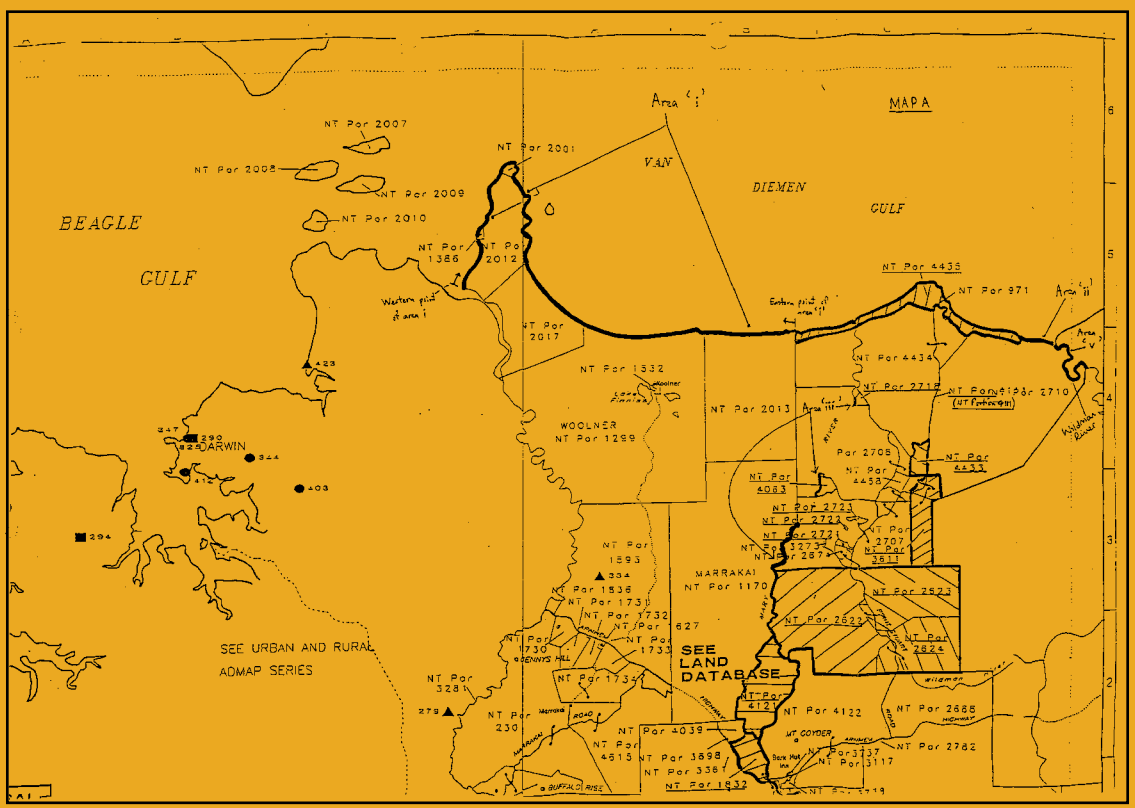
AUSTRALIA

Aboriginal Land Rights (Northern Territory) Act 1976

Woolner / Mary River Region Land Claim No. 192

Report of the Aboriginal Land Commissioner
to the Minister for Indigenous Australians
and to the Administrator of the Northern Territory



ABORIGINAL LAND RIGHTS (NORTHERN TERRITORY) ACT 1976

Woolner / Mary River Region
Land Claim No. 192

Report No. 75

Report and Recommendation
of the Aboriginal Land Commissioner,
the Hon John Mansfield AM QC,
to the Minister for Indigenous Australians
and to the Administrator of the Northern Territory

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8 December 2021

The Hon Ken Wyatt AM, MP
Minister for Indigenous Australians
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House of Representatives
Parliament House
CANBERRA ACT 2600

By email: Minister.wyatt@ia.pm.gov.au

Dear Minister,

RE: Woolner / Mary River Region Land Claim (No. 192)

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

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

Yours faithfully,

The Hon John Mansfield AM QC
Aboriginal Land Commissioner

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8 December 2021

The Hon Vicki O'Halloran AO
Administrator of the Northern Territory
Office of the Administrator
14 The Esplanade
DARWIN NT 0800

By email: govhouse@nt.gov.au

Dear Administrator,

RE: Woolner / Mary River Region Land Claim (No. 192)

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

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

Yours faithfully,

The Hon John Mansfield AM QC
Aboriginal Land Commissioner

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.

CONTENTS

1. INTRODUCTION AND SUMMARY OF ISSUES

1. This Report is made to the Minister for Indigenous Australians (the Minister) and to the Administrator of the Northern Territory (the Administrator) pursuant to section 50(1)(a)(ii) of the *Aboriginal Land Rights (Northern Territory) Act 1976* (the ALRA). The Report relates to the conduct of an Inquiry undertaken by the Aboriginal Land Commissioner (the Commissioner) pursuant to section 50(1)(a)(i) of the ALRA into an application made by or on behalf of Aboriginals claiming to have a traditional land claim to an area of land being unalienated Crown land in the Northern Territory.

2. That claim is the Woolner / Mary River Region Land Claim (Woolner LC), being the claim numbered 192 in the register of claims held by the Office of the Commissioner. It was made by application dated 27 May 1997 and lodged on 29 May 1997. By letter of 4 June 1997, the Northern Land Council on behalf of the claimants indicated that the 27 May 1997 application contained 'some typographical and/or factual errors'; an amended application dated 2 June 1997 was filed with that letter.

3. It is useful to note briefly the nature and purpose of the inquiry.

4. Section 50(1)(a) of the ALRA requires me to ascertain whether those Aboriginals who have made a traditional land claim or any other Aboriginals are the traditional Aboriginal owners of the land claimed, and to report my findings to the Minister and to the Administrator. Where I find that there are Aboriginals who are the traditional Aboriginal owners of the land, I am to make recommendations to the Minister for the granting of the land or any part of the land in accordance with section 11 or section 12 of the ALRA. Section 50(3) of the ALRA provides:

> In making a report in connexion with a traditional land claim a Commissioner shall have regard to the strength or otherwise of the traditional attachment by the claimants to the land claimed, and shall 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 either in whole or in part;
>
> (c) the effect which acceding to the claim either in whole or in part would have on the 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.

5. In this Report, I have set out the relevant details of each of the claims made on behalf of the claimants, the Inquiry process, the evidence produced in support of the claim to traditional Aboriginal ownership of the claimed lands, and I have made detailed findings which lead to my recommendations under section 50(1)(a) of the ALRA. It has been a relatively simple process, as the Northern Territory accepted that the present claimants are the traditional Aboriginal owners of the claimed areas. That acceptance came with some qualifications, which I address in detail below.

6. In addition, the matter to be addressed by section 50(3)(a) of the ALRA was not contentious. Indeed, no party other than the Northern Land Council on behalf of the claimants made submissions on that topic.

