

Aboriginal Land Rights (Northern Territory) Act 1976

Wangkangurru Land Claim

No. 156

Report No 72

Report of the former Aboriginal Land Commissioner, Peter R A Gray,
to the Minister for Indigenous Affairs
and to the Administrator of the Northern Territory

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3 October 2014

Senator the Hon Nigel Scullion
Minister for Indigenous Affairs
PO Box 6100
Senate, Parliament House
CANBERRA ACT 2600

Dear Minister,

The Wangkangurru Land Claim No 156

In accordance with the provisions of section 50(1) of the *Aboriginal Land Rights (Northern Territory) Act 1976*, I present my report on this claim.

As required by the Act, I have sent a copy of this report to the Administrator of the Northern Territory.

Yours sincerely

A handwritten signature in cursive script that reads 'Peter R. A. Gray'.

The Hon Peter RA Gray AM



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3 October 2014

The Hon Sally Thomas AC
Administrator of the Northern Territory
Office of the Administrator
The Esplanade
DARWIN NT 0800

Your Honour,

The Wangkangurru Land Claim No 156

In accordance with the provisions of section 50(1) of the *Aboriginal Land Rights (Northern Territory) Act 1976*, I present my report on this claim.

As required by the Act, I have sent a copy of this report to the Minister for Indigenous Affairs.

Yours sincerely

A handwritten signature in cursive script that reads 'Peter R. A. Gray'.

The Hon Peter RA Gray AM

WARNING

This report contains the names of Aboriginal people who are deceased.

Speaking aloud the name of a deceased Aboriginal person may cause offence and distress to some Aboriginal people.

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1. HISTORY OF THE CLAIM

1.1 Lodgement and amendment

1.1.1 The Wangkangurru Land Claim No 156 is a traditional land claim, made pursuant to s 50 of the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) (“the Land Rights Act”). Strictly speaking, the claim is part of a traditional land claim, the Simpson Desert Land Claim No 41, which was received in the office of the Aboriginal Land Commissioner on 19 February 1980. Land Claim No 41 was the subject of six separate applications to amend, the last of which was received in the office of the Aboriginal Land Commissioner on 1 May 1996. The details of the other amendments to claim No 41 are not material to this report.

1.1.2 The amendment of 1 May 1996 excluded from the land claimed in Land Claim No 41 a square of land bounded:

- (a) on the south by the Northern Territory/South Australia border;
- (b) on the east by the Northern Territory/Queensland border;
- (c) on the north by a line commencing on the Northern Territory/Queensland border, at a point 60 kilometres north of Poeppel Corner (the intersection of the Northern Territory/Queensland border with the Northern Territory/South Australia border, sometimes called Poeppel’s Corner) and running 60 kilometres due west; and
- (d) on the west by a line commencing on the Northern Territory/South Australia border, at a point 60 kilometres west of Poeppel Corner and running 60 kilometres due north, intersecting with the line referred to in (c).

1.1.3 By the amendment of 1 May 1996, this square area of land was made the subject of a separate claim from Land Claim No 41, named the Wangkangurru Land Claim. The Wangkangurru Land Claim was given the number 156 in the register of land claims maintained by the Aboriginal Land Commissioner, pursuant to s 50(1)(c) of the Land Rights Act.

1.2 Listing the inquiry

The land claim was first listed for the inquiry required by s 50(1)(a)(i) of the Land Rights Act to be held from 21-26 June 1996.

1.3 Advertising the hearing

Public notice of the intention to commence the inquiry was given by publication of advertisements in the *NT News* on 15 May 1996, the *Tennant & District Times* on 17 May 1996, the *Centralian Advocate* on 17 May 1996, the *Katherine Times* on 22 May 1996, the *Weekend Australian* on 18-19 May 1996 and Volume 2 Number 39 of *Land Rights News*. Notice of the hearing was also sent by post to all persons whose names appear on the mailing list maintained in the office of the Aboriginal Land Commissioner, and to the Minister for the Environment and Natural Resources of the State of South Australia (as the minister responsible for the Simpson Desert Conservation Park, referred to in 2.3) and the Director General of the Department of Environment and Heritage of the State of Queensland (as the official responsible for the Simpson Desert National Park, referred to in 1.5.1 and 2.4).

1.4 Parties

The only response to the advertising of the inquiry was a notice of intention to be heard received on 30 May 1996 from the Solicitor for the Northern Territory, representing the Attorney-General for the Northern Territory on behalf of the Northern Territory. Apart from the claimants, the Attorney-General for the Northern Territory was the only party participating in the inquiry. The submissions of the Attorney-General for the Northern Territory opposed the making of a recommendation that the land claimed become Aboriginal land under the Land Rights Act.

1.5 Documents from the Simpson Desert National Park claim

- 1.5.1** Abutting the eastern boundary of the land claimed is part of the Simpson Desert National Park of the State of Queensland. In September 1992, an Aboriginal land claim to the Simpson Desert National Park was referred to the Land Tribunal of the State of Queensland, pursuant to the *Aboriginal Land Act 1991* (Qld). The claimants in that claim were, or included, substantially the same group of people who are the claimants in this land claim.

That claim was made on the grounds of traditional affiliation and historical association. In its report, published on 15 December 1994 at paragraph 654, the Land Tribunal made a recommendation that the land the subject of that claim be granted to:

the group of Aboriginal people who are the descendants, including the descendants under Aboriginal tradition, of Wangkangurru and Wangkamadla people who lived on or used the land and land in the region or district of the land.

This recommendation was made on the basis that the ground of historical association had been established. The Land Tribunal did not find in favour of the claimants in that claim on the basis of traditional affiliation. In the course of hearing that claim, the Land Tribunal received a number of documentary exhibits. In relation to many of those exhibits, the Land Tribunal made orders or directions imposing restrictions on the use and publication of the documents and their contents.

- 1.5.2** On 30 May 1996, an application was received in the office of the Aboriginal Land Commissioner from the Solicitor for the Northern Territory, seeking the issue of two notices pursuant to s 54 of the Land Rights Act. Such notices are similar to subpoenas issued by courts: they compel attendance to answer questions or to produce documents. The notices sought were directed to Mr Graham Neate, Chairperson of the Land Tribunal, and to the Director General of the Department of Environment and Heritage of the State of Queensland. If issued, the proposed notices would have compelled the production by the Land Tribunal of five specified exhibits tendered during the hearing of the claim referred to in 1.5.1 and by the Director General of one of those exhibits.
- 1.5.3** By letter dated 30 May 1996, I informed Mr Neate of the request that had been made for the issue of a notice directed to the Land Tribunal, of the documents that were sought in that proposed notice, and of my reluctance to sign such a notice directed to the head of a tribunal, seeking documents that had been received in evidence in the course of that tribunal's proceedings.

I asked whether Mr Neate would be prepared to supply copies of the documents, informed him that I proposed to make any copies he might supply available to the parties to this land claim for inspection and copying, and told him that I did not seek any copy of any document subject to any restriction imposed by the Land Tribunal.

1.5.4 By letter dated 3 June 1996, Mr Neate informed me that he had directed that one copy of each of the documents constituting four of the exhibits requested, which were not subject to any restrictions imposed by the Land Tribunal, be sent to my Executive Officer. Mr Neate also informed me that the remaining exhibit requested was the subject of such restrictions and that he was reluctant to vary those restrictions to enable him to release the document to me.

1.5.5 A further letter from the Senior Deputy Registrar of the Land Tribunal, dated 17 June 1996, informed me that the Land Tribunal had received, and dealt with, a further application by the Solicitor for the Northern Territory for access to, and the making of copies of, some 14 exhibits received in evidence by the Land Tribunal during its hearing of the claim referred to in 1.5.1, and the transcript of that hearing, all of which were subject to restrictions imposed by the Land Tribunal. Enclosed was a copy of written reasons for decision by the Land Tribunal, in which the Land Tribunal refused the application for access to the 14 restricted exhibits and granted the application for access to the transcript of the hearing, subject to undertakings: to use the documents only for the purposes of this land claim; not to copy the documents or reveal their contents to anyone other than for the purposes of this land claim; to return the documents to the Land Tribunal within 28 days of the publication of the report in this land claim; and to respect any gender restrictions placed on the contents.

1.6 Documents from the Finke Land Claim No 67

By letter dated 7 June 1996, the Solicitor for the Northern Territory sought permission to copy and refer to a number of exhibits tendered to the Aboriginal Land Commissioner in the Finke Land Claim No 67, which was the subject of report no 39, dated 31 October 1990, by the then Aboriginal Land Commissioner, Justice Olney.

The letter was copied to the Central Land Council, which replied indicating that it had no objection to the use of Finke Land Claim No 67 documents in the possession of the Solicitor for the Northern Territory for the purposes of this land claim, but did object to the making of further copies and desired any existing restrictions on the use of the documents to be observed otherwise.

1.7 The first stage of the hearing

1.7.1 The hearing of the inquiry began at the Civic Centre at Birdsville, Queensland, on Friday, 21 June 1996. A number of exhibits were tendered by counsel for the claimants in opening and some oral evidence by claimants was given. Late in the afternoon, the hearing was adjourned and reconvened at the Birdsville cemetery, where the graves of relatives of claimants are located and where some claimants gave further oral evidence. On the morning of Saturday, 22 June 1996, all parties (including a significant number of claimants) left Birdsville to travel to the land claimed. The route followed the Birdsville Track (inside track) into South Australia, as far as Clifton Hills station, and then a track to the north, which had been used by petroleum explorers. When the convoy stopped for lunch on the way, it was apparent that rain clouds were approaching the area. A weather forecast obtained by radio confirmed that significant rainfall was expected in the area that afternoon and evening. I was aware of the difficulty of travelling by vehicle in desert country after substantial rain. At my suggestion, the convoy turned around and returned to Birdsville. During part of the return journey, heavy rain fell.

1.7.2 The morning of Sunday, 23 June 1996 was sunny and windy. In the expectation that the access road would dry out quickly in those conditions, I acceded to the suggestion of counsel for the claimants that another attempt to reach the claim area be made that afternoon. Unfortunately, Clifton Hills station and the country to the north of it had received a lot of rain. With the vehicles axle-deep in mud, only slow progress was possible. The party camped that night without having reached the intended camp site within the land claimed. That camp site was reached in the middle of Monday, 24 June 1996. During that afternoon, some evidence was given at *Tjilpatha* (site 1).

1.7.3 In the course of that night, it began to rain again. During the night, showers became longer and more frequent. By morning, it was raining steadily. I was aware that the intended route back to Birdsville, using the track known as the QAA Line, required crossing a salt lake close to the camp site and then crossing the bed of Eyre Creek closer to Birdsville. At my suggestion, the party left that morning, Tuesday, 25 June 1996, and returned to Birdsville. It was therefore not possible to complete the program of site visits proposed by counsel for the claimants, or to hear all of the evidence that the claimants proposed to lead. I adjourned the hearing of the inquiry part-heard.

1.8 Restrictions on transcript of cross-examination at *Tjilpatha* (site 1)

1.8.1 Following the adjournment of the hearing, I reflected on the reasons for decision of the Land Tribunal (see 1.5.5), the undertakings given by the Attorney-General for the Northern Territory to the Land Tribunal (see 1.5.5) and the course of cross-examination of certain witnesses by counsel for the Attorney-General for the Northern Territory on 24 June 1996 at *Tjilpatha* (site 1). The tenor of the cross-examination suggested to me that counsel had made use of material from the transcript of the Land Tribunal's hearing in the Simpson Desert National Park land claim. In particular, witnesses were asked about evidence given by them in the Land Tribunal's hearing. I came to the view that publication of that cross-examination in the transcript of my hearing might result in a breach or breaches of the undertaking that the contents of the Land Tribunal's transcript "will not be revealed to anyone other than for the purposes of" this land claim. Ordinarily, it would be open to anyone to purchase transcript of the hearing of this land claim, without intending to use it for the purposes of this land claim, and to read the text of the questions and answers about the evidence given in the Land Tribunal's hearing.

1.8.2 By letter dated 1 July 1996 to the Solicitor for the Northern Territory (copied to the Central Land Council), I voiced this concern. I made it clear that it was no part of my function to enforce the undertakings given to the Land Tribunal, but that I was concerned that I not assist in their breach.

I indicated that I had made arrangements for the production of the transcript of the cross-examination separately from other transcript of the hearing of this land claim. I proposed that I direct that the transcript of the cross-examination “not be used or divulged to anyone other than for the purposes of” this land claim. I invited submissions on this proposal. I also forwarded a copy of that letter to Mr Neate, with a letter containing an apology for overlooking the potential breach of an undertaking given to the Land Tribunal.

1.8.3 On 4 July 1996, I received a reply from the Solicitor for the Northern Territory, objecting to the proposal to place restrictions in the publication of the transcript of cross-examination at *Tjilpatha* (Site 1). The letter informed me that:

- (a) the recollection of counsel for the Attorney-General for the Northern Territory was that his cross-examination “relied principally upon the contents of the Queensland Land Tribunal’s published report”;
- (b) the cross-examination also relied in part on the contents of the Anthropologists’ Report (exhibit CLC 2) already tendered in this land claim, which contained extensive references to the evidence presented in the Land Tribunal’s hearing;
- (c) counsel “does not recall asking any questions which revealed any information about the Queensland proceedings which was not already in the public domain”; and
- (d) in the written application to the Land Tribunal seeking access to restricted transcript, the Solicitor for the Northern Territory had informed the Land Tribunal “that one of the specific purposes for obtaining such access was for use in cross-examination.”

1.8.4 By letter dated 4 July 1996, I responded to the Solicitor for the Northern Territory. The letter contains my decision, and my reasons for that decision, to direct that the transcript of cross-examination by counsel for the Attorney-General for the Northern Territory on 24 June 1996 be bound separately from the other transcript and that it not be used or divulged other than for the purposes of this land claim. The text of that letter is set out in Appendix 5.

That letter was copied to Mr Neate; the Central Land Council; counsel assisting me; and Transcript Australia, the organisation responsible for the production of transcript of the inquiry.

1.9 Further documents from the Simpson Desert National Park claim

In the meantime, I had further correspondence in relation to access to transcript and exhibits from the Land Tribunal's hearing of the Simpson Desert National Park claim. By letter dated 1 July 1996 to Pamela Ditton, who had been counsel for the claimants in that claim, I inquired about access to the transcript of evidence and four specified exhibits. All of these documents were subject to restrictions imposed by orders of the Land Tribunal. The restrictions were inapplicable if the written consent was given of the Land Tribunal itself or the claimants in that claim or their authorised representative. I requested access to the documents for myself, counsel assisting me and my consulting anthropologist. I offered to provide undertakings. By letter dated 18 July 1996, written consent was given by the authorised representative of the claimants, on the terms I had proposed. I therefore wrote to Mr Neate on 24 July 1996, requesting access to the documents and giving the undertakings I had proposed.

