herb Lee Ian Bilbil
Inez Cubillo Jason Barradjap
Jason Singh Jeffrey Moreen
Jim Fejo Joan Fejo
Joel McLennan John Bigfoot
John Gordon John Woodie
John Singh John Moreen
John Devine John Rama
John Scrubby John Biyanamu
John Karadada Joseph McLennan
Josephine Rankin Josephine Edmunds
Joy Woodie Judith Williams
Judith Barradjap Judy Woodie
Julianne Barradjap Julie-Ann Rama
June Mills Karen McLean
Karen Cubillo Kathleen Bilbil
Kathleen Cubillo Kathy Cubillo
Kathleen Presley (aka Minyinma) Keith Williams
Keith Risk Kevin Djarrug
Kitty Moffatt Kitty Gongoburr (aka Presley) (aka Minyinma)
Laurie Cubillo Lennie Singh
Leslie Nilco Linda Hill (aka Linda McLean)
Lorna Talbot Lorna Tennant
Lorna Fejo Lorraine Williams

Lorraine Lane Lucy White
Lucy Batcho Maggie Timber
Maggie Rivers Margaret Waters
Maria Lippo Marjorie Morgan
Marjorie Bilbil Mark Bilbil
Marlene Barradjap Mary Lee
Mary Jane Biyanamu Mathew Yarrowin
Maudie Bennett Maureen Ogden
Maureen Wanganeen Michael Lippo
Michael Rankin Michelle Biyanamu
Millie de Bush Murray Bradbury
Nathan (Burrburr) Bigfoot Nicky Djarrug
Paddy John Smiler Patricia Browne
Patrick Moreen Patrick Djarrug
Pauline Baban Peter Djarrug
Philip Morgan Philip Quall
Phyllis Batcho Pilar Cubillo
Prince of Wales Rachel Costello
Raelene Singh Raymond Mardi
Reginald McLennan Rex Edmunds
Rex Singh Rex Gordon
Richard Barnes Richard Rankin
Rick Rivers Rita Moreen
Robert Lippo Robert Browne
Roderick Mardi Rodney Browne
Roger Yarrowin Rona Alley
Rogue Lee Roslyn Young
Ruby Yarrowin Ruby Gurruk
Russell Cubillo Sam Cooper
Sam Fejo Sean Moreen

Sebastian Rankin Seri Lippo
Sharon Williams Simon Moreen
Sonia Singh Sophie Moreen
Stephen Cubillo Susan McLean
Susan Lippo Tanya Batcho
Teresa Henda Terry Moreen
Theresa Timber Tibby Quall
Tommy Barradjap Tomtom Henda
Tony Lee Topsy Secretary
Topsy Warrawu Trevor Biyanamu
Victor Williams Wally Fejo
Weslan Mills William Mardi
Willie Browne Winnie Woodie
Yula Batcho Yvonne Rankin
Zoe Singh
Other Witnesses (dealing with traditional ownership)
Bernard Max Baumber
Michael James Walsh
Other Witnesses (dealing with matters for comment)
Graham Stewart Bailey
Adrian Michael Prince

APPENDIX D

EXHIBITS TENDERED

NLC = tendered on behalf of the claimants.
NTG = tendered on behalf of the Attorney-General,
BMB = tendered on behalf of Mr B.M. Baumber.
ALC = marked by the Aboriginal Land Commissioner or tendered by Counsel assisting.
R = access to exhibit restricted (see note below).
RM = access to exhibit restricted to male eyes only (see note below).

Exhibit No.	Nature of Exhibit
NLC 1	"Kenbi Land Claim 1979"
NLC 2	"Ten Years On" (April 1989)
NLC 3R	Genealogies (April 1989)
NLC 3.1R	Amended Genealogy (Cyril Frith)
NLC 3.2R	Genealogy (McLennan family)
NLC 4R	Genealogies (Kenbi, 53-107)
NLC 5R	Personal particulars of claimants (April 1989)
NLC 6	Particulars of Aboriginal persons advantaged (April 1989)
NLC 7R	Site map (August 1989)
NLC 8R	Site register (September 1989)
NLC 9	Land status materials (November 1989)
NLC 10R	"Hunting and Gathering in the Kenbi (Islands) Claim Area." (B. Povinelli, June 1989)
NLC 11	"Ecological and economic use of the Cox Peninsula by Darwin Larrakia and Belyuen Aborigines." (B. Povinelli, June 1990)
NLC 12R	Map: typical paths and products hunted and gathered on the Cox Peninsula
NLC 13R	Submission on Larrakia and Wagaidj women's business in Kenbi Islands claim area
NLC 14	Alphabetical list of claimants (April 1989)