7. Section 50(3)(b) requires me to comment on the detriment to persons or communities that might result if the claims were acceded to in whole or in part. There were a number of persons or entities who asserted some form of detriment. None were Aboriginal groups. I have also referred to the evidence adduced by the range of persons and entities and who claimed that they might suffer detriment if the claim were acceded to. I have reported on those claims of detriment in accordance with section 50(3)(b), and on the matters referred to in section 50(3)(c). The claimants in response often proposed ways by which asserted detriment might be addressed. I have included in this Report when addressing the detriment claims details of those proposals and my comments upon them.

8. While it is not the function of the Commissioner to make recommendations to the Minister about how to address the concerns of detriment, I have endeavoured to address each submission on detriment in a manner which I hope will be of assistance to the Minister.

9. I note that there were no other Aboriginal groups who asserted that detriment might be suffered by their communities or by any part of their communities if each of the claims were acceded to by the Minister: see section 50(3)(b) of the ALRA.

10. I note also that the claims do not relate to alienated Crown land, so the matters to which section 50(3)(d) refers are not required to be addressed in this Report.

11. Subject to those comments, this Report, as required, contains my findings and recommendations in respect of the Woolner / Mary River Land Claim (No. 192).

2. HISTORY, APPLICATIONS AND THE INQUIRY

12. It is useful to first identify the general area surrounding the Woolner LC.

13. The claim relates to an area in the 'Top End' of the Northern Territory, located to the east of Darwin. The westernmost areas of the Woolner LC surround Cape Hotham in the north, and extend, generally speaking, along the intertidal zone of that coastline to the Wildman River which borders Kakadu National Park in the east. It is briefly interrupted at Cape Hotham by an area subject to claim in the Wulna Land Claim (No. 155), after which it resumes. That land claim, which is yet to be finalised, is discussed below.

14. At around the midpoint between Cape Hotham and the Wildman River lies the mouth of the Mary River. At that point, the Woolner LC extends upstream to the south, encompassing the beds and banks along various stretches of that river. These beds and banks abut several pastoral stations as the river runs south to the southern extremity of the claim areas, at or around where the Mary River meets the Arnhem Highway. While the Mary River runs much further to the south after that road, the Woolner LC does not extend south of that point.

15. The claim areas as expressed in the original claim were as follows:

    (i) Intertidal Zone in the Woolner Region

    All that land in the Northern Territory of Australia between the high water mark and the low water mark, commencing at the southern-most point of the western boundary of Northern Territory Portion 2012 and extending to the eastern-most point of the northern boundary of Northern Territory Portion 2013.

    …

    (ii) Intertidal Zone in the Mary River Region

    All that land in the Northern Territory of Australia between the high water mark and the low water mark, commencing at the eastern boundary of Northern Territory Portion 4435 and extending to the eastern bank of the Wildman River at its mouth.

    …

    (iii) Beds and Banks of the Mary River

    All that land in the Northern Territory of Australia being several portions of the beds and banks of Mary River as follows:-

    First, that portion of the Mary River which is adjacent to the western boundary of Northern [sic] Portion 2718;

    Secondly, that portion of the Mary River from the northern-most point of the western boundary of a small, unmarked portion adjacent to the northern boundary of Northern Territory Portion 4063, to where the Mary River diverges from Northern Territory Portion 4063;

    Thirdly, that portion of the Mary River from where the Mary River meets and becomes adjacent to the eastern boundary of Northern Territory Portion 1170 in a generally southerly direction to the southern-most point of the eastern boundary of Northern Territory Portion 3051;

    and including any islands within the said river.

    …

(iv) Other land in the Mary River Region

All those areas of land in the Northern Territory of Australia being Northern Territory Portions:-

(A) 1832
(B) 4063
(C) 2622
(D) 4111
(E) 4435
(F) 2718
(G) 3611
(H) 2623
(I) 2624
[sic](K) 2721
(L) 2722
(M) 2723
(N) 4433
(O) 4121
…

(v) Beds and Banks of the Wildman River

All that land in the Northern Territory of Australia being the beds and banks of the Wildman River commencing at the mouth of the Wildman River in Van Diemen Gulf and extending in a southerly direction to where the river meets the western boundary of Northern Territory Portion 4061, otherwise known as Kakadu National Park, and including any islands within the said river.

…

(vi) Land seawards of the mainland of the Northern Territory

All that land in the Northern Territory of Australia which is adjacent to, and seawards of the low water mark of the seacoast of the mainland from, in the west, the point where the western bank of the Adelaide River meets the aforesaid low water mark (marked on Map B by the letter 'X') and from, in the east, the point where the western bank of the Wildman River meets the aforesaid low water mark (marked on Map B by the letter ' Y');

including, without limitation:-

(A) any islands, or part of any island, to low water mark, in the region described above, including any rights, members or appurtenances of such an island, or part thereof;

(B) the bed of any bays or gulfs of the mainland or of an aforesaid island (or part thereof), or part of any such bay or gulf, in the region described above; and

(C) all those sandbars, islands, islets, reefs, rocky areas and other formations enumerated on the map attached to this application;

but excluding:-

(D) land which is Aboriginal land under the *Aboriginal Land Rights (Northern Territory) Act 1976*.

…

16. Attached to the original Woolner LC application is a map titled 'Map A'. It is annexed to this Report as Annexure A. It is a rough map which demonstrates the original extent of the land claim. Also attached to the original application is a map titled 'Map B': the areas depicted on that map are not subject to claim for reasons which are detailed below at [26]. Accordingly, that map is not annexed to this Report.

17. The historical background of those areas is detailed in the anthropologists' report of Erika Cherola, Dr. Philip A. Clarke and Adrian Peace, dated 22 December 2017 (the Anthropologists' Report). It is not contentious, but it provides a useful context which I should briefly note.

18. Since the mid-1880s, there has been an array of anthropological and other studies concerning the claim areas. These have included linguistic and other accounts by early settlers and more recently, anthropologists. Unsurprisingly, the more recent studies have unearthed more complex and sophisticated ideas about the original inhabitants of the claim areas than those of their predecessors.

19. The first attempt at permanent British settlement in the Top End took place at Escape Cliffs at Cape Hotham in 1864 on land adjacent to the claim areas. Resistance to the newly arrived Europeans by the local Indigenous population resulted in violent reprisals against them, despite some accommodation in respect of supplies and building materials. Many of the Indigenous inhabitants moved westwards during this time.

20. In 1869 the Escape Cliffs settlement was moved to Darwin, then called Palmerston. Wulna people from the Adelaide River region were thereafter moved to that settlement, resulting in conflict with the local Larrakia people.

21. In the late 19th and early 20th century various reserves and missions were founded in areas proximate to Darwin, with varying degrees of success. Aboriginal people from surrounding areas lived on these reserves and missions, participating in the emerging cattle and buffalo industries. The Anthropologists' Report at p 35 notes that this participation allowed groups to maintain traditional ties and obligations to country throughout this period.