1.10 The second stage of the hearing

Because of other commitments of all those involved in this land claim, it was impossible to find further dates for the hearing to resume in 1996. It was not until 26 May 1997 that the hearing resumed at the Civic Centre in Birdsville, where further evidence was given. At that time, the bed of the Eyre Creek was full of water, and there was flood water lying in the flats between the sandhills for several kilometres on each side of that bed. Access to the land claimed by vehicle was not possible. The Central Land Council obtained the use of a helicopter with a pilot. By using the helicopter to shuttle small groups of people to sites on the land claimed, it was possible to continue the hearing on the land claimed on 27 May 1997. Evidence was given at *Pulapurdunha* (Site 3) and *Mirri-Ngupa-Ngupa* (Site 4) on that day.

1.11 The third stage of the hearing

I convened the hearing for its final day on 3 December 1997 at Alice Springs. The evidence on that day was heard in the absence of any representative of the Attorney-General for the Northern Territory. By letter dated 30 October 1997, the Solicitor for the Northern Territory informed me that, because counsel of choice was not available during the first week in December 1997, the Attorney-General for the Northern Territory would not be represented, but would make written submissions subsequently about any matters relevant to the inquiry.

1.12 Further documentary evidence

1.12.1 By letter dated 16 December 1997, I asked the Solicitor for the Northern Territory whether the Attorney-General for the Northern Territory proposed to lead evidence in relation to any of the matters on which s 50(3) of the Land Rights Act requires comment and, if so, of the date by which statements of proposed witnesses could be made available. The reply to this letter, dated 28 May 1998, informed me that the Attorney-General for the Northern Territory did not propose to lead evidence in relation to those matters. Enclosed with this reply was a statement of Bernard Ambrose from the Department of Transport and Works, concerning roads within the land claimed. This statement became exhibit NTG1.

1.12.2 By letter dated 31 July 1998, the Solicitor for the Northern Territory conveyed to me the views of the Department of Environment and Heritage of the State of Queensland and the Department of Environment and Natural Resources of the State of South Australia in relation to certain issues relevant to the matters to which s 50(3) of the Land Rights Act relates.

1.12.3 By letter dated 7 August 1998, the Solicitor for the Northern Territory advised me that the Attorney-General for the Northern Territory proposed to lead no further evidence in the inquiry. Despite this, by letter dated 16 October 1998, the Solicitor for the Northern Territory sought to tender certain extracts from the transcript of evidence given in the Finke Land Claim No 67. I accepted the tender and marked the transcript extracts exhibit NTG2.

1.13 Delays in finalising this land claim

1.13.1 By letter dated 10 September 1998, my Executive Officer conveyed to the Central Land Council and the Solicitor for the Northern Territory my direction that the parties file and serve final submissions on or before 31 October 1998 and submissions in reply on or before 27 November 1998. By letter dated 15 October 1998, the Solicitor for the Northern Territory requested that the date for submissions be deferred until the end of February 1999, pending discussions between the parties about the possible settlement of this land claim on a basis other than by a report pursuant to s 50(1)(a)(ii) of the Land Rights Act. By letter dated 21 October 1998, my Executive Officer informed the Central Land Council and the Solicitor for the Northern Territory of my agreement to this proposal. The letter requested advice by 16 December 1998 of the progress of negotiations.

1.13.2 Despite repeated attempts by my former Executive Officer, it was difficult to obtain any further information about the state of negotiations. The retirement of my former Executive Officer, coupled with my desire not to interfere if there were negotiations, resulted in the land claim drifting. Subsequently, it appears that the Northern Territory Government made an offer of settlement in June 2000, which was rejected in July 2000 and then formally withdrawn. In 2011, the Solicitor for the Northern Territory received oral advice from the Central Land Council, suggesting that there was a desire to recommence negotiations. When the present Aboriginal Land Commissioner, Justice John Mansfield, took up office, he began to press for information.

On 11 April 2012, his Honour conducted a callover of uncompleted land claims, at which counsel for the claimants indicated that he would present further information to the Solicitor for the Northern Territory, with a view to resuming negotiations. His Honour suggested that this be done within two months. It was not done within that time. Nor was it done by 12 September 2012, when the Solicitor for the Northern Territory so advised his Honour by letter.

1.13.3 At a further callover on 13 September 2012, his Honour advised the parties of my intention to retire as a judge of the Federal Court of Australia in May 2013. Counsel for the claimants expressed a desire to continue to explore the possibility of settlement.

His Honour noted this, and directed that the Central Land Council make submissions to me by 12 October 2012 and the Attorney-General for the Northern Territory respond by 30 November 2012.

1.13.4 This timetable was not observed. The submissions on behalf of the claimants (exhibit CLC 9) were sent under cover of a letter dated 14 February 2013. They are accompanied by an article written by Dr Peter Sutton (exhibit CLC 10), which the claimants wished to rely on. The submissions on behalf of the Attorney-General for the Northern Territory (exhibit NTG 3) are dated 28 March 2013. They are accompanied by documents, which the Attorney-General for the Northern Territory wished to rely on: a paper by Professor Basil Sansom (exhibit NTG 4); Professor Sansom's resume (exhibit NTG 5); and a statement of Robert Kendrick (exhibit NTG 6).

1.14 Completion of the report

I did not complete this report prior to my retirement as a judge of the Federal Court of Australia on 17 May 2013. I have completed it in my own time. My second term as Aboriginal Land Commissioner expired on 24 October 1997, before the completion of the hearing. I have not been reappointed since. Section 54(2) of the Land Rights Act provides that, where the period of office of a commissioner has expired, the commissioner shall, unless the Governor-General in Council otherwise directs, be deemed to continue to hold the office of commissioner for the purpose only of completing the performance of a function under the Land Rights Act commenced but not completed before the period of office expired. I am not aware of any direction of the Governor-General in Council that would have the effect of ousting the deeming effect of this provision. I have completed this report in the exercise of the power given to me by s 54(2) of the Land Rights Act.

1.15 The appendices

Appendix 1 to this report contains a list of the sites at or near which evidence was taken. Appendix 2 contains a list of the representatives of the parties and the names of my counsel assisting and my consulting anthropologist. Appendix 3 contains a list of the witnesses who gave evidence during the inquiry.

Appendix 4 contains a list of the exhibits tendered to me in the course of the inquiry. Appendix 5 contains my decision and reasons for decision on restricted transcript, being the text of the letter dated 4 July 1996 referred to in 1.8.4. Appendix 6 contains a map of the land claimed, showing the approximate locations of the sites listed in Appendix 1 and other sites within the land claimed. The sites are designated by numbers as well as their names. I have used the numbers allocated on the site map (exhibit CLC 4), the site register (included in exhibit CLC 2) and the site register supplement (exhibit CLC 6).

2. THE LAND CLAIMED

2.1 Formal description of the land claimed

In 1.1.2, I have identified the land claimed by reference to its boundaries. The formal description of the land claimed in the Submission on Title (exhibit CLC1) (excluding the reference to the attachment of the plan referred to) is:

An area of unalienated Crown land of some 3,600 square kilometres in the south-east corner of the Northern Territory, being a square each side of which is 60 kilometres in distance [*sic*], and which is bounded by the Simpson Desert Conservation Reserve in South Australia to the south and the Simpson Desert National Park in Queensland to the east. The south-eastern point of the area claimed is that known as “Poeppel Corner”. The land is part of N.T. Portion 2011 as shown on Compiled Plan 4402...

All the land under claim may be described as being bounded on:-

- (a) the south, by a portion of the boundary of the Northern Territory with South Australia, and beyond this the Simpson Desert Conservation Reserve in South Australia.
- (b) the east, by a portion of the boundary of the Northern Territory with Queensland and beyond this the Simpson Desert National Park in Queensland.
- (c) the north, by an area of unalienated [*sic*] Crown Land known as the Simpson Desert and forming part of N.T. Portion 2011 as shown on Compiled plan 4402.
- (d) the west, by an area of unalienated Crown land known as the Simpson Desert and forming part of N.T. Portion 2011 as shown on Compiled Plan 4402.

The land so described has been allocated an identifying description by the Northern Territory Land Titles office. It is Northern Territory Portion 4917.

2.2 The remainder of the Simpson Desert Land Claim No 41

The area to the north and west of the land claimed was the subject of the amended Simpson Desert Land Claim No 41 and is the subject of

report no 71 of the Aboriginal Land Commissioner, entitled Simpson Desert Land Claim Stage IV comprising Simpson Desert Land Claim (Claim No. 41) and Central Simpson Desert Repeat Land Claim (Claim No. 144), submitted on 22 April 2009.

2.3 The Simpson Desert Conservation Park

The area immediately to the south of the land claimed was listed in the Fourth Schedule to the *National Parks and Wildlife Act 1972-1974* (SA) and, by the operation of s 29(1) and (2) of that Act, thereby became constituted as a conservation park under the name Simpson Desert Conservation Park.

2.4 The Simpson Desert National Park

2.4.1 By an Order in Council, published in the Queensland Government Gazette on 5 October 1991, the Governor in Council of the State of Queensland set apart a number of areas of land, declared those areas to be national parks, and amalgamated those national parks with an existing national park, pursuant to the *National Parks and Wildlife Act 1975* (Qld). The areas the subject of that Order in Council included the land immediately to the east of the land claimed. The national park is known as the Simpson Desert National Park.

2.4.2 On 15 December 1994, the Simpson Desert National Park was the subject of a recommendation to the Minister for Lands of the State of Queensland that the fee simple title be granted to five named persons as trustees for the benefit of the descendants of Wangkangurru and Wangkamadla people, pursuant to the *Aboriginal Land Act 1991* (Qld) (see 1.5.1). Such a grant was made, subject to a condition requiring an immediate lease back in perpetuity to the Crown for the purposes of the management of the national park in accordance with the *National Parks and Wildlife Act 1975* (Qld). At the time of my inquiry, there were negotiations between the Aboriginal beneficiaries of the trust and the Queensland Parks Service, seeking to agree on an arrangement for joint management of the national park.

2.5 Description of the country

The land claimed lies within the much larger area known as the Simpson Desert, which is mostly in the Northern Territory but extends into South Australia and Queensland. The area is normally very dry and in the summer months very hot. Much of the Simpson

Desert consists of parallel sandhills, sometimes as high as 30 metres or more, generally lying in straight lines oriented roughly north-north-west/south-south-east. Because of the direction of prevailing winds that created and continue to build these dunes, their eastern faces tend to be steeper than their western. Between the sandhills are flat areas of land, often with stony surfaces. Vegetation is sparse and consists of drought-tolerant grasses and low shrubs. Animals, birds and reptiles are scarce. Sources of water tend to be very limited. There are natural wells, the Wangkangurru word for which is mikiri. It is not surprising that any site of significance to Aboriginal people tends to be at a place where there is a mikiri.

2.6 Unalienated Crown land

As unalienated Crown land in the Northern Territory, the land claim is available for claim, pursuant to s 50(1)(a) of the Land Rights Act.

3. LOCAL DESCENT GROUP

3.1 Single language group

The first element of the definition of “traditional Aboriginal owners” in s 3(1) of the Land Rights Act is that there must be a local descent group. In my experience, land claims have commonly been made on the basis that those claiming constitute more than one local descent group, each based on one, or a small number of apical ancestors, with membership determined according to the traditional kinship system inherited by those people. This land claim is advanced on the basis that all of the claimants are members of a single local descent group, identified as the Wangkangurru language group. The principle on which group membership is determined is affiliation with the Wangkangurru language.

3.2 Language identity

3.2.1 At the time of the inquiry, some of the claimants who have continued to live in and around Birdsville still spoke the Wangkangurru language and could converse in it among themselves. There was evidence that Linda Crombie, Mary Parker, Ethel Butler and George Lumpkin could speak the language. Some from the next generation could understand it, but could not speak it themselves. Joylene Naylor and Don Rowlands said that they were in this category. Some claimants spoke it as the language of their households when they were growing up. Some are trying to teach their children to speak it. A dictionary of the Wangkangurru language, compiled by Luise Hercus, and for which Linda Crombie was one of the principal sources, is in existence. There was also evidence of a program set up by claimants living in Birdsville to teach the Wangkangurru language to local schoolchildren. Both Joylene Naylor and Don Rowlands were involved in that program.

3.2.2 Even if little of the Wangkangurru language survives as a spoken language in ordinary discourse, affiliation with the language can still be recognised. It is widely understood that Aboriginal people often identify themselves at a basic level by reference to their linguistic heritage, even in the case of languages that are no longer spoken.

In *Northern Land Council v Olney* (1992) 34 FCR 470, at p 485, the Full Court of the Federal Court of Australia, discussing the concept of a local descent group in the definition of “traditional Aboriginal owners” in the Land Rights Act, recognised that “it would be no disqualification that the claimants are members of a linguistic group”. A language group can therefore be a local descent group for the purposes of the Land Rights Act, provided that membership of it is determined on a principle or principles of descent.

3.3 Local character

3.3.1 The requirement that such a group be “local” appears to be satisfied in this land claim by the fact that ancestral speakers of the Wangkangurru language had a physical territorial association with an area of land. The area identified as Wangkangurru country is an area (described more fully in 4.3 – 4.5) substantially in Queensland and South Australia, but with a relatively small portion of it within the south-eastern corner of the Northern Territory. That area encompasses a number of sites identified as having been of significance to members of the Wangkangurru language group, including five sites in the Northern Territory.

3.3.2 It must be recognised, however, that few of the claimants actually live on Wangkangurru country. The majority are scattered widely, principally in Queensland and South Australia.

Although it is said in the anthropologists’ report (exhibit CLC2) that sometimes claimants may travel great distances for gatherings such as funerals, such interaction between relatives is common among people generally and does not appear to point to any factor that could be said to bind the claimants as a single group. No such political, social or cultural mechanism, forming the claimants into a single group, appears to exist. Without the common linguistic heritage, it would be impossible to characterise the claimants as a “group” for the purposes of the definition, but it appears that common linguistic heritage is sufficient.

3.4 Identification of members of the group

3.4.1 My practice in writing the chapter equivalent to this one in reports I have produced pursuant to s 50(1)(a)(ii) of the Land Rights Act has been to include an exhaustive analysis of the genealogies. I have done this to establish that each person who is to be found to be a traditional Aboriginal owner of the land concerned satisfies whatever principle of descent is relied on to establish membership of the group. I have also made a practice of including a complete list of all the persons I have found to satisfy the definition of “traditional Aboriginal owners” in relation to the land concerned. In this report, I do not include either of those things.