Exhibit No.	Nature of Exhibit
NLC 15	Copy letter to Chairman, NLC (23.8.83)
NLC 16	Submission by Richard Barnes Koolpinyah
NLC 17	Copy letter to Ian Gray, NLC (27.11.89)
NLC 18	Statement: Michael Cubillo
NLC 19	Album: documents and photos of Delfin Antonio Cubillo (deceased)
NLC 20	Status of original Kenbi claimants
NLC 21	Occupation licence 992 (16.11.76)
NLC 22	Copy letter Dept of Lands & Housing to Mrs M. Rivers (29.11.88)
NLC 23	Statement: Judith Williams
NLC 24	Statement: Gall Williams
NLC 25	Statement: Sharon Jude
NLC 26	Copy letter NLC to Chief Minister (29.10.89)
NLC 26.1	Maps attached to Ex. NLC 26
NLC 27	"The Wagaitj in Relation to the Kenbi Land Claim Area" (Michael Walsh, 12.12.89)
NLC 28R	Genealogies (January 1990)
NLC 29R	Alphabetical list and personal particulars of claimants (January 1990)
NLC 30RM	Notes on restricted evidence of male claimants (Michael Walsh, 19.11.89)
NLC 30.1RM	Notes on restricted evidence of male claimants (Martyn Paxton)
NLC 31R	Submission on women's evidence (B. Povinelli, 7.12.89)
NLC 32	Photocopy A.P.R. No. 18092. (Ruby Yarrowin/Alunga)
NLC 33	"Women and Land Rights: Kiuk and Wagaidj Women in the Darwin Area" . (Lorna Tennant, AIAS Canberra, 1983)
NLC 34	"The Kangaroo and the Porpoise." (Agnes Lippo)
NLC 35	Statement: Desley Williams

Exhibit No.	Nature of Exhibit
NLC 35ARM	Statement re Goondul
NLC 36RM	Photographs taken by Professor Elkin (c. 1950)
NLC 37RM	(Now Exhibit 35ARM)
NLC 38	"Book of Remembrance" (Fejo family)
NLC 39	Oral histories as told to Adrienne McConnell and Christine Wilson
NLC 40	"Remarks on Kenbi" (Michael Walsh, 17.5.90)
NLC 41R	Report to Sacred Sites Authority (E.A. Povinelli, 10.9.89)
NLC 42	Report (E.A. Povinelli, 16.5.90)
(Part R)	Maps Restricted
NLC 43	Report (E.A. Povinelli, 29.5.90)
(Part R)	Maps Restricted
NLC 44	Curriculum vitae: Michael Walsh
NLC 45	Curriculum vitae: E.A. Povinelli
NLC 46	Notes on Kenbi necrology (Michael Walsh, 11.6.90)
NLC 47	Ethnobotanical Notes from Belyuen, NT (N.M. Smith and C.M.Wightman)
NLC 48	Statement: E.A. Povinelli
NLC 49	Larrakia genealogies (June 1990)
NLC 50	Larrakia personal particulars (June 1990)
NLC 51	Belyuen genealogies (June 1990)
NLC 52	Belyuen personal particulars (June 1990)
NLC 53	Copy letter Solicitor for the NT to Chairman, NLC (20.6.90)
NLC 54	Copy Dum-In-Mirrie Island Land Claim application (29.6.78)
NLC 55	Copy Kenbi (Cox Peninsula) Land Claim application (20.3.79)
NLC 56	Copy Kenbi (Cox Peninsula Section 12) Land Claim application (9.3.90)