22. However, by 1920 the Indigenous population in the Darwin hinterland (within which much of the claim area is situated) had suffered a 95% decrease in numbers. Massacres and exposure to introduced diseases played significant roles, and led to increasing movement towards Darwin. From that period onwards Aboriginal people from the area largely lived in Darwin itself, or on the eastern stations such as Koolpinyah (which is no longer in operation), Humpty Doo, Woolner or Marrakai. Many of the ancestors of the present claimants are said to have lived on these stations for the majority of their lives.

23. Following the introduction of the ALRA in 1976 the claimants have acted in various ways to gain recognition of their traditional rights and interests in the claim areas. I detail these below in my findings on traditional Aboriginal ownership.

24. I now turn to the procedural history of the application and the Inquiry.

25. As is mentioned above, the Woolner LC application was made on 2 June 1997 by the Northern Land Council on behalf of the claimants. On 13 April 1999, Commissioner Olney directed that the Woolner LC be consolidated with the Wildman River Land Claim (No. 162) (Wildman LC) due to the existence of overlapping claim areas. From that time on, the claims were addressed together at periodic callovers, and were referred to as the 'Woolner/Mary River Region (Consolidated) Land Claim (Nos. 162/192)'.

26. As is the case with several land claims made during that period, the areas originally included in the claim were more extensive that have been pursued in this Inquiry. The area contained in the originating application as Area (vi), namely that seawards of a low water mark, has been recognised as unavailable for claim as a result of the decision of the High Court of Australia in *Risk v Northern Territory of Australia* (2002) 210 CLR 392; [2002] HCA 23.

27. It also came to be accepted that many of the areas in the Woolner LC, which were held by the Northern Territory Land Corporation, were not available for claim under the ALRA as they did not qualify as unalienated Crown land. Following a request to the Northern Land Council on 9 November 2006 for the claimants to provide their claim materials in respect of those areas pursuant to section 67A(7) of the ALRA, on 16 May 2007 Commissioner Olney made a determination under that section and section 67A(10) with the effect of finally disposing of those areas. That disposed of the areas claimed in Area (iv) of the original application.

28. On 15 October 2007, Commissioner Olney further requested that additional information be provided from the claimants through the Northern Land Council pursuant to section 67A(7), this time in respect of areas relating to both the Woolner LC and Wildman LC. In the absence of any response, those areas were finally disposed of on 21 April 2008, without objection. The Wildman LC was thereupon finally disposed of in totality.

29. The remaining areas subject to claim in the Woolner LC were thereafter understood to consist of intertidal zones and beds and banks of rivers: Areas (i), (ii), (iii) and (v) in the original claim.

30. On 19 May 2009, the Commissioner gave notice under section 67A(7) requiring the claimants to present their claim material in relation to those areas within 6 months. Following the decision of the Full Court of the Federal Court in *Huddleston v Aboriginal Land Commissioner* [2010] FCAFC 66; (2010) 184 FCA 551 given on 8 June 2010, that notice, in conjunction with notices in respect of 9 other land claims, was withdrawn on 29 June 2010. It is not necessary to recount that process.

31. The decision of the High Court in *Northern Territory v Arnhem Land Aboriginal Land Trust* (2008) 236 CLR 24; [2008] HCA 29 (*Blue Mud Bay*) determined that, where the grant of land to the traditional Aboriginal owners under the ALRA

extends to the low water mark, permission of the traditional Aboriginal owners is required to access intertidal waters overlying Aboriginal land to the low water mark. To that time, the traditional Aboriginal owner rights to control access to the low water mark was not clear.

32. Following that decision, as was the case with the Woolner LC and other land claims over the beds and banks of rivers and intertidal zones, both the Northern Land Council on behalf of the various claimants and the Northern Territory indicated at periodic callovers before the Aboriginal Land Commissioner that it was preferable for any inquiry into outstanding claims (including this claim) to be deferred while negotiations were undertaken to explore overall resolution of the issues arising from that decision. The progress of those negotiations was periodically notified to the Commissioner. To date, those negotiations have not produced a long-term resolution. Having regard to the passage of time whilst those negotiations were being undertaken without any final outcome, and at the request of the Aboriginal Land Commissioner, the Northern Land Council on behalf of the claimants indicated that it was preparing for an inquiry to be conducted.

33. The primary claim material, which included the Anthropologists' Report referred to above, as well as a site register, genealogies, claimant profiles and the Submission on the Status of Land Claimed, was lodged with my Office on 25 January 2018.

34. In the document entitled 'Submission on Status of Land Claimed' dated 25 January 2018 the Northern Land Council on behalf of the claimants provided an updated map of the claim areas, titled 'Map B'. It is annexed to this Report as Annexure B. 'Area (v)' is that area of the Wildman River which has been withdrawn, having already been scheduled to the ALRA. As is detailed below, parts of 'Area (iii)' have also been withdrawn. Subject to the ruling contained in Annexure E to this Report, Map B accurately reflects the claim areas properly pursued in the Woolner LC.

35. On 1 February 2018 I gave to the claimants and to the Northern Territory, and to other potentially interested persons and entities, notice of an intention to commence an inquiry into the claim. That notice was also publicly advertised in the NT News on 3 February 2018. The notice described four separate areas to be subject to the Inquiry, all being either intertidal zones or beds and banks of rivers in the Woolner, Mary River and Wildman River regions. They are as follows:

    1. <u>The intertidal zone in the Woolner Region</u>

    All that land… between the high water mark and the low water mark, commencing at the southern-most point of the western boundary of Northern Territory Portion 2012 and extending to the eastern-most point of the northern boundary of Northern Territory Portion 2013.

    2. <u>The intertidal zone in the Mary River Region</u>

    All that land… between the high water mark and the low water mark, commencing at the eastern boundary of Northern Territory Portion 4435 and extending to the eastern bank of the Wildman River at its mouth.

3. Beds and Banks of the Mary River

All that land…being several portions of the beds and banks of the Mary River as follows:

(i) that portion of the Mary River which is adjacent to the western boundary of Northern Portion 2718;

(ii) that portion of the Mary River from the northern-most point of the western boundary of a small, unmarked portion adjacent to the northern boundary of Northern Territory Portion 4063, to where the Mary River diverges from Northern Territory Portion 4063;

(iii) that portion of the Mary River from where the Mary River meets and becomes adjacent to the eastern boundary of Northern Territory Portion 1170 in a generally southerly direction to the southern-most point of the eastern boundary of Northern Territory Portion 6976;

And including any islands within the said river.

4. Beds and banks of the Wildman River

All that land… being the beds and banks of the Wildman River commencing at the mouth of the Wildman River in Van Diemen Gulf and extending in a southerly direction to where the river meets the western boundary of Northern Territory Portion 4061, otherwise known as Kakadu National Park, and including any islands within the said river.

36. Apart from the proper interest of the Northern Territory in the identification of the traditional Aboriginal owners, the persons and entities who responded were concerned with the matter of detriment. They are referred to in detail when addressing that issue below. A list of those who gave notice of intention to participate in the Inquiry is also annexed to this Report as Annexure C.