3.4.2 There are two reasons for this departure from my normal practice. First, the genealogies (exhibit CLC 3) and the claimant profiles (exhibit CLC5) were compiled in April 1996. In the years that have passed since then, it is certain that some of the original claimants, whose names appear in those documents, will have died. It is also certain that others, who might also satisfy the element of the definition of “traditional Aboriginal owners” that requires that there be a local descent group, will have been born. Some of those born since April 1996 will now be approaching adulthood. A list of the members of the group derived from the genealogies and claimant profiles would now be incomplete and inaccurate. My second reason for the departure is that, in this report, I conclude that I cannot be satisfied that any of the claimants satisfy the definition of “traditional Aboriginal owners” in relation to the land claimed. The need for a complete list of those who satisfy the definition does not exist.

3.4.3 For the purposes of this report, it is sufficient to know that the Wangkangurru language group is made up of people in the following categories.

- Descendants of a man named Wilyali through his great-grandson Irinyili Mick McLean, being members of the McLean, Hudson, Walkington and Strangways families.
- Descendants of Wilyali through his great-granddaughter Ikiwilyaka Topsy Mclean, being members of the Marks and Sly families.

- Descendants of a man called Ililyili-Birbana through his grandson Tankaiyuna Tommy Lumpkin and through Tommy Lumpkin's daughter Melba Lumpkin, being members of the Lumpkin, Murray and Harris families.
- Descendants of a woman called Minimini Lucy Reese through her daughter Akawilyika Maudie, being members of the Oldfield, Butler and Booth families.
- Descendants of the unnamed brother of a man named Yungili, and that brother's wife Maggie, who is said to have been a Wangkangurru woman, through their son Malka Naylor, being members of the Macumba and Finn families.
- Descendants of the same unnamed brother of Yungili and Maggie through their daughter Alice George (also known as Alice Lane), being members of the McKenzie, Rowlands and Parsons families.
- Descendants of Yungili through his granddaughters Clara Intjiniga (or Indjiniga) Naylor and Dora Alinda Naylor, being members of the Reece (or Reese) and Parker families.
- Descendants of Yungili through his granddaughter Linda Naylor, being members of the Crombie, Stewart, Barr and Parsons families.
- Descendants of Yungili through his grandson Bob Naylor, being members of the Naylor family.
- Descendants of Yungili through his daughter Rosie Naylor Urbunda, being members of the Ah Chee and Peckham families.
- Descendants of Yungili through his son Riley Naylor, being members of the Naylor, Fuschtei and Warren families.
- Descendants of Yungili through his daughter Molly Naylor, being members of the Stuart family.

3.4.4 Of course, claimants may have surnames that are not in this list, because of marriages that have involved name changes and inheritance of surnames from fathers who are not Wangkangurru. There is some interrelationship between the lines of descent I have identified, so that an individual claimant might belong to the group through more than one line of descent.

The claimant profiles (exhibit CLC 5) contain the names of 488 claimants, who are said to be members of the group.

3.5 Principle of descent

It is clear that the principle of descent on which the claimants rely to establish membership of the group is descent from any person regarded as of the Wangkangurru language group. Descent through either parent, and for any number of generations, even if there is also descent from non-Wangkangurru people, is sufficient.

3.6 Finding of local descent group

On this basis, I am prepared to find that the element of the definition of “traditional Aboriginal owners” in s 3(1) of the Land Rights Act that requires the existence of a local descent group is satisfied by the claimants in this land claim.

4. COMMON SPIRITUAL AFFILIATIONS, PRIMARY SPIRITUAL RESPONSIBILITY AND RIGHTS TO FORAGE

4.1 Elements of the definition of “traditional Aboriginal owners”

In chapter 3 of this report, I have dealt with that element of the definition of “traditional Aboriginal owners” in s 3(1) of the Land Rights Act that requires that there be a “local descent group”, and have found that there is such a group in this claim. The remainder of the definition requires that the local descent group be of Aboriginal people 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.

4.2 The correct approach to these elements of the definition

The correct approach to the application of this definition in a claim under the Land Rights Act was dealt with in *Northern Land Council v Olney* (1992) 34 FCR 470. At pp 487-488, the Full Court of the Federal Court of Australia described the process as follows:

The task of the Commissioner is first to ascertain the relevant group to be investigated and then to determine whether the members of that group have the requisite common spiritual affiliation such that the group is as a result under a primary spiritual responsibility for the site and the land. A group necessarily comprises persons. Clearly it is not necessary to call each member of the group to give evidence to establish that they have the appropriate spiritual affiliation. It will be sufficient if the evidence establishes, on the balance of probabilities, that the Aboriginals who comprise the group have that affiliation.

At p 488, the Full Court said:

the Act contemplates that each member of the local descent group must share in common with each other member the common spiritual affiliations to a site on the land of which the definition speaks.

4.3 Sites on the land claimed

4.3.1 The site register, contained within the anthropologist’s report (exhibit CLC 2), and the site map (exhibit CLC4) identify four sites within the land claimed. They are: *Tjilpatha* (site 1); *Parlani* (site 2); *Pulapurdunha* (site 3); and *Mirri-ngupa-ngupa* (site 4). Between the preparation of those documents and the start of the inquiry, the claimants identified a fifth site on the land claimed, designated as *Mirri-pungkinha* (site 4a), details of which are in the site register supplement (exhibit CLC6). The approximate location of each of these five sites is shown on the map in Appendix 6.

4.3.2 In his evidence at *Pulapurdunha* (site 3), Jimmy Crombie said his grandfather had told him of a site called *Urlitha*, to the north-west. He described it as being on the other side of “the stone country” and said it was Wangkangurru country. It is not clear whether he was saying the site is within the land claimed or further to the north-west. At *Mirri-ngupa-ngupa* (site 4), Don Rowlands described *Urlitha* as being between *Mirri-ngupa-ngupa* (site 4) and *Pulapurdunha* (site 3), which would place it to the south-west of *Pulapurdunha* (site 3). According to Don Rowlands, there is a large grinding stone at *Urlitha*, as well as evidence that trees have been cut with a blunt instrument, such as a stone axe, probably to build shelters. This leads him to conclude that there is a mikiri there. There is no indication of any traditions associated with *Urlitha*, although it is possible that it may have been another site on or associated with the land claimed.

4.4 Other sites in the area

4.4.1 The site register (within exhibit CLC2) and the site map (exhibit CLC4) also contain references to some 19 other sites said to be, or to have been, of significance to Wangkangurru people.

Two of those, *Dakadaka* (site 21) (described as being on the Northern Territory/Queensland border “a little north of Poeppel’s Corner”) and *Ngarkani* (site 22) (described as being “just north-east of Dakadaka [site 21]”) are of uncertain location, so only 17 are shown on the site map (exhibit CLC4). Five of these 17 sites lie in South Australia, to the south of the land claimed and within 25 kilometres or so of the southern boundary of the land claimed. They are *Parra-parranha* (site 9), *Pirlakaya* (site 11), *Walpurkanha* (site 12), *Kadlalumpa* (site 13) and *Approdinna Attora Knolls* (site 20). To the south-west of those five South Australian sites are another five sites in South Australia, further away and spread more sparsely (although two of them are close together). They are *Pilpa* (site 5), *Marapardi* (site 6), *Pulawarni* (site 7), *Palkura* (site 8) and *Mararru* (site 10). Six of the remaining sites identified lie in Queensland, within 20 kilometres or so of the Northern Territory border. Four of those lie east of the eastern boundary of the land claimed. They are *Yalkiri* (site 15), *Nyilyirrka* (site 16), *Telkerran* (site 19) and *Pantu-Mirlaka* (site 23). *Pitili* (site 17) is further north, a short distance north-east of the north-eastern corner of the land claimed. *Madlhu* (site 18) is quite some distance further north again. The remaining site shown on the site map, *Purumani* (site 14) is in Queensland, further to the east of the eastern boundary of the land claimed.

- 4.4.2** Of the 22 sites the locations of which are identified, therefore, 12 lie within a 30 or 40 kilometre radius of Poeppel Corner. The descriptions of the locations of the two sites whose locations were not identified precisely suggests that they also lie within this concentration of sites. Two more sites, in Queensland, *Nyilyirrka* (site 16), *Telkerran* (site 19) are not far outside this radius. There are two sites in Queensland to the north, and one to the east, of this concentration. The remainder of the sites identified are those five to the south-west in South Australia. The sites that are relatively concentrated around Poeppel Corner include all five identified within the land claimed. This suggests that those five sites are central to Wangkangurru country.
- 4.4.3** The site map reveals that all the sites shown lie within a strip of land sweeping from the north to the south-west.

Initially, from the northernmost site, *Madlhu* (site 18), that strip of land is narrow and follows the Northern Territory/Queensland border southwards. Approximately 30 kilometres north of Poeppel Corner, it broadens significantly both to the west and the east. At its broadest, it encompasses *Mirri-ngupa-ngupa* (site 4) to the west and *Purumani* (site 14) to the east, a distance of approximately 70 kilometres. South of the Northern Territory/South Australia border, the strip of land swings to the south-west. It retains much of its breadth, so that the south-westernmost sites, *Pilpa* (site 5) and *Marapardi* (site 6) are approximately 50 kilometres apart.

4.5 Whether the whole of the land claimed is Wangkangurru country

4.5.1 There is some controversy about whether all, or even any, of the land claimed is properly characterised as Wangkangurru country. The evidence contains assertions that Wangkangurru country extends from *Madlhu* (site 18) in the north and Birdsville in the east, across the Simpson Desert to Dalhousie in South Australia in the west. Arthur Ah Chee even said that Wangkangurru country extended to Oodnadatta, and perhaps beyond.

The evidence is not consistent, however. The claim in the Land Tribunal to the Simpson Desert National Park was made by both the Wangkangurru and Wangkamadla language groups, and the recommendation of the Land Tribunal (see 1.5.1) recognised, on a historical basis, both groups in relation to the land immediately to the east of the land claimed in this land claim. There are suggestions in the evidence in this land claim that *Parlani* (site 2) is a Wangkamadla site. There are also suggestions that the Arrente, Arabanda and Yarluyandi language groups encroached onto much of the area sometimes described as Wangkangurru country. The preponderance of the evidence in relation to the five sites identified within the land claimed is that they are definitely sites traditionally belonging to country of the Wangkangurru language group. I am prepared to find that those five sites are Wangkangurru sites.

4.5.2 This is not to say that it would be possible to make a finding that the whole of the land claimed is Wangkangurru land. The choice of the location of the northern and western boundaries of the land claimed is obviously an arbitrary one.

The choice was made that the land claimed should be limited to the 60-kilometre square described in 1.1.2 and 2.1, but all of the five sites on the land claimed are within, or close to, the south-eastern quadrant of that square. There is little, if any, evidence that any of the sites has any association with any particular area of land, much less that that area of land extends for 30 or so kilometres in any direction.

4.5.3 In his evidence at *Tjilpatha* (site 1), Jimmy Crombie said that he recalled his grandfather telling him about “a few more mikiris”, pointing to the north-west. He did not give any evidence as to how far from *Tjilpatha* (site 1) these mikiris might be, or any other specific evidence about them. In 4.3.2, I have summarised the evidence of Jimmy Crombie at *Pulapurdunha* (site 3) and Don Rowlands at *Mirri-ngupa-ngupa* (site 4) as to the whereabouts of *Urlitha*. The uncertainty as to the location of *Urlitha* makes this evidence of little use in establishing that there are other sites to the north-west of the five identified as being on the land claimed, or as to the question whether the land associated with those five sites extends any significant distance to the north-west of them.

4.5.4 I drew the attention of counsel for the claimants to the absence of evidence linking sites to the whole of the land claimed on the last day of the hearing at Alice Springs. In response, counsel for the claimants referred to the “high sandhill” country and to the “mikiri country” and said that there is “a Wangkangurru word for the high sandhill country as opposed to the riverlands to the east.” He referred to a passage in paragraph 4.1.8 of the anthropologists’ report (exhibit CLC 2). In that passage, the authors refer to one of the main dialects of the Wangkangurru language which has two names, one translating as Wangkangurru “from the mikiri wells” and the other as Wangkangurru “from the high sandhills”. This is said to be:

the language belonging to the northern group of Wangkangurru, who relied almost entirely upon the mikiri wells for sustenance during periods of drought. This is the group whose descendants are represented by the majority of the claimants today.

4.5.5 There is nothing in that passage to show the whereabouts of what is referred to as the “high sandhills” country.

In response to a question from counsel for the claimants, Linda Crombie gave evidence that the word for the high sandhill country is *Madlhu*, the name of site 18, which is in Queensland, some distance north and east of the land claimed. She referred to sandhills between *Tjilpatha* (site 1) and *Parlani* (site 2), and to sandhills to the east of the land claimed, on the way to Birdsville. She was asked specifically whether Wangkangurru country keeps going north from *Parlani* (site 2) and *Tjilpatha* (site 1). She replied, “Yes, keep going right up to *Madlhu* [site 18].”

- 4.5.6** Annexed to the statement of Bernard Ambrose (exhibit NTG 1), which was tendered for another purpose (see 7.2.2), is an AUSLIG 1:250,000 map of a large part of the Simpson Desert, with Poeppel Corner in its south-eastern corner. The entire map has markings depicting sandhills. Relevantly for present purposes, two different descriptions describing those sandhills appear in several places on the map. The inscription “Average height of sandridges 15 metres” appears five times on the map, three of them within the land claimed. One of these is almost immediately west of the K1 Line, less than five kilometres south of its intersection with the QAA Line (see 7.2.2). This inscription therefore relates to land well within the south-eastern quadrant of the land claimed. Another such inscription is approximately 20 kilometres west of the lake that is near *Mirri-ngupa-ngupa* (site 4), and is therefore in the south-western quadrant of the land claimed. A third of these inscriptions is in the north-eastern quadrant of the land claimed. The other two occurrences of the inscription “Average height of sandridges 15 metres” are well to the north and north-west of the land claimed respectively. The other inscription is “Average height of sandridges 10 metres”, and appears eight times on the map. Two of these are well to the north of the land claimed and four of them are a long way to the north and north-west. One is approximately 45 kilometres west of the western boundary of the land claimed and almost due west of the lake near *Mirri-ngupa-ngupa* (site 4). The significant occurrence of this inscription is adjacent to the western boundary of the land claimed and approximately 17 kilometres south-west of the north-west corner of the land claimed. There is no shading or other indication on the map of the extent of the land to which each inscription relates.

If it can be assumed that the inscriptions relating to an average height of 15 metres coincide with what is said to be “the high sandhill country”, there is no indication that the north-west quadrant of the land claims belongs in that country. The nearest inscription to that quadrant indicates an average height of 10 metres. What is missing from the evidence, of course, is any attempt to link any particular area with the description “the high sandhill country.”

- 4.5.7** Linda Crombie described the claimants’ ancestors as walking around the country, hunting, and carrying water with them in animal skins. Counsel for the claimants asked her specifically, “So from Parlani [site 2] they might walk like that, any direction?” Her reply was:

Yes, they go back to up to what’s-a-name Mirri-pungkinha [site 4a] and all that. Back to what’s-a-name, Tjilpatha [site 1]. Tjilpatha [site1] was the main waterhole, deep dam, carry water for to go back from I think, what’s-a-name, Parlani [site 2] had water too.