Exhibit No.	Nature of Exhibit
NLC 57	NLC submissions on Defence Practice Areas (23.8.90)
NLC 58	NLC submissions on traditional ownership (with index)
NLC 59	NLC reply on behalf of claimants
NTG 1	Supplement to "Ten Years On" (21.6.89)
NTG 2	Copy letter Secretary, Dept of Law (NT) to NLC (10.11.89)
NTG 3	Copy letter NAALAS to Secretary, "Land Rights Commission" (19.5.75)
NTG 4	Statement: Graham Stewart Bailey
NTG 5	Darwin Regional Land Use Structure Plan 1990
NTG 6	Cox Peninsula Land Use Structure Plan 1990
NTG 7	Gunn Point Peninsula Land Use Structure Plan 1990
NTG 8	Litchfield Land Use Structure Plan 1990
NTG 9	Finniss Land Use Structure Plan 1990
NTG 10	Mandorah Land Use Concept Plan 1990
NTG 11	Murrumujuk Land Use Concept Plan 1990
NTG 12	Statement: Adrian Michael Prince
NTG 13.1	Report by Pak Poy Lange Pty Ltd (Preliminary Traffic Model Greater Darwin, November 1989)
NTG 13.2	Report by Pak Poy Lange Pty Ltd (Transport System Evaluation, April 1990)
NTG 14	NT submission on Darwin Regional Planning (J.G. Renwick, 12.4.90)
NTG 15	Photocopy extract from Commonwealth of Australia Gazette S289 (25.7.85)
NTG 16	Photocopy extract from Commonwealth of Australia Gazette GN 16 (19.8.87)
NTG 17	Photocopy extract from Land Rights News No. 12 (June 1977)
NTG 18	Photocopy report of Cabrina Pilakui

Exhibit No.	Nature of Exhibit
NTG 19	Photocopy of field report by Mr Bill Ivory (30.5.77)
NTG 20	Photocopy letter Maria Brandl to President, Belyuen Council (21.8.79)
NTG 21	Photocopy letter Maria Brandl to Lorna Tennant (14.2.80)
NTG 22	Photocopy letter Maria Brandl to President, Belyuen Council (14.2.80)
NTG 23	NT submissions on planning and traffic (12.7.90)
NTG 24	NT submissions on traditional ownership (Part RM) (See note attached to p.85)
NTG 25	NT submission on status of section 12, Hundred of Bray and defence practice areas (8 June 1990)
ALC 1	Copy letter re Dum-In-Mirrie and Mrs Rivers' ownership (1.8.77)
ALC 2	Statement: Regamen Daisy Majar
ALC 3	Genealogies (Danggalaba Clan)
ALC 4R	Site map (April 1989)
ALC 5R	Genealogies (September 1989)
ALC 6	Photocopy letter Associate to Ward J to NAALAS (20.5.75)
BMB 1	Statement: Bernard Maxwell Baumber
BMB 2	Letter Cridlands to Associate to Aboriginal Land Commissioner (13.11.90)

NOTES CONCERNING RESTRICTIONS

1. The restrictions placed upon access to documents marked R are as follows:
   Contents not to be -
   revealed to persons other than the Commissioner conducting the inquiry, his consultants and staff; participants in the inquiry whose interests may be affected by the material concerned; and counsel for those participants, and those instructing or advising them in relation to the inquiry.

EXCEPTIONS

(i) To the extent which the Commissioner considers necessary and appropriate, contents may be revealed in his report.

(ii) Counsel for participants in other traditional land claim inquiries may have access to this material for the purposes of research.

(iii) Contents may be used in and for the purposes of other traditional land claim inquiries.

(iv) Contents may be revealed to the Minister for Aboriginal Affairs, his advisors and consultants.

(v) Contents may be revealed to the Administrator of the Northern Territory.

(vi) Subject to any other restrictions applied, the Commonwealth of Australia and its instrumentalities may have access to this material for the purpose of discharging its responsibilities under the Constitution, but on the understanding that no Commonwealth public servant or other Commonwealth functionary will publish the material or any part of it beyond what is strictly necessary for the discharge of those responsibilities.

(vii) Subject to any other restrictions applied, the Northern Territory of Australia and any other body politic which succeeds it and their instrumentalities may have access to this material for the purpose of discharging its responsibilities under the Northern Territory (self-government Act 1978 or any other constitutional enactment by which it is replaced, but on the understanding that no public servant or other functionary of the Northern Territory of Australia or its successors will publish the material or any part of it beyond what is strictly necessary for the discharge of those responsibilities.

(viii) Any anthropological or other researcher may apply to a person holding the office of Aboriginal Land Commissioner for permission to inspect these materials and, subject to obtaining that consent, may inspect them upon such conditions as the Commissioner may impose.

2. In the case of documents marked RM the following restrictions apply:
Contents not to be revealed to any female person or uninitiated Aboriginal male.

EXCEPTIONS

(i) To the extent to which the Commissioner considers necessary and appropriate, contents may be revealed in his report.

(ii) Contents may be revealed to the Minister for Aboriginal Affairs.