37. The Inquiry then commenced on 2 March 2018 in Darwin, and the primary claim materials referred to above were tendered as evidence without objection. Counsel for the claimants and the Northern Territory were present. Counsel for the following persons or entities claiming detriment were also present: the Northern Territory Cattlemen's Association (NTCA), Marrakai Pastoral Co Pty Ltd (Marrakai Pastoral), a number of pastoral landholding corporations collectively referred to as 'the Walker entities', Paspaley Pearls Properties Pty Ltd (PPP), and Ms Therese Lynn Frost, who is the owner of the land on which the Mary River Wilderness Retreat is operated pursuant to a lease. Other interested parties who were in attendance at that hearing were Berno Brothers Pty Ltd, along with representatives from the Amateur Fishermen's Association of the Northern Territory (AFANT) and from the Northern Territory Seafood Council (NTSC).

38. Subject to the issue identified in the following paragraphs, there was common ground that the areas claimed were all available for claim. The beds and banks and intertidal zones claimed by the time of the hearing had reduced a little from the original claims due to the grant of the Mary River National Park in 2007.

39. Counsel for PPP on that occasion, namely 2 March 2018, identified an issue as to whether one area described in the notice of intention to commence the Inquiry was in fact available to be claimed. Counsel for the claimants accepted that there may have been some uncertainty, and noted that it was capable of resolution by way of advice from the Surveyor-General of the Northern Territory. Counsel for the claimants also indicated that the area subject to claim relating to the Wildman River had already been scheduled to the ALRA. That issue was not pressed any further during the hearing.

40. A timetable was fixed for the exchange of correspondence in respect of the Northern Territory's position on traditional ownership, in addition to the proper ascertainment of the extent of the detriment interests and the Northern Land Council's response on behalf of the claimants.

41. The hearing of detriment evidence took place in conjunction with that of several other land claim inquiries. There were two tranches of oral evidence relating to the Woolner LC: the first between 25-29 June 2018, and the second on 15 May 2019.

42. Prior to the first tranche of detriment evidence, on 22 June 2018 the Surveyor-General provided to my Office an advice which indicated that certain areas of the claim were not properly included in the application and raised at the hearing of 2 March 2018 (the 2018 Advice). During the hearing of 26 June 2018, counsel for the claimants, on the basis of the 2018 Advice accepted that some of the claimed areas were in fact unavailable for claim, as detailed in the 2018 Advice. The 2018 Advice was then received into evidence as Exhibit NT2. The 2018 Advice was supplemented by more detailed compiled plans of the Surveyor-General, which the Northern Territory provided to my office on 25 October 2019 (the 2019 Plans).

43. Throughout 2018 and the first half of 2019 the Northern Land Council on behalf of the claimants and the Northern Territory, with the assistance of its consultant anthropologist Mr Kim Barber, engaged in discussions about the identification of the traditional owners presented in the primary claim materials. On several occasions Mr Barber produced a series of questions for the Northern Land Council's Dr Clarke, which were accordingly responded to over some time. These exchanges resulted in the tendering of further anthropological materials by the claimants, in the form of a supplementary report of Dr Clarke dated 8 March 2019 ('Dr Clarke's Report'), at a directions hearing in Darwin on 12 March 2019.

44. Following Mr Barber's review of the supplementary materials, by a letter to my Office dated 10 May 2019 the Northern Territory accepted that the claimants are the traditional owners of the claimed areas. This was subject to what was termed the 'caretaker' status of one of the claim groups. That position was acknowledged and accepted by the Northern Land Council in a letter dated 18 June 2019.

45. I explore that status in greater detail in my findings on traditional ownership, contained later in this Report.

46. On 5 November 2019 the Northern Land Council on behalf of the claimants wrote to my Office to formally withdraw several areas contained in the originating application of the Woolner LC (the Withdrawal) in part based upon the 2018 Advice and in part to give effect to the commonly adopted understanding in relation to the Mary River National Park and the 'scheduling' of the Wildman River section. As foreshadowed at the commencement of the hearing for this Inquiry on 2 February 2018, the area described in the application as 'Beds and Banks of the Wildman River' was appropriately withdrawn on the basis that it had already been scheduled as Aboriginal land under the ALRA. Some of the areas referred to as 'Beds and Banks of the Mary River' were also withdrawn from the claim on the basis of the 2018 Advice and the 2019 Plans, to the extent that they were 'contained within' the portions identified in those documents and therefore not available for claim.

47. On 8 November 2019 the Northern Land Council lodged with my Office its written submissions on the issue of traditional ownership of the areas finally claimed as set out in [52] below, largely relying on 'the Territory's acceptance of traditional Aboriginal ownership in this land claim': at [7]. The Northern Territory responded to these submissions on 6 December 2019, advising that one claimant should, according to Mr Barber, be excluded from the claim group. The Northern Land Council accepted this position in its written submissions of 18 December 2019.

48. My Office received substantive written submissions on detriment from interested parties on 8 November 2019, and a response from the Northern Land Council on behalf of the claimants on 8 December 2019. Further replies were progressively received in the period immediately thereafter.

49. However, in late 2019 and the first half of 2020 a dispute arose as to the boundaries of the claim areas and consequently the effect of the Withdrawal. It suffices at this point in the Report to note that it became apparent that the 2018 Advice and 2019 Plans, which identified certain parts of the claimed areas as unavailable for claim, were incorrect. The Surveyor General had given subsequent advice to that effect. That later advice had the effect of accepting that the areas as claimed at the commencement of the hearing on 2 March 2018 were all available to be claimed. This was accepted as accurate by all parties to the Inquiry.

50. Accordingly, on 21 August 2020 I indicated that I proposed to treat the areas available to be claimed as including all those covered in the Anthropologists' Report, Dr Clarke's Report and in the Notice of the Inquiry, subject to any submissions to the contrary, and I invited parties to provide further submissions on any additional detriment relating to the disputed areas, and a timeline for any responses. I also invited any submissions on the boundaries of the claim area. Counsel for Marrakai Pastoral took the position that, by reason of the Withdrawal of parts of the claimed areas by the Withdrawal of 5 November 2019, those withdrawn areas were not available to be claimed. I subsequently provisionally indicated that I regarded the areas as claimed at the commencement of the hearing were still available to be claimed, notwithstanding the Withdrawal and indicated that I would provide reasons for a ruling on that issue in this Report: those

reasons are annexed to this Report as Annexure E. Hence, as indicated, the issue of detriment was able to be revisited by any interested party to encompass those areas to the extent that had not already been done.

51. Final submissions on detriment were received on 27 November 2020, and on 3 December 2020 I wrote to the parties to the Inquiry confirming that the Inquiry was complete.