Although her answer might be taken as assent to the proposition that the ancestors walked in all directions from *Parlani* (site 2), it is clear that Linda Crombie was not contemplating them walking to the north-west. *Mirri-pungkinha* (site 4a) is south of *Parlani* (site 2) and *Tjilpatha* (site 1) is east of *Parlani* (site 2).

- 4.5.8** None of this evidence assists in determining how far, if at all, the land associated with the five identified sites on the land claimed extends the north, the north-west and the west of those sites.

In particular, there is no evidence that it extends all the way to the arbitrary northern and western boundaries of the land claimed. The pattern of sites shown on the site map (exhibit CLC 4) (described in 4.4) suggests that it may well not so extend. In the absence of specific evidence that the claimants’ ancestors travelled significant distances to the north-west from the identified sites in good seasons, or of clear evidence that there are further mikiris to the north-west of the identified sites, I cannot assume that all of the land within the boundaries of the land claimed is either associated with the identified sites, or is Wangkangurru land.

4.5.9 If I were to accept that the claimants meet the definition of “traditional Aboriginal owners” in s 3(1) of the Land Rights Act with respect to the five sites within the land claimed, it would be impossible for me to make any additional finding that the claimants meet that definition with respect to the whole of the land claimed.

4.6 The basis of the claim of spiritual affiliations to sites

4.6.1 The anthropologists’ report (exhibit CLC2) has four authors Dr Luise Hercus, Philip Jones, Sarah Holcombe and Dr Peter Sutton. Of those four authors, Dr Sutton was the only one to give oral evidence. Much of what is in the report is based on earlier research, some of it done for the claim to the Simpson Desert National Park, dealt with by the Land Tribunal (see 1.5) and some even earlier than that.

4.6.2 It is no surprise that, in a desert, the sites detailed by the authors (and in some cases by earlier visitors) tend to be found at places that would support life. Anywhere that a natural spring or well, called a mikiri in the Wangkangurru language, could be found would be regarded as an important place. The report contains a good deal of information about the mythology associated with the sites. Creator beings, often travelling from place to place, formed the landscape and endowed specific places with important attributes. It is common for us to refer to these being as “dreamings”, a word that describes the concept inadequately, but has come into common usage in Australian speech and writing. The claimants tend to refer to these creatures, and the stories of their activities, as “histories”.

4.6.3 Each of the five sites on the land claimed has one or more dreamings or histories associated with it. Again, it is no surprise that, in a desert, these histories should often have rain as their foci. Thus, *Tjilpatha* (site 1) is associated with the Eastern Simpson Desert Rain History, which connects the salt lake at *Mirri-ngupa-ngupa* (site 4) with *Yalkiri* (site 15) in Queensland. *Parlani* (site 2) is associated the Two Trees History, a complex story that has elements of both the collection of grass seed for food and the summoning of rain. *Pulapurdunha* (site 3) has its own version of a rain dreaming, another complex story.

As well as its strong association with the Eastern Simpson Desert Rain History, *Mirri-ngupa-ngupa* (site 4) is also associated with the Seven Sisters History, a long-distance travelling dreaming, coming from Lake Eyre to the south-west, passing through the claim area and then heading north. This latter dreaming has aspects secret to women. It is also associated with *Mirri-pungkinha* (site 4a), which also has other dreaming associations, including one involving lightning from a thunder-cloud.

- 4.6.4** The authors of the anthropologists' report (exhibit CLC2) make it clear that it is not possible to establish common spiritual affiliations between the all of the claimants and any of the sites on or associated with the land claimed, on the basis that all of the claimants hold those affiliations.

They recognised that the dreaming traditions had ceased to be held during the 20th century. The severe drought at the very end of the 19th century completed the emigration of Wangkangurru people from the Simpson Desert, as they moved to survive on government rations, or to work on cattle stations. Ceremonies based on the histories associated with sites on the land claimed, and other Wangkangurru sites, were no longer performed regularly by the 1950s. By the time of the inquiry into this land claim, such ceremonies had not been held at all for a number of years, although it was said that some claimants participate in ceremonies relating to other places. The authors recognise that knowledge of the sites and their histories is not held widely within the claimant group.

- 4.6.5** The anthropologists' report (exhibit CLC2) contains criticism of the Land Tribunal for failing to find that the claimants had traditional affiliations to the Simpson Desert National Park. The authors contend that surviving traditional affiliations on the part of a "knowledgeable minority" of claimants should have been recognised as establishing traditional affiliation on a group basis. It is no part of my function to determine the correctness or otherwise of the Land Tribunal's conclusion.

- 4.6.6** In the present claim, the authors of the anthropologists' report put the claim on the primary basis described in 4.6.7.

Their secondary argument is that the traditional affiliations of the small number of knowledgeable claimants should be regarded as being held by those claimants on behalf of the group as a whole. On this basis, it is said, the members of the group can be regarded as having common spiritual affiliations to the five sites identified within the land claimed.

4.6.7 The primary basis of this land claim is expressed in the anthropologists' report as follows:

In the present case, what the claimants as members of a group have in common, and which lies at the basis [*sic*] of their entitlement to spiritual affiliations with the claimed land, is their recognised significant descent from former Wangkangurru landowners.

It is not true, however, that this is all that is possessed in common and that goes to the question of the spiritual relationship between Wangkangurru people and the claimed land. In a more overt domain, and rather more readily articulable by most claimants, is their common commitment to the belief that their ancestors' spirits persist, and that they persist in the claimed land itself. It is demonstrable that Wangkangurru people quite generally will say that they can and do feel the presence of their 'old people' or ancestors in Wangkangurru land. This is more likely to occur at particular places than in a totally diffuse sense. The human remains in the claim area define places of special spiritual significance to claimants, both those who are most knowledgeable about mythology and History tracks and those who are far less so.

4.6.8 I have strong doubts that the Land Rights Act contemplates success in establishing the existence of traditional Aboriginal owners of land on the basis of spiritual attachments based on the believed, and perceived, presence of ancestral spirits in that land. The definition of "traditional Aboriginal owners" in s 3(1) is quite complex, with a number of elements (see 4.1). If it had been intended that Aboriginal people whose ancestors inhabited an area of land, and whose ancestors' spirits were regarded as having a continuing presence in that land, could succeed in establishing that they are traditional Aboriginal owners of the land for the purposes of the Land Rights Act, much of the definition would be redundant.

The Land Rights Act and the history of claims under it would have been very different from the actual legislation and the experience of working with it.

I am bound by the terms of the Land Rights Act. My first task, pursuant to s 50(1)(a)(i), is to ascertain whether the claimants, or any other Aboriginal people, “are the traditional Aboriginal owners of the land” claimed. In doing so, I must apply the definition of “traditional Aboriginal owners”.

- 4.6.9** In this land claim, this means that I must attempt to apply that definition to the claimed spiritual affiliations. I must ascertain whether the evidence establishes them to be “common” to the members of the Wangkangurru language group and, if so, whether they are such as to place the claimants under a primary spiritual responsibility for the sites and the land.

4.7 Spiritual affiliations through dreamings

- 4.7.1** The evidence given by claimants during the inquiry tends to confirm that there is little traditional knowledge of the sites on or near the land claimed now held by those claimants.

- 4.7.2** At *Tjilpatha* (site 1), Jimmy Crombie gave evidence that his grandfather told him stories about site, including a rain story that Jimmy Crombie said he did not remember. He understood that it was his grandfather’s story. When pressed for details, Jimmy Crombie gave a summary of the story that the anthropologists’ report (exhibit CLC 2) recounts as the rain history for *Pulapurdunha* (site 3), and said he thought his grandfather had the same story for every mikiri. His grandfather did not teach Jimmy Crombie any song. Jimmy Crombie does not know if there is any ceremony for the story and his grandfather did not tell him how he came to know the story or who it was a story for.

- 4.7.3** At *Pulapurdunha* (site 3), Jimmy Crombie again told the story associated with that site. He said his grandfather had told him the story in the Wangkangurru language. The following exchange took place between counsel for the claimants and Jimmy Crombie:

And you’re holding that story today?

Yes. Granddad’s story.

Are you going to tell other people about that one too?

Well, one day, I suppose, yes, the young ones, because I am going to get old too, one day.

And for this place, what's important about this place, for you?

Well, it's important, it's my place, my granddad's place. And another thing, I like the country, I love the country because I think it's – the sooner I get back into the country, the better. I love the country... You know, this is my granddad's country and I want to be there.

Now, when you say that you got that story, are you holding that story just for yourself, or for other people?

Well, not too many other people really, you know, I got my cousin... and they're going to pass on too, my cousins, my age, because you know. I got a nephew, I suppose he can...

No, what I mean is, which mob own that story, which...

Wangkangurru, Wangkangurru yes. That's my story and I don't think anyone else is allowed to have it.

4.7.4. This evidence does not suggest that Jimmy Crombie regards himself as having a spiritual affiliation with *Pulapurdunha* (site 3) on the basis of the story his grandfather had given him. When given the opportunity to articulate such a spiritual affiliation, he responded that his view of the importance of the site is founded on the fact that it was his grandfather's and that he loves the country. When given the opportunity to express a desire to pass on the story to all members of the group, or to acknowledge their entitlement to it, he seemed reluctant.

4.7.8 Also at *Pulapurdunha* (site 3), Linda Crombie (Jimmy Crombie's mother) told the story of the rain dreaming associated with that site. She was asked whether it is a true story, and whether she believes it now, to both of which she assented. She said she got the story from her father and, "This is my father's country".

She was asked whether other claimants sitting at the site belonged. She assented to this, and gave some evidence of the kinship connections between herself and those other claimants. She gave evidence that the site should be protected and was then asked why she would want to look after it and protect it. In her answer, she used Wangkangurru words that were not translated and then said that the site is “our mikiri and my father’s mikiri.” Either she was not presented with an opportunity to express anything about spiritual affiliations to the site through the story she had inherited, or she passed up such an opportunity in favour of an appeal to descent as giving her entitlement to the country.

- 4.7.9** At *Mirri-ngupa-ngupa* (site 4), Linda Crombie, Raelene Hudson and Valerie Fuschtei (Naylon) collaborated in telling aspects of the story for the site, which they regard as restricted to women (although Linda said she learned it from her father). The story they told also relates to *Mirri-pungkinha* (site 4a). Raelene Hudson and Valerie Fuschtei had learned this story from Linda Crombie and both expressed a desire to continue to learn about the country. Valerie Fuschtei said that she wanted to learn more, “So I can go back and...tell my kids...so that they can know their history.” When asked why it was important for her to learn this story, Raelene Hudson said:

Got to learn my Wangkangurru side, you know, my history. It’s important because it’s a sense of belonging, you know, because we always been out of our country, Wangkangurru country and then we missed out on it, you know with the age gap, with grandfather and us. You know, they were old and the language was dying...and we’re fortunate enough to have some stories of it and come back to us and know our heritage.

- 4.7.10** Once again, Linda Crombie was asked about protection of the place. In response to a question about what she would feel if someone was going to damage it, she said she would feel “no good inside.” She referred to a cairn that has been constructed at the site, and said that she had not been asked for permission to construct it.

- 4.7.11** The evidence of Linda Crombie, Raelene Hudson and Valerie Fuschtei at *Mirri-ngupa-ngupa* (site 4) in relation to the aspects of the story restricted to women prompted the Attorney-General for the Northern Territory to concede in written submissions (exhibit NTG 3) that “there is sufficient evidence of spiritual affiliation to” *Mirri-ngupa-ngupa* (site 4) and *Mirri-pungkinha* (site 4a). For the reasons set out in 4.7.13 – 4.7.17, I do not accept that the evidence is sufficient to lead to a finding that all members of the claimants have common spiritual affiliations to those sites, based on a connection with them through the dreaming involved in that story.
- 4.7.12** Also at *Mirri-ngupa-ngupa* (site 4), Linda Crombie told the story known as the Wadi Trees history. It is a dreaming not related to that site, but to Andado Station to the west (in South Australia), Birdsville to the east and Bedourie to the north. She said it is a Wangkangurru story. There was no follow-up question that might have given her an opportunity to talk about any issue of spiritual affiliation.
- 4.7.13** In none of this evidence is there anything to indicate that any of the witnesses had spiritual affiliations to *Mirri-ngupa-ngupa* (site 4), based on the story they told. They were given little opportunity to talk about such affiliations, if they do have them. Such opportunities as they did have, they passed up. The responses of Valerie Fuschtei and Raelene Hudson to questions about the importance of passing on the knowledge they had acquired were in terms of heritage, rather than spiritual affiliation. As was the case at *Pulapurdunha* (site 3), Linda Crombie’s answer to a question about protection of the site was not put in terms of spiritual affiliation or spiritual responsibility. Even if Linda Crombie, Raelene Hudson and Valerie Fuschtei were found to have spiritual affiliations on this basis, there is no evidence that they share them with other claimants. If those three claimants have spiritual affiliations based only on aspects of the story restricted to women, they could not share them with male claimants.
- 4.7.14** In his evidence at Alice Springs, Arthur Ah Chee, another senior claimant, made no discernible reference to having spiritual affiliations to any site on or associated with the land claimed.

When asked whether the claimants were talking more about histories and stories associated with particular places, Arthur Ah Chee said:

We talk about the mythologies, where they travel, where they come from, where they start, how it ties in with the different ceremonial grounds and the different other groups that tie into that.

The description of these matters as “mythologies” does not suggest that Arthur Ah Chee sees himself as having spiritual affiliations with the sites through those histories or stories.

4.7.15 There was no evidence of any system of passing on traditional knowledge, or of any determination to ensure that future generations of Wangkangurru descendants become acquainted with it. The evidence concerning the passing on of knowledge is dealt with in some detail at 4.10. There is no doubt that, in any claimant group under the Land Rights Act there will be members of the group who do not have enough knowledge to be able to assert their own spiritual affiliations to sites. Some will be too young to have acquired the knowledge. Some might have been taken away from their families at a young age, and not had the opportunity to learn. Others may suffer from mental deterioration and have forgotten what they knew. In many cases, it is possible to say that the system of knowledge holding and transmission within a group is such that young people will not only have opportunities to learn, but will be encouraged, even compelled, to learn. Those taken away who have returned will be given the knowledge. Old people who have once had the knowledge but have forgotten will not be regarded as having left the group. The dynamics of the group will be such that spiritual affiliations will genuinely be held in common, and only a conscious decision to renounce any entitlement to those affiliations will cause a person to cease to hold them. No such system is evident in the claimant group in this claim.

4.7.16 In addition, it seems that those who do hold knowledge of dreamings or histories in relation to sites on or associated with the land claimed no longer attach to that knowledge the significance that it formerly had.