52. The claim areas pursued and the subject of this Report are therefore:

    (i) Intertidal Zone in the Woolner Region, described in the original application as the land 'between the high-water mark and the low water mark, commencing at the southern-most point of the western boundary of Northern Territory Portion 2012 and extending to the eastern-most point of the northern boundary of Northern Territory Portion 2013' (claim area i or Western Intertidal Zone)

    (ii) Intertidal Zone in the Mary River Region, described in the original application as the land 'between the high water mark and the low water mark, commencing at the eastern boundary of Northern Territory Portion 4435 and extending to the eastern bank of the Wildman River at its mouth' (claim area ii or Eastern Intertidal Zone)

    (iii) Beds and Banks of the Mary River, with three sub-areas described in the original application as:

        a. …

        b. '… that portion of the Mary River from the northern-most point of the western boundary of a small, unmarked portion adjacent to the northern boundary of Northern Territory Portion 4063 [claim area iii.b or the Mary River Northern Part]

        c. … that portion of the Mary River from where the Mary River meets and becomes adjacent to the eastern boundary of Northern Territory Portion 1170 in a generally southerly direction to the southern-most point of the eastern boundary of Northern Territory Portion 3051 [claim area iii.c or the Mary River Southern Part]

        and any islands within the said river'.

53. Having made that provisional ruling, I note that the beds and banks of the Mary River which are bounded by and contained with Northern Territory Portion 4121 are not the subject of this Report. That area was referred to throughout the Inquiry as area 'iii.c.4': its withdrawal was not the subject of contestation. The same can be said of the area termed 'iii.a', being those parts of the beds and banks of the Mary River that are contained within Northern Territory Portion 2708: the withdrawal of those areas from the Woolner LC was not contested.

54. It has been noted above that the areas of the claim relating to the beds and banks of the Wildman River have already been added to Schedule 1 of the ALRA. That area (referred to as 'Area v' in the originating application) was specified in the Withdrawal as having been withdrawn, and also was not disputed. It too is not the subject of this Report.

55. I move now to my findings on traditional Aboriginal ownership.

3. TRADITIONAL ABORIGINAL OWNERSHIP

56. I have detailed above the process of the discussions between the Northern Land Council on behalf of the claimants and the Northern Territory on the issue of traditional Aboriginal ownership. The Northern Territory in its submissions did not seek to contest the claimants' submissions on traditional Aboriginal ownership of 8 November 2019 (Claimants' Submissions) other than in respect of one claimant's membership of a certain estate group: see Submissions of the Northern Territory dated 6 December 2019 (Northern Territory Traditional Ownership Submissions) at [11]–[12]. Following assessment by the claimants' anthropologists, this position was accepted by the claimants in their responsive submissions of 18 December 2019: at [8]. Accordingly, traditional Aboriginal ownership of the claimed areas is not in issue.

57. Nevertheless, the Commissioner must still address the matters referred to in sections 50(1)(a) and 50(3)(a) of the ALRA, including the strength of the traditional attachment of the claimants to the claimed land. The material relevant to this task in this Inquiry is the Anthropologists' Report (22 December 2017, Exhibit A2), Site Register produced by Dr Clarke on behalf of the claimants (22 January 2018, Exhibit A3), Genealogies produced by Dr Clarke on behalf of the claimants (January 2018, Exhibit A4) and Claimants Personal Particulars produced by Dr Clarke on behalf of the claimants (January 2018, Exhibit A5). The claimants also submitted that these documents are to be read subject to amended versions of the Genealogies (March 2019, Exhibit A5(A)) and Personal Particulars (March 2019, Exhibit A4(A)) and Dr Clarke's Report. This latter set of materials addresses the queries of the Northern Territory's consultant anthropologist Mr Kim Barber, which arose during the course of the Inquiry: Claimants' Submissions at [19]–[20].

58. Given that the Northern Territory accepted traditional ownership subject to the point outlined above, which was later accepted by the claimants, my comments need not be extensive.

59. Section 50(1)(a)(i) of the ALRA prescribes that the functions of the Commissioner in respect of a traditional land claim are to 'ascertain whether those Aboriginals or any other Aboriginals are the traditional Aboriginal owners of the [claimed] land'. The definition of 'traditional Aboriginal owners' contained in section 3(1) of the ALRA requires that there be a local descent group of Aboriginals, who:

(i) 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

(ii) are entitled by Aboriginal tradition to forage as of right over that land.

60. Each of these criterion, and their application in respect of the present claim, are now considered in turn.

3.1. A LOCAL DESCENT GROUP

61. It is useful, in the context of this particular claim, to recall the widely accepted definition of 'local descent group' that has been adopted in past reports.

62. The meaning of 'a local descent group' was discussed by the Full Court of the Federal Court in *Northern Land Council v Aboriginal Land Commissioner* (1992) 105 ALR 539. In that case, the Court (Northrop, Hill and O'Loughlin JJ) at 553 unanimously agreed with the view of Toohey J as Commissioner in the *Finniss River Land Claim (No. 39) Report No. 9* (22 May 1981), noting that a 'local descent group' in the sense of the ALRA requires that there be:

> … a collection of people related by some principle of descent, possessing ties to land who may be recruited… on a principle of descent deemed relevant by the claimants.

63. Toohey J's interpretation was further explained by the Court as having two related components. First, it was said that descent need not be merely biological; that is, a person could be adopted by a local descent group, irrespective of a lack of biological links. Second, the Court considered it necessary to explain Toohey J's phrase 'a principle of descent deemed relevant by the claimants'. This did not mean that a principle of descent might be deemed relevant on a whim: rather, his Honour simply meant that the relevant principle of descent in operation will depend upon the circumstances of the claim at hand. As such, the Court said that 'the principle of descent will be one that is *recognised as applying in respect of the particular group* [emphasis added]'. It necessarily follows that principles of descent may vary amongst groups.

64. Importantly, the Court added that a principle of descent need not be rigid or fixed, saying that 'there is no reason [why] the particular principle of descent traditionally operating may not change over time': at 553-54.

65. That explanation of 'local descent group' and its accompanying descent criteria has been applied in many subsequent Reports since that decision: see, e.g., *Ngaliwurru/Nungali (Fitzroy Pastoral Lease) Land Claim; Victoria River (Beds and Banks) Land Claim (Nos. 137 and 140) Report No. 47* (22 December 1993) at [3.1] per Gray J as Commissioner; *Frances Well Land Claim (No. 64) Report No. 73* (16 June 2016) at [58]–[60]. It is once again apt for the present claim.

3.1.1. Principles of descent – Wulna, Limilngan/Minidja and Uwynmil groups

66. It is submitted by the claimants and accepted by the Northern Territory that there are three local descent groups: Wulna, Limilngan/Minidja ('Limilngan') and Uwynmil. The Anthropologists' Report at [1.2] notes that the Wulna language is closely related to that of the Limilngan, but that less is known about the Uwynmil language. Language, as the Anthropologists' Report explains, relates to one's ethnic identity, rather than their actual ability to speak the language: see [1.2.2].

67. It should first be noted that there has been considerable amalgamation amongst what were formerly three distinct groups, leading to largely shared responsibility for the claim area. In the case of the Wulna and Limilngan, the groups have effectively merged to form part of a larger regional society with similar principles of descent. This is due to the impact of colonisation (amplified by the close proximity of the claim areas to Darwin) and resulting interdependence in respect of hunting, ceremony and other social interactions. However, it is not submitted that the two groups constitute a single, combined local descent group: see Dr Clarke's response to question 4 of Mr Kim Barber's queries dated 20 March 2018 (Attachment A to Claimants' Submissions). It was also submitted that the same principles apply in respect of the Uwynmil group, due to their former conflation with and re-emergence from within the Limilngan community: see Dr Clarke's response to question 4 of Mr Barber's additional queries dated 11 April 2018 (Attachment A to Claimants' Submissions) and Dr Clarke's Report p 3.

68. These principles of descent, as relevant to each of the claim groups and recognised as such, are now considered.

69. The principles of descent of the claim groups are described in the Anthropologists' Report at [1.11] and Chapter 3. It details how once-strict laws of social organisation have been relaxed to accommodate the stresses of colonisation from the north, leading to the acceptance of individuals assuming multiple language group identities. For example, in order to fill the gap in a child's paternal affiliation (often due to movement of men between areas or marriage to non-Aboriginal people), an individual could follow their adoptive or 'social' father, or be given rights by other members in the mother's extended family. Further, an individual could be integrated into the community of the country where they had grown up. Under these principles, a child would retain the identity of the language group, rather than a clan or moiety identity: at [1.11.1]–[1.11.2]. Consequently, the Genealogies show links between all three claim groups.

70. It follows that, while in the past social organisation was based on the complex Kariera model of kinship, the claimants no longer regard knowledge of these formerly important structures as a pre-condition to membership of the group, although some group members do still possess knowledge of these structures: see the Anthropologists' Report at [3.1.3]. Nowadays, membership can be based on a variety of factors, which may include patrilineal descent, other cognatic descent in circumstances where patrilineal connections to a language group are lacking,

adoption by traditional owners, and knowledge of the claim area amongst others: see the Anthropologists' Report at [3.1.4]. Acceptance by others is also a means by which group membership may be strengthened, but this is subject to a range of situations and personal relationships (the 'jural public'): at [3.1.5].

71. However, despite the substantial relaxation of traditional group membership rules, it is clear from the Anthropologists' Report that certain modes of descent are still prioritised. Rights to one's father's father's country are privileged and seen as the ideal mode of establishing group membership and resulting responsibilities in relation to country. The primacy of these rights is also reinforced by the jural public, such that persons who live away from their father's father's country and resultingly have little knowledge of its stories may nevertheless be recognised as traditional owners.

72. Important roles are also attributed to one's mother's father's country, and other relationships, such as the country on which one was 'grown up' or learnt stories, are acknowledged: Report at [3.1.2].

73. The present constitutions of the claim groups reflect these principles and their adaptation over time. I turn now to the groups themselves.

3.1.2. Limilngan/Minidja local descent group

74. While the principle of descent in respect of this claim group historically placed emphasis on ancestry alone, in recent times the view of the jural public has shifted. Ancestral links, mediated by spiritual affiliation gained through firsthand knowledge of sacred sites and ceremonies, are now given priority: Anthropologists' Report at [3.1.6]. This shift is said to be evident in the differences between the composition of the present claim groups and that of the Limilngan-Wulna (Lower Adelaide and Mary Rivers) Land Claim (No. 10).

75. Indeed, it is mentioned in the Anthropologists' Report at [3.2] that the adaptation of the descent criteria, in combination with the re-emergence of the Uwynmil local descent group, has resulted in various members of the claim group in the Limilngan-Wulna (Lower Adelaide and Mary Rivers) Land Claim (No. 10) no longer being considered members of the Limilngan group.

76. The current Limilngan local descent group therefore is comprised of the descendants of four deceased ancestors: George Luwanbi, Marrakai Alex Nanmurrang, Jimmy Linman and Willy Diyal Miminiki.

77. A brief canvassing of the links between the claimants and their ancestors displays the functioning of the principles of descent described above. On the evidence, claimants are shown to be members of the Limilngan in varying ways, including through the patriline, matriline and adoption in respect of both. In all cases, claims to group membership are substantiated by both knowledge of country and recognition by other group members of resulting rights and responsibilities.

78. Conversely, the Anthropologists' Report and supporting materials state that a fifth group descended from a woman named Lulu did not receive sufficient community support to be considered traditional owners amongst this group. While this was subject to further scrutiny by the Northern Territory, it was eventually acknowledged: see Northern Territory Traditional Ownership Submissions at [7]. This non-acceptance of Lulu's descendants shows how the jural public functions in determining group membership.

79. The links of the surviving generations of the Henry and Cooper families to deceased ancestor Jimmy Linman are described in the Anthropologists' Report at [3.2.1] and are supported by the Amended Genealogies (Limilngan Group: Sheet 2). Their claim to traditional ownership is substantiated by the deep knowledge of sacred sites possessed by Victor Guruwarlu Cooper, who has links to Jimmy Linman through both his adoptive father and adoptive mother.

80. Additionally, Samson Mundaling Henry, as the son of Lena Henry Wuraki (who was a daughter of Jimmy Linman), has spiritual rights and responsibilities stemming from his mother's father according to classically assigned roles. The evidence suggests that he is *junggayi* for Limilngan country; a term which indicates several responsibilities which range from 'caretaker' (stemming from his status as a child of a mother with patrilineal affiliation to country) to 'senior ceremony person', and even can extend to patrifilial traditional owner. This term has expanded from its original meaning to accommodate rights and responsibilities stemming from the adapted principles of descent. Samson Mundaling Henry considers Victor Guruwarlu Cooper to be his elder: this shows the primacy of the patriline, even if it be through adoption.

81. The descendants of Marrakai Alex Nanmurrang (deceased) are the Gumurdul family. The most senior member of this subset of the claim group is Adrian Nanmurrang Gumurdul, who has links to the claim area through his father's father. Despite having lived the majority of his life at Gunbalanya, he and his children are recognised as Limilngan traditional owners by the other Limilngan groups. Again, the continuing priority given to one's father's father is evident through this group's basis for inclusion.

82. Henry and Derek Yates have recently confirmed that Nanmurrang was their paternal father's father: Anthropologists' Report at [3.2.2.2], but they are also adoptive descendants of apical ancestor George Luwanbi (deceased), who was a brother of Nanmurrang: see amended Genealogies (Limilngan: Sheet 1). Other descendants of George Luwanbi include the Kenyon family, whose present-day link is established through his adoption of their father. Their Limilngan status not disputed. The Anthropologists' Report at [3.2.4.2] states that David and Graham Kenyon therefore inherit their senior ceremonial status and responsibility in this subset by virtue of their father's father: this is again substantiated by sheet 1 of the Limilngan Genealogies.