They no longer see themselves as having rights and obligations in relation to those sites through the medium of those stories.

It is difficult, therefore, to find that even the holders of that knowledge have spiritual affiliations to those sites. The knowledge holders are a tiny minority of the claimant group. They number five out of the 20 claimant witnesses. The five did not give any evidence concerning the holding of their knowledge on behalf of other members of the claimant group. The other 15 did not give any evidence of any understanding that the five held knowledge, giving rise to spiritual affiliations to sites, on their behalf, or on behalf of other members of the claimant group.

4.7.17 The evidence being as it is, it is impossible for me to find that those claimants who possess traditional knowledge relating to sites and dreamings regard that knowledge as affiliating them to those sites in a spiritual way. Nor is there evidence that would enable me to find that those claimants hold that knowledge in such a way as to give rise to common spiritual affiliations held by all members of the group. In the absence of such findings, any finding that the spiritual affiliations place the group under a primary spiritual responsibility for the sites and the land is out of the question. The secondary basis on which this land claim was put, that the holding of knowledge by a small number of senior claimants on behalf of other members of the claimant group is sufficient to give rise to common spiritual affiliations on the part of all members of the group, cannot be sustained.

4.8 Spiritual affiliations through ancestors' spirits

4.8.1 It is therefore necessary to turn to the primary basis on which the claim is put, the possession of common spiritual affiliations through the presence in the land claimed of spirits of the ancestors of the members of the group.

4.8.2 There is no doubt that some of the claimants who gave evidence believe that the spirits of their Wangkangurru ancestors are still in Wangkangurru country generally, or in sites on that country, including sites on the land claimed.

4.8.3 At *Tjilpatha* (site 1), there is a burial place. There has been some interference with that place and there are bones visible. Linda Crombie said that they are the bones of her ancestors, who had died there. She said they could still be seen there, and referred to the bones.

Later, she repeated that they are “still here” and referred to the remains of rough shelter that had been built there previously. During evidence taken at that shelter, Linda Crombie told of a previous visit, when the wind was seen to shake the boughs that constituted the frame of the old shelter. She said:

Well, that makes me think that old fellas must have been spirit here... When they died, the spirit's there, stopped, wouldn't go away... it's there now.

4.8.4 Raelene Hudson was asked how she felt on coming to the burial place at *Tjilpatha* (site 1). She said:

Well, I feel sad, you know, [to] see the old people laying like this now and... tourists desecrating the place... we don't go to... their cemeteries and... take things like that from, ruin it and all that.

She was asked what makes it a sacred place for her and replied:

The old people are buried in it. That's what makes it sacred, it's those old people, Wangkangurru people that were travelling the country and that.

She said she would like the people buried there to be left in peace. Later at the same site, counsel for the claimants had the following exchange with Raelene Hudson:

Raelene, I just want to ask you about these old people buried here. When those old people finished up there, was that the end of them or is there still something here?

No there's still something here. There's still their spirit here... they died in this country where they... lived and worked.

How do you know that?

Well, because they're buried here, aren't they?

So their spirit is here because they're buried here?

Yes. They're in the country here.

4.8.5 Also at *Tjilpatha* (site 1), Don Rowlands expressed the view that tourists should not be allowed to come to the burial site. He gave as his reason:

it's our ancestors, you know, and I think they deserve to be, you know, rest here in peace, not to be continued to be exploited and looked at... These are our ancestors and I think we all have a spiritual right to look after this country and these sorts of areas.

- 4.8.6** At *Pulapurdunha* (site 3), counsel for the claimants asked Don Rowlands, "What's your feeling for this country out here?" Don Rowlands replied:

Well, it's a hard thing to describe but it's something special. It's a spiritual connection. We have a spiritual connection to this area, to this country and it's really special. I own a houseblock in town, but it's nothing like coming back out here. So there's a lot of difference if you can try and fathom the feeling we get when we come back here, you know. We have that spiritual connection. We have a spiritual – what's the word? We need to teach and bring our people back here, you know, bring them back, bring our people right across Australia. And today I reckon they'll be with us, you know, not in body, but in soul they'll be with us here today.

- 4.8.7** Later, Don Rowlands was describing *Parlani* (site 2), where he said the human remains had been exposed because a bulldozer had been used by a seismic exploration crew, probably in the 1980s. Asked what he would say if anybody wanted to do the same today, he said, "No way in the world they'd do that today." In response to a question as to why it is important that no more damage is done to places like that, Don Rowlands said, "it's our spirit country... where our people have lived all those thousands of years ago and it's sad to see these sort of things happen and nobody seems to have the respect for these types of places." He expressed a desire to look after it for the future.

- 4.8.8** Don Rowlands was cross-examined by counsel for the Attorney-General for the Northern Territory.

The cross-examination included the following exchanges:

Do you feel that same spiritual connection with the land around Birdsville that you say you feel for out here?

...this is the land where our people lived, you know, like they moved out there because of the droughts and stuff and they had to have some connection to that land. But this is where they really lived. So this is where we really get the feeling from.

...

Is it something to do with the isolation of the Desert that makes you feel that you have got a spiritual connection to the country out here?

No, it's just a sense of belonging. It's your, you know, it's ours, it's somewhere. Sometime, at last we have something that is ours, you know.

...

So when you talk about feeling a spiritual connection for places like this, that's something that you've only come to feel in recent years?

I guess it's in you all the time. It's something that is within you...and when you come onto something that your people have lived and roamed for years and thousands of years...you think, gee whizz, here I am at last, back home.

- 4.8.9** In all of this evidence about spiritual connection, Don Rowlands was not asked about the source of that connection, or what it involved, questions that might have enabled him to give evidence that he had a connection to sites on the land claimed through the spirits of deceased ancestors that remained in the land, and that he shared that connection with others.

4.8.10 During the hearing of evidence at Alice Springs, I drew the attention of counsel for the claimants to my concern about the fact that:

the issue of common spiritual affiliation through the spirits of ancestors is one on which there doesn't seem to be a great deal of evidence from the claimants. A couple of times people have been taken up to it and then stop before they actually got that far and I think in fact, the only one who really said anything significant about it was properly [probably] Raelene at Tjilpatha [site 1]. I don't know whether you can do anything in relation to that.

Counsel for the claimants sought, and I granted, a short adjournment after I had raised this issue.

4.8.11 On the resumption of the hearing, counsel for the claimant attempted to address the issue. He began by asking about the people buried at the identified sites. Linda Crombie and Raelene Hudson quickly became distracted by their perception that counsel was asking them to supply Wangkangurru words for various terms associated with death, burial and spirits. Then, the following exchange occurred between counsel for the claimants and Linda Crombie:

What happens with that spirit after they have died and buried there?

Well, they gone too.

...

When you go back into that country now...

I still got my old man's spirit with me, anyway.

...

Where's it coming from, that spirit?

That old man's body.

...

From that body, from that place where they are buried, is that what you are meaning?

Yes, Pirlakaya [site 11, a site in South Australia, south of the land claimed. Linda had already given evidence that it is was the place where her father had died.]

...

Although you mightn't know the name of some of the people whose bones you see there...Have they got spirit too?

Yes. You go there now, the spirit will go in you and you'll finish, you'll get sick, you want to go with the Flying Doctor then.

That's like Parlani [site 2]?

Yes, Parlani [site 2] and Tjilpatha [site 1] and Pulapurdunha [site 3] back there, you know, where we came.

...

All those places?

All those places got spirit.

Is that the same for all your mob?

Yes, same for all the Wangkangurru.

And is that why, some people said, and you might be one, that you've got to look after those places?

Yes, got to look after them.

And protect them?

That's right.

I think you said you would be sad if the bulldozer came back?

Yes, at Tjilpatha [site 1]?

Yes.

Yes, they dug that up.

Yes, but that's where the mikiri was.

Yes, the mikiri

What about if the bones were touched?

Well the bones was chucked in Tjilpatha [site 1],
out there, you all seen it.

- 4.8.12** The exchange was interrupted by another witness and became a discussion about interference with the bones at *Tjilpatha* (site 1). I have excluded from the quotes passages that did not affect the substance of the evidence, particularly the instances when Linda Crombie was supplying the Wangkangurru words for the things she was talking about.
- 4.8.13** Also at Alice Springs, there was evidence of people being aware of the manifestations of spirits when they travel to the land claimed.
- 4.8.14** Arthur Ah Chee said that old people had told him that, once they pass away, their spirits are protecting him and others. He also said that he believed that the deceased come back in some form of animal life, and that the main one is a dog. He had seen dogs come out of nowhere and disappear. He believed that he should not let anyone shoot a dog. The old people told him he was never to shoot dogs, because when old people pass away they transform into something and “they don’t go to heaven like you blokes.” The old people had told him that when a spirit leaves the body, the family is still there and looking after him and others, protecting him and others in one form or another.

He said he has seen dogs on Wangkangurru country. The following exchange took place between counsel assisting me and Arthur Ah Chee:

If the old people protect you, is there something that you’ve got to do because they protect you?

To me, my feeling is that it’s a sense of belonging and I know my identity, I know where I can walk without interfering with other people’s country. I know where I can chuck a swag down of a night time and not feel afraid of anything. I also know when I’m lying down there, there’s someone there looking after me.

Do you look after them?

And I look after them. I look after the country. I look after the family. So I’m sort of the mediator and at the

same time to sort of make sure that we're keeping the family together.

4.8.15 Linda Crombie said that an ancestor's spirit will sometimes turn into a cat sitting in a tree and then just disappear.

4.8.16 Raelene Hudson told a story of camping at *Tjilpatha* (site 1). Her brother came into a dream and told her she had a cheeky dog there. She woke up to find a dingo at the foot of her bed. She said, "that was the dream that woke me up to see that dingo, that spiritual thing." Her brother was alive, in Port Augusta at the time. She thought it was some kind of spiritual affiliation, because she had never dreamt about him until he told her to wake up and look at the bed. Raelene Hudson said:

that spirit [of the old people] is still in that land there because when I got there, my hair stands up...and I cry...I sort of stood on this sand dune afterward and said, old people have come back...you got that feeling, you know, in yourself and that's like my spiritual connection to that land and to the old people that once walked that country...the Wangkangurru.

Raelene Hudson went on to say, "we should protect that site because it's like a grave site thing and spiritual people and that's the remains there in the country, in the Wangkangurru country". If the site were not looked after, "you get sick". Again, she compared what had happened to the bones at *Tjilpatha* (site 1) with desecration in a European cemetery, because "you let the spirits rest there in that country or anywhere they resting"

4.8.17 Valerie Fuschtei then told of her experience during a field trip before hearing. After visiting a site that she did not name, she and others went back to camp, where she said "you can more or less, feel them around you." She said that, in the distance, you could hear:

like singing...or something, spiritual way, I suppose. That's when Brownie and Marlene Doolan mob was there, they couldn't sleep because that was in their head, loud singing...they come from Finke, see. And they reckon they was in the wrong country. It wasn't their [sic] and they could hear it all night, they couldn't sleep. They waked us up

then...Us lot could sleep. But Marlene and Brownie and them mob couldn't sleep...the Finke mob.

When Valerie Fuschtei first mentioned singing, both Linda Crombie and Raelene Hudson repeated "Singing".

4.8.18 Linda Crombie then said:

I believe that Aborigine have spirit because when I get sick, I'll sing out to my dad and he'll come along and fix me and I'll be right next morning. I believes that...I sing out to my old dad and you can see the old fella coming up too.

When you get up and you can see a dog trotting away.

Linda Crombie assented to the suggestions of counsel that that is why she believes in the spirits and that you can see the spirits of the old people are in that country.

4.8.19 Valerie Fuschtei then mentioned an experience that Jimmy Crombie and Don Rowlands had. The following exchange took place between counsel for the claimants and Linda Crombie:

Tell us about that.

Yes, my Jimmy, he hears his grandfather talking to him too and singing. When I go back to Tjilpatha [site 1] country, well I'll sleep, well they all sing this song, they'll sing a song, they sing – [Singing in language]. They'll sing that song, old dad does.

That was Dad going out for a kangaroo and emu and all that kill. Old grandfather was laying down in the tree. And that's all the time in my mind.

At Tjilpatha [site 1] you hear that song?

Yes, I hear that song wherever I goes. I'm here – last night, I was laying down listening.

Does that song belong to Tjilpatha [site 1]?

Yes, belongs to Tjilpatha [site 1], old Dad's.

And Jimmy, he's heard that one, he told you he heard something?

Yes, Jimmy says that too. Like all our family spirit come back to us.

And is that related to the dead people in the country?

Yes. Dead people there in Tjilpatha [site 1], all around and Pirlakaya [site11]. You just go there you know, like family, you can hear them old people singing.

And does that mean that you Wangkangurru mob have got to look after that country?

Yes, got to look after that.

Is that all of you or just one person?

Oh, all of us, like Wangkangurru goes out there, as long as we get a car to go out there and look after. I like to get back to Pirlakaya, my old grandfather way and my aunty. See, we're staying in Birdsville there, had no car, nothing. We can't get around to go and see them family like now.

Valerie Fuschtei added that Don Rowlands had same experience as Jimmy, because they both camped together. She said that they go out a lot together to the desert and answered "Yes" to the question "And that is happening to them on other times too?"

4.8.20 The following exchange with counsel for the claimants then took place:

Linda Crombie: I believe my spirit and family spirit, I believe that.

Do you believe that, Valerie?

Valerie Fuschtei: Yes. Oh, yes, myself, got to believe it.

And that's connected to your relationship with the country?

Linda Crombie: That's right.

Valerie Fuschtei: Mm.

4.8.21 Linda Crombie also said that her younger son had passed away recently and "he come back to me too, singing out," asking her for money. Her son Harry Crombie had heard his brother singing out. "We all hear it".

4.8.22 Raelene Hudson said her sister went out for a field trip, looking for a particular site. Her grandfather Mick McLean came to her in a dream and “he told the people to go to the north-west”. They went in a helicopter and found the site they were looking for.

4.8.23 Arthur Ah Chee said that, on one occasion at *Tjilpatha* (site 1), he touched the bones, because he felt something was drawing him to them.

4.8.24 I have dealt extensively with the evidence relating to the presence of spirits of ancestors, because of its importance in the way that the claim is put. The evidence is problematic in several respects. First, there is no consistent articulation of the presence of ancestors at sites, whether on the land claimed or associated with it. Linda Crombie gave evidence both of her ancestral spirits accompanying her everywhere she went, and of their location at specific sites, especially *Tjilpatha* (site 1). The protective nature of the ancestral spirits, irrespective of location, seems to have been their most significant aspect for Arthur Ah Chee. The strong presence that Raelene Hudson and Valerie Fuschtei experience while on the land claimed seems to be at odds with the experiences of Linda Crombie, in summoning her father when she is ill and hearing her deceased son asking her for money when she is at home. It is difficult to derive from the evidence any notion of ancestral spirits being the medium for the possession of spiritual affiliations to sites. Expressions of the need to protect sites seem to have more to do with the preservations of the physical remains of ancestors at burial places than with the maintenance of spiritual affiliations with those places.

4.9 Commonality of spiritual affiliations through ancestors’ spirits

4.9.1 Even more problematic is the notion that the evidence shows common spiritual affiliations on the part of the members of the claimant group. Of the 20 claimant witnesses, only five (Linda Crombie, Raelene Hudson, Valerie Fuschtei, Arthur Ah Chee and perhaps Don Rowlands), with the possible addition of Jimmy Crombie, if the second-hand account of his experiences while camping with Don Rowlands can be counted, gave evidence of any connection at all to the land claimed based on ancestral spirits. The other witnesses tended to rely on assertions that the country was Wangkangurru country, or that it was their ancestral country,

rather than giving evidence about the presence in the country of ancestral spirits. Some saw association with the land claimed as important for the maintenance of their Wangkangurru identity. It is true that many witnesses were not asked questions designed to provide them with opportunities to talk about spiritual affiliations. It is also true that some of the statements of witnesses that might have verged on spiritual issues were not followed up by questions that would have encouraged them to talk about such issues. An examination of evidence of these kinds follows.

4.9.2 Lynette Harris's evidence contained the following:

Now when you say that Wangkangurru country, do you come in for that country yourself?

Through my ancestors and that, yes.

So you're Wangkangurru from your ancestors?

Oh yes. I'm blood Wangkangurru.

...

[After naming other claimants who are her relations] We all got that one blood. Don't matter what

What is that blood?

Wangkangurru. We could go anywhere and live but we're still here. Out there, the Desert is still our home.

Do you want to say any more about anything to do with Wangkangurru or land claim or your family?

Yes, that's our Dreaming. We all one here.

4.9.3 Norman Harris said that he mostly talks Wangkangurru and can talk with Linda Crombie, and others who speak it. He answered in the affirmative the question of counsel for the claimants that "you're coming in for Wangkangurru country from...Mother's side, grandfather?" He said he had never been to the mikiri country but had been told about it by Linda Crombie, when he was in his twenties. His grandparents used to tell him when he was a 7 or 8-year old child how they used to live, but he did not remember any names. Counsel for the claimants engaged in the following exchange with him:

Can you say which mob hold that country – take that country?

No, not really.

Can you say which language is for that country out there?

Wangkangurru.

The evidence of Norman Harris was left at that.

4.9.4 Robert (known as Johnny) Parker said that, until his mother died, Wangkangurru was spoken in his family's household. It was the only language. After his mother's death, he went to live with Luise Hercus, who played him tapes so he would remember his language. He was asked the following questions and gave the following answers:

And you've still got that language today?

Yes.

You know where this land claim is?

Yes.

Have you been to that country, where the land claim is?

No.

Do you know what language is the language for that country?

Yes. Wangkangurru.

...

Now you're a claimant for this Wangkangurru Land Claim?
Correct?

Yes.

Why are you claiming it?

I always would like to see that it would always be in Wangkangurru hands and a place for my children to come back to.

4.9.5 Kenny Crombie gave evidence that his family has the Wangkangurru language. He got it from his grandfather Jimmy Naylor, his mother Linda Crombie and the rest of the family. He has been once to the mikiri country with Don Rowlands, to look at the country and see if they could find other mikiris. They went to *Tjilpatha* (site 1). The following exchange took place with counsel for the claimants;

...what is the language for that country out there?

Wangkangurru

...

Why are you making a land claim?

It belongs to my grandfather and I just feel that I want to keep the spiritual part of him still there and going strong as the day he was alive and see it maintain within the rest of the family within the oncoming years.

4.9.6 Later in Kenny Crombie's evidence, there was another relevant exchange:

Why is it important to you...to protect those mikiri places, those sites?

For one thing, as we all know, people going in and treading on things and destroying things, like with other areas that I've been in – I won't say where, but there are places where people are not just looking after the place sort of thing. They go in there, take things or they go in there and leave rubbish or things like that where it should be more protected.

...why is it important to you and to your Wangkangurru mob, for that protection?

Well, it's part of our culture and it's part of our land sort of thing through our grandfather's side.

4.9.7 Robert Naylor said he was claiming through his father and grandfather. The only time he had been to the country was in preparation for the hearing of this land claim. Counsel for the claimants asked him the following question, to which he gave the following answer:

Can you say why it's important for you to be a claimant for that country?

It's important to me because for myself and for my children too, so when they grow up I got to tell them where I come from, where my grandfather comes from

and just to let them know where they come from,
where their families are too or where they been.

- 4.9.8** Robert Naylor agreed that it is important to look after places where people lived:

in case, if we ever go there we can always – if we take our kids out there, we show them too, if it's still there.

What is it that still there that you're showing them?

All the bones and everything of our ancestors and like the humpies, the mikiris and all that. Keep it intact.

So you can pass it on?

Yes, pass it on. Show my kids and hopefully they show their kids later on down the line if they can get out there at all.

- 4.9.9** When asked where Wangkangurru country is, Mary Parker said it is “in the Desert”. She said:

My grandfather and mother and that come from there.

That's why I want the children to know their country and they can talk the language.

She had been to the land claimed, but could not remember the names of any places on that country. She was asked the following question, to which she gave the following answer:

Why is it important to you to be part of land claim?

This was grandfather's country and Mum, I think she was on that there, Aunty Linda. That's why I want it, for my children, for when they grow up and come back here, if they want to, you know.

- 4.9.10** A comparison of the passages from the evidence of Linda Crombie, Raelene Hudson, Don Rowlands, Valerie Fuschtei and Arthur Ah Chee, dealt with in 4.8.3 – 4.8.23, with the passages from the evidence of Lynette Harris, Norman Harris, Robert (Johnny) Parker, Robert Naylor and Mary Parker, dealt with in 4.9.2 – 4.9.9 makes it obvious that, even among those who gave evidence, it is not possible to make a finding that common spiritual affiliations exist on the basis of the presence of ancestral spirits. The evidence of the latter five

witnesses is about descent, language affiliation and the presence of physical remains. There is no hint of any significance attached to ancestral spirits, as there is in the evidence of the former five witnesses.

4.10 Absence of a system for passing on knowledge of spiritual affiliations

4.10.1 A finding that spiritual affiliations are common to members of a group is easier if there is a demonstrable system for passing on knowledge of such affiliations to younger members of the group. In this land claim, there is a good deal of evidence about the importance of teaching children and grandchildren, and of a determination to do so, but it is rare to find any indication of teaching of spiritual affiliations through dreamings attached to sites on or associated with the land claimed, or through the association of ancestral spirits with those sites.

4.10.2 Linda Crombie gave some indication that she, at least, was attempting to pass on to her grandchildren some notion of the importance of ancestral spirits. She said it is “important...for...Wangkangurru families to go up there [to the sites on the land claimed], learn.” She said, “I told my family to listen, that’s Granddad coming home, singing to us.” She also gave the following answer to this question:

Do you tell the younger ones about the spirits of the old people?

Yes. They believe it, them grandson mine.
They frightened too.

4.10.3 Raelene Hudson was involved in the following exchange:

why is this land claim important for you?

This is my grandfather’s country, where he was born and he recorded a lot of history there and you know, to keep it for us and not only for us, but for share their knowledge for everybody for this country.

4.10.4 Later, in Alice Springs, Raelene Hudson participated in the following exchange:

is it important for people coming after you, young people coming up to understand and have that relationship to the country from respected [sic] the old people's spirits?

Yes, I do believe that because he gave names, Wangkangurru names to the first three eldest grandsons before he passed on with law associated with the rain making history. And my son was called Anintjula, other one was called Irinyili, after him and another one was called Walyi and they were all rain making. And then they know that because we always tell them their names and you know, tell them of the country they belong to, Wangkangurru country.

4.10.5 These encouraging passages in the evidence may be compared with those involving other witnesses. Maria Stuart gave evidence in Birdsville on the first day of the inquiry. It was the first time she had been there. The following questions and answers were part of her evidence:

Now, amongst those families from your mother, from your mother's brothers and sisters, or sisters mainly there, have you ever discussed with them about Wangkangurru side of the family?

Yes.

And, does the family know about it?

Yes, well they know who their relations and that are.

...

And do you think it's important to follow the Wangkangurru side?

Yes.

Is that what you've been doing.

I'd like to learn more. I'd like to learn a lot more on the Wangkangurru side.

...

Now, with your own children, are you already starting to use language and teach them?

Yes, yes.

Do you want them to learn Wangkangurru side?

Well, I'd like to learn it myself.

So, you've got to learn and they got to learn?

Yes.

Right. Good. Why do you think it's important for them to learn that?

...

Because it's part of their culture and to know where their family is from.

It is true that the nature of the questions to Maria Stuart did not encourage her to expand on what she regarded as the "Wangkangurru side", but plainly she is not one of those either able or eager to pass on knowledge about affiliations to sites.

- 4.10.6** Dean Ah Chee learned about "Wangkangurru side" from his uncle Freddie Ah Chee in Alice Springs, when he was young and living there. He was not asked any questions about the nature of his knowledge, or about whether he was passing on anything.
- 4.10.7** Jimmy Crombie learned from his grandfather, with whom he visited sites on the land claimed. He also said, "I'm teaching myself today". Nothing in the evidence, except the second-hand account of his experience with his grandfather's spirit, dealt with in 4.8.19, gives any indication that Jimmy Crombie either knows anything about affiliations to sites through ancestral spirits, or is passing on to anyone any of whatever knowledge he does possess.
- 4.10.8** Valerie Fuschtei said that one of her grandsons, through her daughter:
- knows a lot about the Desert, more than his mother. He's come up on every trip, more or less, you know, from a little fella, right up.

The nature of the knowledge is not clear. Valerie Fuschtei also appeared to take the view that the entitlement of members of her family to the land claimed was simply through descent. Speaking of the way in which old people corrected her name, telling her she was a Naylor, she said:

Wangkangurru. They know we come from the Desert, because my father and my grandfather and all them mob from the Desert.

She said her sisters have kept the Naylon name to:

Show their kids that they come from one area. So the kids will know where they come from and what their last – their family tradition, you know, their bloodline.

So it makes a difference to keep that name?

Yes, yes.

Because that is the Wangkangurru bloodline?

Yes. And we tell them that too, you know, when we – always remind them when we're talking to them.

4.10.9 Arthur Ah Chee said that, when he was young, he went to Oodnadatta with his mother, who had to hand down the responsibility for the country. A ceremony was held with all the elders at Oodnadatta, where the country was handed down to him. All his brothers were there when his mother handed it down. He said it was Wangkangurru country. He participated in the following exchange with counsel assisting me:

Is that including this mikiri country that we're talking about?

Yes, sort of – well it was explained to me, over the years, by the old people, that we had to keep the family together. We had to keep the country together, so that's what I've been doing.

How do you try and keep the country together? What sort of things do you do to keep the country together?

Well, virtually it's by sharing the knowledge that the young ones don't know. And I mean a lot of our younger ones did know their identity. And with us our identity is the main thing, a very important thing, because that identity is a tie and it will tie us back to a group. And that group will tie us back to and [sic] area. Like Lin [Linda Crombie], she talks about the eastern side of the desert. When I grew up, my mother

used to talk to me about the desert. And the way she used to talk to me about these mikiris, to me, my picture of the mikiri was that they were like paradise. And it's just the way she explained it. Like she explained all around Dalhousie and things like that, living on bandicoots and possums and all that.

Whatever it is that Arthur Ah Chee is passing on to other members of the group does not appear to have anything to do with affiliations to sites on or associated with the land claimed, either by reference to traditional knowledge of dreamings, or by reference to the continued presence of the spirits of the ancestors of the claimants.

4.11 No finding of common spiritual affiliations

The state of the evidence is such that it is impossible for me to make a finding that each member of the claimant group shares in common with each other member the common spiritual affiliations to a site on or associated with the land claimed, of which the definition of “traditional Aboriginal owners” in s 3(1) of the Land Rights Act speaks. It is one thing for Linda Crombie to say (as she did) in relation to her belief about the presence of spirits at *Parlani* (site 2), *Tjilpatha* (site 1) and *Pulapurdunha* (site 3) that it is the “same for all the Wangkangurru [sic].” It is another for others of the Wangkangurru language group to recognise that they have the same affiliations. Some members of the group may have affiliations through the presence of ancestral spirits, but on the evidence these affiliations appear not to be shared, even by all of the relatively small number of claimants who gave evidence. It is therefore unlikely that they are shared by significant numbers of the remaining members of the group who have the capacity to possess spiritual affiliations.

In the absence of any systematic or habitual process of teaching, it is unlikely that all of the younger members of the group will have the opportunity to assimilate such spiritual affiliations, as they acquire the capacity to have them.

4.12 No finding of primary spiritual responsibility

The lack of common spiritual affiliations makes it unnecessary, and indeed impossible, to determine whether any spiritual affiliations

are such as to place the members of the group under a primary spiritual responsibility for any site or land.

4.13 Right to forage

4.13.1 It is unnecessary to determine whether the claimants have a right to forage over the land claimed. There is some evidence that they do, and no evidence to the contrary. There is no evidence relating to so much of the land claims that lies outside the area of the five identified sites, but it is probable that at, and in the vicinity of, those sites, there is a right to forage. Linda Crombie described the old people using grinding stones to prepare food at *Tjilpatha* (site 1). She and Jimmy Crombie also drew attention to plants at the site and gave evidence of their uses as food. Linda Crombie engaged in the following exchange with counsel for the claimants:

When you come here, if you want to go and take that bush tucker that you were looking at today and showing the Judge, you can just take that?

Yes, I can take it without asking anyone, you know, that's my –

So, all Wangkangurru can take that?

Yes, Wangkangurru people can take them, not somebody else, not Wangkamadla or anybody like that.

4.13.2 At *Pulapurdunha* (site 3), Jimmy Crombie gave evidence, in answer to questions, as follows:

Jim, if you want to take that food like you took yesterday, out of the ground, do you have to ask anyone to do that?

I don't have to ask anyone David, it's mine.

It's yours?

Yes. I can pick him up and eat him.

Now, if I want to come along and eat the tucker off this country, do I have to ask?

Yes, David. I feel that you would have to ask.

Why is that?

Because that's my food, not yours.

Mm. It's Wangkangurru?

Wangkangurru food.