83. The final subset of the Limilngan group is comprised of the descendants of Willy Diyal Mimininiki (deceased). These are the Bishop/Campbell children of Joseph Bishop Linman and Jeanie Bishop Lunbirr (both deceased), who

consequently claim membership through their father's father and mother's father respectively. The members of this group are recognised as Limilngan, despite the children of Joseph Bishop Linman not having been active in group matters: see sheet 3 of the Limilngan Genealogies and the Anthropologists' Report at [3.2].

84. Save for the descendants of Lulu, the evidence shows a clear link between the claimants and their ancestors based on the principle of descent described above, albeit in varying ways. Further, it is clear from the evidence that this fact is accepted amongst the claimants themselves: see, e.g., Anthropologists' Report at [3.6.1]. I am therefore satisfied that, as has been accepted by the Territory, the Limilngan constitute a 'local descent group' for the purposes of the ALRA.

3.1.3. Wulna local descent group

85. The adapted principles of descent described in the Anthropologists' Report are also evident in the constitution of the present-day Wulna claimants. Indeed, while membership was traditionally established through the patrilineal line, there no longer remain any members who can claim descent by this method: Anthropologists' Report at [3.3.2]. The Genealogies show three deceased apical ancestors (and putative brothers): Anyulnul, Wulna and Finity. However of the three, only Finity is survived by members of this local descent group.

86. In addition to their Limilngan status, the evidence shows that the Kenyon family are linked to Finity through their mother's mother and thus claim Wulna membership. This is not considered to be unusual considering the history of the claim area canvassed above, as well as historical interactions between the two groups in respect of hunting, ceremony and social occasions: see the Report at [3.5]. The Kenyons support their claim to Wulna membership by participation in regional ceremonial events as well as through recognition as leaders by members of neighbouring groups: Anthropologists' Report at [3.3.4].

87. The Browne and Talbot families also constitute part of this group and are recognised as such. Both claim descent from Finity through their respective mothers' mother Topsy Garramanak Drysdale (deceased). The Fejo and Rankin descendants also claim descent through other daughters of Garramanak.

88. Jeanie Bishop Lunbirr, in addition to Limilngan status, also claims Wulna membership through adoption, and therefore also through her mother's mother Garramanak. Accordingly, her descendants are accepted to be both Limilngan and Wulna: Anthropologists' Report at [3.3.6].

89. While traditional principles of Wulna descent have substantially adapted due to historical occurrences, particularly in their divergence from the patriline, these claims to membership were not contested either within the claim group or by the Northern Territory. I am satisfied that the Wulna claimants are a local descent group within the meaning of the ALRA.

3.1.4. Uwynmil local descent group

90. The final group in this land claim is the Uwynmil (pronounced 'Ah-win-mill').

91. It is noted above that the independent status of the Uwynmil from the Limilngan has only recently become apparent. The Anthropologists' Report at [3.4.1] theorises that this may have been due to the fact that there were often dual speakers of the Limilngan and Uwynmil languages. Nevertheless, it is clear on the evidence that principles of descent operate in respect of the group. Specifically, membership is established by cognatic descent (i.e., through both one's father's and mother's line), mediated by connections to and knowledge of country: Anthropologists' Report at [3.4] and Dr Clarke's Report pp 3–4.

92. The oldest surviving generation of the Tambling family claim descent through their father's father, who was adopted by apical ancestor Alangurradj. Consequently, many claimants with the surnames Tambling and Yates are considered and accepted to be Uwynmil. This is substantiated by the continuance of totemic naming practices: see the Report at [3.6.3] and Dr Clarke's Report at pp 4–5.

93. It should be noted that the Kenyon family had, during the Alligator Rivers Stage II Land Claim (No. 19), been identified as 'Nawinjmil' by a senior Limilngan man, excluding them from membership of the Limilngan group: Anthropologists' Report at [3.4.4]. This has been vigorously contested by the family. As evidence demonstrating their membership of the Limilngan claim group is accepted by other members of that claim group and the Northern Territory in this land claim, it is not necessary for me to consider whether they have Uwynmil status, either in addition to their accepted Limilngan status or otherwise.

94. I am satisfied that the Uwynmil constitute a local descent group in accordance with the definition contained in the ALRA and the materials referred to above.

3.2. COMMON SPIRITUAL AFFILIATIONS AND PRIMARY SPIRITUAL RESPONSIBILITY

95. Having been satisfied that each of the claim groups are local descent groups in the sense contemplated by section 3 and section 50(1)(a) of the ALRA, the next task of the Commissioner in respect of traditional Aboriginal ownership is to identify whether that local descent group has 'common spiritual affiliations, being affiliations that place the group under a primary spiritual responsibility for that site and for the land': ALRA section 3(1)(a). It is well recognised that this definition does not require sites to be located within the claim areas specified. Rather, common spiritual affiliations and primary spiritual responsibility may be established by demonstrating a connection between nearby sites and the land subject to claim: see, e.g., *Ngaliwurru/Nungali (Fitzroy Pastoral Lease) Land Claim; Victoria River (Beds and Banks) Land Claim (Nos. 137 and 140) Report No. 47* (22 December 1993) at [4.1] per Gray J; *Frances Well Land Claim (No. 64) Report No. 73* (16 June 2016) at [126]–[132].

96. The material relevant to this exercise is contained in Chapters 4, 5 and 6 and Appendix C of the Anthropologists' Report, as well as the Site Register. Appendix C displays the Dreaming tracks and sacred sites in the vicinity of the claim area. There are 17 such recorded sites and, on the evidence, more which the claim group were reluctant to share. This is for fear of disturbance or due to gender restricted knowledge: see, e.g., Anthropologists' Report pp 57–58. I do not consider the provision of information in respect of additional sites to be necessary to the outcome of this claim.

97. Additionally, Dr Clarke's Report provides supplementary information in respect of the Uwynmil claimants.

98. It is accepted by the Northern Territory that the three claim groups have common spiritual affiliations with the relevant sites, but that there are in fact differing levels of spiritual responsibility at present. It is therefore necessary to briefly describe the evidence.

3.2.1. Wulna claim group

99. Figs. 9 and 10 on pp 23–24 of the Anthropologists' Report demonstrate the general areas with which each group is associated. According to those maps, Wulna interests in the claim area include Cape Hotham to the north and the western end of the Chambers Bay coastline (closest to claim area i or the Western Intertidal Zone in this claim). Lake Finnis has been suggested by the claimants as the point where Limilngan and Wulna interests meet, however it is accepted that there is an overlapping area to the east and south-east (claim area iii.b or the Mary River Northern Part): see also the Anthropologists' Report at [1.8].