4.14 No finding that claimants are traditional Aboriginal owners

The claimants have failed to satisfy that element of the definition of “traditional Aboriginal owners” in s 3(1) of the Land Rights Act that requires the members of the local descent group to have common spiritual affiliations to a site on the land. They have therefore failed to establish that they are traditional Aboriginal owners of the land claimed, within the meaning of that definition. There is no reliable evidence that any other Aboriginal people might be traditional Aboriginal owners of the land claimed within that definition. I am therefore unable to make a finding of the kind contemplated by s 50(1)(a) of the Land Rights Act, that the Aboriginal people making this land claim, or any other Aboriginal people, are traditional Aboriginal owners of the land claimed.

5. STRENGTH OF ATTACHMENT

5.1 Assessing strength of attachment

Section 50(3) of the Land Rights Act requires the Aboriginal Land Commissioner, in making a report in relation to a land claim, to “have regard to the strength or otherwise of the traditional attachment by the claimants to the land claimed”. In any group of claimants, there will be variations in the strength of traditional attachments of members of the group. What seems to be required is a generalised assessment of strength (or weakness) of traditional attachments, based on the evidence.

5.2 Evidence of variation in strength of attachment

The sort of variation possible is illustrated in the present claim by some evidence of Raelene Hudson. As the passage I have quoted in 4.10.4 makes clear, a son of hers, and two sons of her sister have been given traditional middle names (Anintjula, Iriniyili and Walyi), associated with rainmaking histories in Wangkangurru country. Of those children, Raelene Hudson said “They know that their grandfather come [*sic*] from the Simpson Desert and they feel strong about that.” On the other hand, Raelene Hudson said of children of a deceased first cousin of hers and a non-Aboriginal woman “they don’t know the cultural part of it, I don’t think.”

5.3 Spiritual affiliations not established

In attempting to generalise about strength of traditional attachment in this land claim, perhaps the most important factor is that traditional knowledge, of histories relating to sites, is no longer held by many of the members of the claimant group, and there is no system to pass it on, or even to revive it from available sources. I have dealt with this issue in 4.7. The attempt to fill that gap by basing the claim on the presence of ancestral spirits in the land claimed has been unsuccessful, in that the members of the group as a whole have not been shown to have, or to be likely to acquire, spiritual affiliations to sites on that basis. These issues are dealt with in 4.8 – 4.10.

5.4 Evidence of attachment

5.4.1 The evidence does disclose some express assertions of attachment to the land claimed. They include the evidence of Raelene Hudson about naming children, with which I have dealt in 5.2. It is also very clear from her evidence that Linda Crombie's attachment to the land claimed was very strong, because she spent time there when she was young, with her grandparents and parents.

5.4.2 Jimmy Crombie and Don Rowlands have towed a caravan to *Tjilpatha* (site 1), built a roof over it, and installed a water tank to catch rain water from the roof. Jimmy Crombie engaged in the following exchange about this, explaining the reason for establishing this camp as:

because we thought we might go there a week or so just to look at the country and I'd be more than happy to stay there for a week or so because I'm breaking my neck to back into [*sic*] the country. I'm looking at things that later on we'd be able to live there and...I could go there and take my horse there and live out there with my horses, just look at the country and ride through the country nicely because my horse wouldn't leave much track – won't cut the country up too much. I think that's something I'd like to do.

If you had that out there, is there something you would still want to be looking for out there?

I'll be looking till the day I die...in that country for those things. That country is so – the Aboriginal people left it so clean. The country is clean, that country...

Those things you said – are those the places your grandfather told you about that you haven't found yet?

Well I haven't found a lot of those mikiri that my grandfather told me and that's why I'm searching, I'm going to search for.

Why is that important for you to keep following that along?

Because Granddad told me and I like to be on his track to follow and see what he left or seen what him and his relatives left – relatives left there years ago. I'd love to see it.

5.4.3 In the following exchange, Don Rowlands explained the placing of the caravan and associated works as:

because we want to be able to come and stay in the country for a long time. And as it stands now, well you can't do that because you run out of water in no time.

...

And is it important for you to have a base on the land here?

Oh, yes. It really is important. We need that base for a camp so that we can come back to the land and live. And it's really important that we do have water, but yes, it's really important that we can come back and live there.

Do you have to ask anyone to come back on this country?

No. We haven't had to and I don't think we need to, so we feel free to go there and do that.

Why is that?

Oh, it's our country, Wangkangurru country. It belongs to us Wangkangurru mob...

5.4.4 Kenny Crombie also expressed a desire to live on the land claimed. His evidence was as follows:

If land claim succeeds and the title is handed over to a land trust for Wangkangurru people to look after, have you thought about what you'd like to do and talked to other people about that?

Well, first of all, I'd like a plan of management, how we can manage the place, sort of get things going...like for instance, first things like water out there, where maybe we can go back out there and stay...plan of management – that sort of thing.

Would you like to have any help from the Northern Territory Government side?

Oh yes. Draw up plans, how we can actually work the land, sort of thing and get it going and for other people who would like to come through there and see what actually what we're doing.

What about those places where the people are buried and the mikiris there?

Well, they'd be kept secretly. It's only for the Wangkangurru people to know where those areas are and I don't feel that we should be letting everyone go up there and destroy it, sort of thing, where it could be kept in some sort of form where it may remain there for a period of years.

Protect that?

Yes

Would it be all right for tourists to keep driving through on the road they use today?

Yes, yes along the road. But if they go off the road, they need further permission for that reason. Like if they go off the road – get broken down or something, then it's up to the community go out there and search for them so we put more stress on people around here and the way the Government policy is run today, there is no money to go out there and do that sort of thing.

So that road is all right? Would it be all right for people to camp near the road?

Yes. Near the road.

...

Why is it important to you, if you could say a bit more, to protect those mikiri places, those sites?

For one thing, as we all know, people going in and treading on things and destroying things, like with other areas that I've been in – I won't say where, but there are places where people are not just looking after the place sort of thing. They go in there, take things or they go in there and leave rubbish or things like that where it should be more protected.

If I could take it a bit further, when you say it should be more protected, why is that important to you and to your Wangkangurru mob, for that protection?

Well, it's part of our culture and it's part of our land sort of thing through our grandfather's side.

...

You said if you could get the water there and a facility there, you might even – you didn't say you would assist tourists but you said something like that. Is that you're thinking could happen in the future?

Well, if we had water there, maybe you can go out there and live for a start, somewhere and then, like housing and that sort of thing later. But at this time we just need water there or something.

5.4.5 This evidence of Raelene Hudson, Linda Crombie, Jimmy Crombie, Don Rowlands and Kenny Crombie could be taken to demonstrate traditional attachment of some strength by them. It is not matched by evidence from other witnesses. There were numerous statements of a desire to visit the land claimed, and to bring children to it so that they would know where their ancestors came from, but no expressions of a desire to maintain any stronger connection.

5.5 Finding on strength of attachment

On the evidence, the strength of attachment of the claimants as a group is toward the low end of the spectrum.

6. MATTERS FOR COMMENT

6.1 Statutory requirement to comment

Section 50(3) of the Land Rights Act also requires the Aboriginal Land Commissioner to comment on each of the following matters:

- (a) the number of Aboriginals with traditional attachments to the land claimed who would be advantaged, and the nature and extent of the advantage that would accrue to those Aboriginals, if the claim were acceded to either in whole or in part;
- (b) the detriment to persons or communities including other Aboriginal groups that might result if the claim were acceded to in whole or in part;
- (c) the effect which acceding to the claim either in whole or in part would have on existing or proposed patterns of land usage in the region; and
- (d) where the claim relates to alienated Crown land – the cost of acquiring the interests of persons (other than the Crown) in the land concerned.

6.2 Numbers advantaged

Assessing the number of Aboriginal people with traditional attachments to the land claimed who would be advantaged if the claim were acceded to is a difficult task in this land claim. As I have said in 3.4.4, the number of claimants named in the claimant profiles (exhibit CLC 5) is 488. Some of those people will have died since the claimant profiles were prepared in 1996. Others will have been born since then, so the group itself is likely to have increased in number. I cannot tell the number of the increase. It can be assumed that each of the members of the group would be advantaged by a grant of the land claimed to a land trust, in accordance with the Land Rights Act, as the land trust would hold the land on their behalf, as well as on behalf of any other Aboriginal people who have traditional entitlements in relation to the land claimed.

I have no evidence that there are other Aboriginal people who would be advantaged, or what their numbers might be. It is possible that there would be people of the Wangkamadla language group who would have traditional entitlements of some sort. It is also possible that some of the claimants might be married to Aboriginal people who are not members of the Wangkangurru language group, but who might benefit from a grant of the land claimed to a land trust. The best estimate I can make of the number of Aboriginal people who would be advantaged is that it would probably exceed 500.

6.3 The nature and extent of the advantage

6.3.1 If the land claimed were to become Aboriginal land under the Land Rights Act, there would be practical advantage to all those people. The land trust that would be created to hold the title to the land claimed would hold inalienable freehold title. Future proposals for mining would have to be approved by the Central Land Council, under the system operating through Part IV of the Land Rights Act. The system established by the Land Rights Act and the *Aboriginal Land Act* (NT), whereby people require permits to access Aboriginal land, would mean that the Central Land Council would control access, and those who did not have permits would not be able to enter the land claimed lawfully. Before exercising its powers in relation to either mining proposals or the grant of permits for entry, the Central Land Council would be obliged to consult all those people who have traditional entitlements to the land claimed.

If mining were conducted, the Central Land Council would receive royalty equivalents from the Commonwealth Government, and this might result in financial benefit to the persons advantaged. In the absence of evidence of any likely mining proposals, this advantage must be described as theoretical.

6.3.2 There would also be intangible advantage, resulting from knowledge that the traditional ownership of the Wangkangurru people of the land claimed had been recognised in Australian law and at the highest level of government. The effect of this on self-esteem and pride in Aboriginal identity could be important. The permit system would also assist in the control and protection of burial sites, to which a number of the claimants who gave evidence attached much importance. It would contribute in this way to the intangible advantage.

6.3.3 In practical terms, for those who would like to visit sites and show those sites to their children, the advantage would not be great. The land claimed is currently in public ownership and there do not appear to be restrictions on entry to it (although it might be necessary to have permits to traverse the Simpson Desert National Park in Queensland and the Simpson Desert Conservation Park in South Australia, in order to reach it). Access to the sites is available. There might be some advantage in that those exercising such access would be less likely to encounter other visitors, because of the permit system, and conditions in permits might have some effect in keeping other visitors away from sensitive areas, such as burial grounds.

6.4 Detriment to other Aboriginal groups

There is no evidence that any other Aboriginal groups would suffer if the land claim were acceded to. I have not found that people of the Wangkamadla language group are traditional Aboriginal owners of the land claimed but, to the extent to which they have traditional entitlements, the Central Land Council would be obliged to consult them in relation to mining proposals and permit applications.

6.5 Detriment to persons and communities

6.5.1 By letter dated 31 July 1998, the Solicitor for the Northern Territory conveyed to me the views of the Department of Environment and Heritage for the State of Queensland and the Department of Environment and Natural Resources of the State of South Australia. The former wished to ensure that access through the Northern Territory to the Simpson Desert National Park in Queensland would be maintained. The latter expressed a similar wish in relation to the Simpson Desert Conservation Park in South Australia. Assuming that the portions of the four-wheel drive tracks known as the K1 Line and the QAA Line that lie within the land claimed would be excluded from any grant of the land claimed as roads over which the public has a right of way (see 7.2.2), these wishes would be largely met and there would be little detriment to other persons or communities. Those who wish to cross or visit the Simpson Desert in vehicles would be entitled to continue to do so, and their entitlement would include camping in the road reserve.

6.5.2 Only if people wished to leave the public roads referred to in 7.2.2 would they need permits.

This may include people using motor-bikes or camels, or choosing to walk (as has been done occasionally, to cross the Simpson Desert). It might also include those who choose to cross in vehicles from tracks north of the land claimed.

There is a track running north-north-west from the junction of the K1 Line and the QAA Line within the land claimed. This track is capable of being used by people driving four-wheel drive vehicles. It links with the Madigan Line from the west in South Australia. It also continues to the Lindsay Bookie Tourist Camp, at the northern end of the Simpson Desert. The Northern Territory Government does not claim that it is a road over which the public has a right of way, even though it is used by members of the public to pass and repass. If this land claimed were acceded to, and the land on which this track lies were to become Aboriginal land, members of the public who wish to use the track would suffer detriment in having to apply for and obtain permits before being entitled to use the track.

6.6 Effect on existing or proposed patterns of land usage in the region

- 6.6.1** The existing pattern of land usage in the region of the land claimed is almost exclusively adventure tourism by those seeking the desert experience. As I have said in 1.5.1, 2.3 and 2.4, the land claimed abuts the Simpson Desert National Park in Queensland and the Simpson Desert Conservation Park in South Australia. The most common human activity within and in the region of the land claimed consists of tourists visiting or driving across the Simpson Desert. Little else seems to be practicable, because of the dry climate. Although Kenny Crombie spoke in his evidence of the possibility of working the land (see 5.4.4), the conduct of any farming activity on or in the immediate vicinity of the land claimed seems very remote. There is no evidence that acceding to this land claim in whole or in part would have any significant effect on the existing or proposed pattern of land usage in the region, and I cannot imagine any such effect.
- 6.6.2** In written submissions on behalf of the claimants, the Central Land Council submitted that mineral exploration would not be affected if this land claim were acceded to, because a grant of the land claimed to a land trust would not affect mining interests.

This is the case with any existing mining interests. Future proposals for mining would be subject to the regime in Pt IV of the Land Rights Act, under which mining activities would be expected to continue with the consent of the land trust, reflecting the views of those with traditional entitlements to the land claimed.

6.6.3 The Central Land Council also submitted that there would be benefit from the application of the sorts of land management programs administered by the Central Land Council in relation to Aboriginal land elsewhere in the Northern Territory. These programs are designed to involve Aboriginal people in fire management, the control of feral animals (particularly camels) and the monitoring of native flora and fauna.

6.7 The cost of acquiring interests

As the land claimed is entirely unalienated Crown land, there is no requirement for me to make any finding as to the cost of acquiring interests in the land, if the land claim were acceded to.

7. OTHER MATTERS

7.1 Acquisition of secure occupancy

7.1.1 Section 50(4) of the Land Rights Act provides:

In carrying out his or her 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.

7.1.2 There is no place within the land claimed at which any Aboriginal people of the Wangkangurru language group (or any other Aboriginal people) are living. No occasion arises to consider whether any such people should be able to acquire secure occupancy of such a place.

7.1.3 As I have said in 3.3.2, most of the claimants no longer live on land that could be described as country of the Wangkangurru language group. The three claimant witnesses who expressed a desire to live on the land claimed, Jimmy Crombie (see 5.4.2), Don Rowlands (see 5.4.3) and Kenny Crombie (see 5.4.4), are all described in the claimant profiles (exhibit CLC 5) as living in Birdsville. On the evidence, Birdsville is in the country of the Wangkangurru language group. Those three men therefore do not fall within the category of Aboriginal people who are not living at a place on the traditional country of their tribe or linguistic group. It is unnecessary to consider whether they should be able to acquire secure occupancy of a place on the land claimed.

7.1.4 Although non-Aboriginal explorers in the 19th century found substantial numbers of people living, apparently permanently, at mikiri sites, it is highly unlikely that any place within the land claimed would support a significant resident population in the 21st century. It is unlikely that Jimmy Crombie, Kenny Crombie, Don Rowlands, or any other claimants, would wish to return to a traditional hunter-gatherer lifestyle, with all the privations that it would involve. There is no evidence of any desire to do so. The installation of a caravan, with a roof to collect rainwater and a tank to store it (see 5.4.2 and 5.4.3), suggests otherwise. Jimmy Crombie's evidence of his desire to use horses to search the land claimed (see 5.4.2) also suggests that he would not be attempting to rely entirely on mikiri water and whatever food he could find on the land claimed to sustain himself and his horses. The climate of the region makes it unlikely that rainwater tanks would provide a consistent, long-term water supply for a significant population. It is much more likely that Jimmy Crombie, Kenny Crombie, Don Rowlands, and perhaps others, would use the caravan (and any other similar installations) for temporary stays on the land claimed and that they would bring with them most of the food and other supplies they would need.

7.2 Roads over which the public has a right of way

7.2.1 The effect of s 11(3) of the Land Rights Act is to require that any grant of land to a land trust pursuant to the Land Rights Act must exclude any road on that land over which the public has a right of way.

It is customary for the Aboriginal Land Commissioner to include in a report a finding as to whether the land the subject of the relevant claim includes any road over which the public has right of way.

7.2.2 In the case of the land claimed, the statement of Bernard Ambrose, Regional Manager Construction, Department of Transport & Works, Alice Springs (exhibit NTG 1) establishes that the only roads over which the public has a right of way are portions of the tracks known as the K1 Line, and the QAA Line that lie within the land claimed. The K1 Line enters the land claimed from the south close to Poeppel Corner and proceeds north-north-west, between sandhills, for 18 kilometres.

At that point, close to *Tjilpatha* (site 1), it becomes the QAA line and proceeds east to Birdsville, crossing the sandhills. These tracks are unformed and are not maintained by the Northern Territory Government. They are used principally by tourists in four-wheel drive vehicles to access the Simpson Desert. In particular, in conjunction with the French Track, which intersects with the K1 Line a little south of Poeppel Corner, they are used as part of the crossing of the Simpson Desert, usually from west to east, so as to ascend the sandhills on their less steep western faces. Estimates of the number of vehicles that might use the portions of the tracks within the land claimed range from 2000 to 3500 per year. The use is as of right, as members of the public. In the event that the land claimed is granted to a land trust pursuant to the Land Rights Act, the Northern Territory Government would seek the exclusion of a road reserve of 100 metres (50 metres each side of the centre line of the track) for each track.

8. CONCLUSION

8.1 Inability to find that there are traditional Aboriginal owners

For the reasons I have given in chapter 4, I am unable to make a finding that there are Aboriginal people who are the traditional Aboriginal owners of the land claimed. This is because the evidence does not establish that members of the claimant local descent group, the Wangkangurru language group, have common spiritual affiliations to a site or sites on or associated with the land claimed.

8.2 No recommendation for the land to become Aboriginal land

I therefore do not make a recommendation of the kind contemplated by s 50(1)(a)(ii) of the Land Rights Act, that the land claimed or any part of it be granted in accordance with ss 11 and 12 of the Land Rights Act. In the absence of a finding that there are traditional Aboriginal owners of the land claimed, I have no power to make such a recommendation.

8.3 Final disposal of this land claim

It is my understanding that, pursuant to s 67A(5)(c)(ii) of the Land Rights Act, when the Minister for Indigenous Affairs is informed of my inability to make such a finding, by his receipt of this report, that will dispose of this land claim finally.

APPENDIX 1

List of sites at or near which evidence was taken

Tjilpatha (site 1) 24 June 1996

Pulapurdunha (site 3) 27 May 1997

Mirri-ngupa-ngupa (site 4) 27 May 1997

I also viewed *Parlani* (site 2) and *Mirri-pungkinha* (site 4a), but did not land to visit those sites.

APPENDIX 2

List of the representatives of the parties and the names of my counsel assisting and my consulting anthropologist

Counsel for the claimants: Mr David Avery

Instructed by: The Central Land Council

Counsel for the Attorney-General for the Northern Territory: Mr Tom Pauling QC (Solicitor-General for the Northern Territory) and Mr Vance Hughston

Instructed by: The Solicitor for the Northern Territory (Mr Paul Walsh and Mr Dominic McCormack)

Counsel assisting the Aboriginal Land Commissioner: Mr AC Neal

Consulting Anthropologist to the Aboriginal Land Commissioner:
Dr Deborah Bird Rose

Executive Officer to the Aboriginal Land Commissioner: Mr Robert Bird

APPENDIX 3

List of the witnesses who gave evidence during the inquiry

(In alphabetical order of surnames)

Arthur Ah Chee

Dean Ah Chee

Ethel Butler

Harry Crombie

Jimmy Crombie (Naylon)

Kenny Crombie

Linda Crombie

Valerie Fuschtei (Naylon)

Lynette Harris

Norman Harris

Raelene Hudson

George Lumpkin

Audrey McLean

Joylene Naylon

Margaret Naylon

Robert Naylon

Johnny (Robert) Parker

Mary Parker

Donald Rowlands

Maria Stuart

Dr Peter Sutton

APPENDIX 4

List of exhibits tendered during the inquiry

Note: Exhibits marked “R” are subject to restrictions on access and use, by direction of the Aboriginal Land Commissioner, pursuant to s 51 of the *Aboriginal Land Rights (Northern Territory) Act 1976*. Reference to the transcript of the inquiry is necessary to ascertain the nature and scope of the restrictions imposed.

Exhibits CLC 1 – CLC 10 were tendered on behalf of the claimants

Exhibits NTG 1 – NTG 6 were tendered on behalf of the Attorney-General for the Northern Territory

| Exhibit no | | Description of exhibit |
|-------------------|----------|---|
| CLC 1 | | Submission on title with annexures |
| CLC 2 | R | Anthropologists’ report |
| CLC 3 | R | Genealogies |
| CLC 4 | R | Site map |
| CLC 5 | R | Claimant profiles |
| CLC 6 | R | Site register supplement |
| CLC 7 | R | Alterations and amendments to genealogies |
| CLC 8 | | Resume of Dr Peter Sutton |
| CLC 9 | | Submissions on behalf of the claimants |
| CLC 10 | | <i>New Age Spirituality and the Simpson Desert (Wangkangurru) Land Claim</i> by Peter Sutton |
| NTG 1 | | Statement of Bernard Ambrose, with two annexures |
| NTG 2 | | Extract from the transcript of the Finke River Land Claim, being pages 187-188, 190-191 and 197-200 |
| NTG 3 | | Submissions of the Attorney-General for the Northern Territory |
| NTG 4 | | <i>Spiritual Affiliation: The Quality of an Emerging Wangkangurru Tradition</i> by Basil Sansom |
| NTG 5 | | Resume of Basil Sansom |

Exhibit no

NTG 6

Description of exhibit

Statement of Robert Kendrick with annexure

APPENDIX 5

Decision and reasons for decision on restricted transcript

(See 1.8.4)

I have received your facsimile letter dated 4th July 1996. It appears to have been written on a misunderstanding of the issues raised in my letter of 1st July.

It is no part of my function to determine whether a breach has occurred of any undertaking given to the Queensland Land Tribunal. I have no desire to attempt to make any such finding. My concern is to ensure that anything I do does not facilitate a possible breach, and to maintain respect for the processes of the Land Tribunal.

I am still of the view that publication of the transcript of cross-examination by counsel for the Attorney-General for the Northern Territory, in a form which is available for purchase by anyone, for any purpose, may give rise to a breach of the undertaking.

At the time of writing my letter of 1st July, I was well aware that access to the restricted transcript of the Land Tribunal's proceedings was sought on the basis that it would be used for cross-examination. I was also aware of the undertaking which had been given that the contents of the transcript would not be revealed to *anyone* other than for the purposes of the Wangkangurru Land Claim No. 156. It is a novel argument that communication of the purpose negates or overrides the undertaking, especially when the two are not mutually exclusive. It is at least arguable that, if the transcript material is to be used for cross-examination, it cannot be in public session, without breach of the undertaking.

It is not clear to me that the undertaking is to be construed as applicable only to material not otherwise in the public domain. It is plain that, if the Solicitor for the Northern Territory were to show the transcript to a person who had no role at all in the Wangkangurru Land Claim No. 156, the possibility that a breach of the undertaking had occurred would have to be considered, even if it could be shown that the Land Tribunal had summarised the evidence "comprehensively", and quoted parts of it, in its report. I do not presume that the undertaking was intended to have no meaning, in the light of the contents of the Land Tribunal's report.

It is true that the evidence in the Queensland claim was the subject of reference in the anthropologist's [*sic*] report (exhibit CLC2) and that passages from that transcript are quoted in that report. I have assumed (whether correctly I do not know, as it is no part of my function to inquire) that this has been done with the written consent of the claimants in the Queensland claim, or their authorised representative. If it were to turn out that this assumption is incorrect, there would be a possible breach of the direction of the Land Tribunal. The existence of such a breach could not justify a breach by the Solicitor for the Northern Territory of an undertaking given to the Land Tribunal.

In any event, reference, and even quotation, in exhibit CLC2 has not had the effect of putting the restricted transcript into the public domain. The exhibit itself is subject to appropriate restrictions.

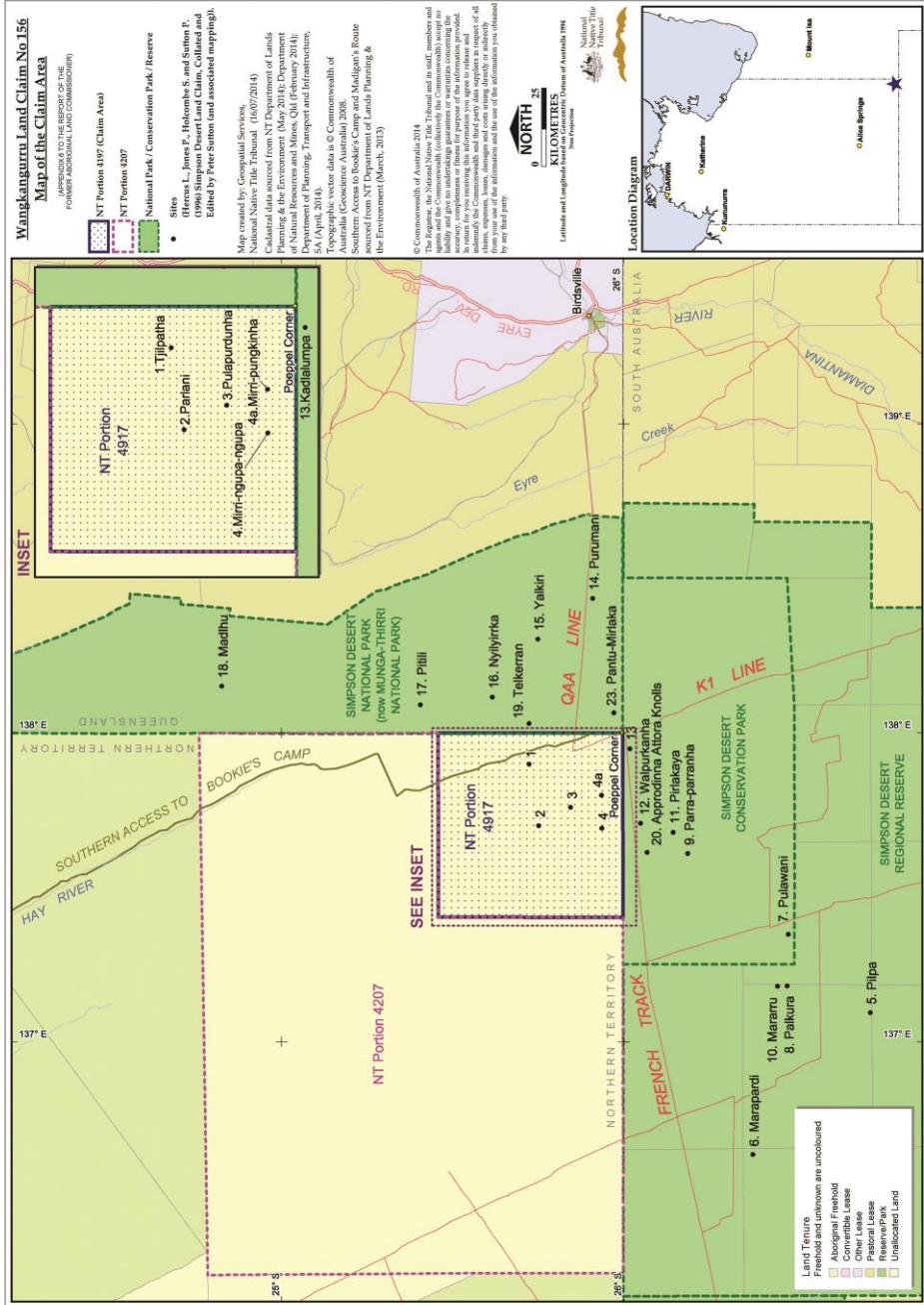
I am therefore not able to accept as resolving the issue the recollection of counsel for the Attorney-General for the Northern Territory that he did not ask "any questions which revealed any information about the Queensland proceedings which was not already in the public domain". This is simply not the issue. The issue is whether any questions were asked which might reveal, by way of publication in the transcript of the Wangkangurru Land Claim No. 156, the contents of restricted transcript of the proceedings in the Land Tribunal. I note that you offer me no assurance from counsel for the Attorney-General for the Northern Territory that such revelation would not occur.

I have a clear recollection of witnesses being asked whether they had said particular things in the Land Tribunal. It is this recollection which gives rise to my assumption that cross-examination was from the transcript of proceedings in that tribunal. If this assumption turns out to be incorrect, when the transcript of evidence given on 24th June 1996 is examined, and I can be assured that there is no possibility of breach of any undertaking given to the Land Tribunal, then the transcript (or parts of it) can be released from restrictions. In the meantime, I remain of the view that the transcript of cross-examination on that day should be restricted.

I therefore direct that the transcript of cross-examination by counsel for the Attorney-General for the Northern Territory on 24th June 1996 be bound separately from the other transcript and that it not be used or divulged other than for the purposes of the Wangkangurru Land Claim No. 156.

APPENDIX 6

Map of the claim area



Wangkangurru Land Claim No. 156

Report of the former Aboriginal Land Commissioner, Peter R A Gray,
to the Minister for Indigenous Affairs and to the Administrator of the Northern Territory