100. The affiliations and responsibility of this group to the claim area and its surrounds has been acknowledged by the Northern Territory in this claim and in other contexts: see Claimants' Submissions at [16]. These include the past settlement of the Limilngan-Wulna (Lower Mary and Adelaide Rivers) Land Claim (No. 10) and resulting grant of land comprising Djukbinj National Park, which is jointly managed with the Parks and Wildlife Commission; the joint management initiative in respect of the Adelaide River Conservation Reserves; and ongoing negotiations between the claimants and the Northern Territory for settlement of the Wulna Land Claim (No. 155) over the tip of Cape Hotham, which is situated in close proximity to the Western Intertidal Zone. In 2020 the Northern Territory indicated their preliminary acceptance of the claimants in the Wulna Land Claim (No. 155) as the traditional Aboriginal owners of the relevant areas, subject to a final review by the Northern Land Council prior to settlement. Many of those claimants mirror those of the present claim. That claim has not yet been formally finalised.

101. It is emphasised in the Anthropologists' Report at [4.1] that water and waterways are significant for all claim groups, and that affiliation to sites is shared. This is supported by the information provided to the anthropologists by dual members of the Wulna and Limilngan, such as the Kenyon family.

102. Water has a heavy spiritual and cultural significance for the claim groups. It is a means by which communication with spirits, considered to be manifestations of either ancestor creator beings or deceased 'old' people, may be mediated. For example, the head-wetting of visitors (*gurlgurl*) takes place in order to alert spirits of their presence at certain sites, and to gain protection from dangerous occurrences. Additionally, the conditions of the seas or waterways are methods by which the spirits express displeasure.

103. It follows that the coastline is also seen as generally significant in spiritual matters, irrespective of the presence of specific sites. This is because there are Dreaming stories detailing how Rainbow Serpents (*Rainbolt* in Kriol) entered into the sea via waterways in or around the claim area. In relation to Wulna country specifically, Fig. 12 at p 53 of the Anthropologists' Report shows that an above-ground Rainbow Serpent Dreaming track runs from the upper Mary River to the south-west, before turning to the north and extending up and out to the sea through Cape Hotham. Its exit point is very close to the area subject to claim in the Wulna Land Claim (No. 155) mentioned above.

104. *Nayidayngu* (Old Man Rock) is recorded in the Site Register as a site of particular significance to the Wulna group, and is located near to the western boundary of claim area i or the Western Intertidal Zone, just inside from the mouth of the Adelaide River. There is a Dreaming associated with this site, which recounts how old man *Wulangin* came from the coast and went into a billabong from the river. Leeches were biting his private parts, so he returned to the ocean and sat down at *Nayidayngu*. As is displayed in Fig. 12 in the Anthropologists' Report at p 53, the Old Man Dreaming track goes south about as far as the Fogg Damn Conservation Reserve, which comprises part of the Adelaide River Conservation Reserves mentioned above. That track is substantially contiguous with the Adelaide River.

105. Spiritual responsibilities in respect of *Nayidayngu* include the observance of appropriate behaviours when visiting the site, such as the throwing of tobacco and calling out to *Wulangin*. This is practiced by Kenyon family members.

106. The Anthropologists' Report in Chapter 5 provides further indicators of the claim group's primary spiritual responsibility in respect of the claim area. These include the transmission of cultural knowledge and shared beliefs which, during the anthropology fieldwork for this Inquiry, was displayed through the active retention and sharing of knowledge about sites and methods of communication with Dreaming spirits. Such knowledge is passed down from generation to generation. Additionally, knowledge must not be shared if it would not be appropriate in the circumstances to do so. This is the case in respect of some ceremonial and burial places, knowledge of which is subject to gender restrictions: see, e.g., Anthropologists' Report at [4.2.1].

107. The Anthropologists' Report at [5.3] details how the right to speak for country also displays a relationship of primary spiritual responsibility for it. This includes the ancillary right to grant or refuse entry of others onto land at or around the claim areas in accordance with traditional customs: the *gurlgurl* ritual is one method by which such permission may be granted. The authority of the claim group over the claim area is recognised by neighbouring groups, giving rise to participation in regional ceremonies and relationships as far north as East Arnhem Land, and as far south as Timber Creek. The right to speak for country carries with it a corresponding responsibility to do so. This is the subject of some anxiety for senior members of the Kenyon family: Anthropologists' Report at [5.3.4].

108. As has been accepted by the Northern Territory during the course of theInquiry and in other contexts, and in accordance with the evidence described above, I consider that the Wulna claimants have primary spiritual responsibilities over parts of the claim area relevant to them.

3.2.2. Limilngan claim group

109. The Limilngan local descent group has its primary interests in areas west of Kakadu National Park along the lower Mary River. Their country extends from its southern-most point at or around Annaburroo Station and Old Mount Bundey Station to the coast at Point Stuart in the north. Eastwards, it goes as far as West Alligator Head Road and up to Four Mile Hole in Kakadu, and follows the course of the Wildman River through to the coast: Anthropologists' Report at [1.7]. Nowadays, it also includes successionary interests further to the east in country formerly held by the extinct Gonbudj group. In this claim, their country relates to claim areas ii and iii.b, or the Eastern Intertidal Zone and the Mary River Northern Part (held in tandem with Wulna), and claim area iii.c. or the Mary River Southern Part. The Mary River Southern Part is also associated with the Uwynmil: this is explored below.

110. Responsibilities of the Limilngan group in relation to the claim area have been recognised outside of this claim, particularly in joint management schemes for the Djukbinj, Mary River and Kakadu National Parks: Claimants' Submissions at [16]. Various members of the claim group were involved in preparing the joint management plan for Kakadu: see Kakadu National Park Management Plan (Attachment E to Claimants' Submissions).

111. The claim materials indicate that the vast majority of sites in or around the claim areas fall within the responsibility of the Limilngan group. As is detailed above, many of these sites are important for people who are members of both the Wulna and Limilngan groups; the knowledge of the Kenyon family supports this. For example, *Nayidayngu* also has a Limilngan name, *watlangan mkbinymarr* ('the old man lies').

112. The importance of water detailed above is shared by this group. *Damogit*, a site inland from Chambers Bay on a saltwater creek named *Galyirr* (Tommycut Creek), and *Milingiki*, a section of Sampan Creek, are both associated with the Yellow-Bellied Water Python Dreaming. The Water Python ancestor is said to have made Sampan Creek, and today yellow-bellied water pythons are prevalent in the floodplain areas. Its Dreaming track is displayed in Fig. 12 on p 53 of the Anthropologists' Report.

113. Additionally, the Rainbow Serpent Dreaming is associated with the sites *Lalidadjan* and *Gunanyjarr* located in the vicinity of Point Stuart and thus between the Western Intertidal Zone and the Eastern Intertidal Zone. *Lalidadjan* in particular is a dangerous site for young women if they enter the area unannounced. This can be addressed by performance of the *gurlgurl* ritual.

114. The Women Travelling Dreaming is highly significant, being associated with numerous sites in the claim area. It is a foundational ancestral myth which connects neighbouring groups together: Anthropologists' Report at [4.1.2.1]. For this claim group, it is associated with *Lalakgili* (a point of high ground near Shady Camp, which is proximate to the Mary River Northern Part), *Garryili* (Mt Goyder, near the Mary River Southern Part), and *Imalakan* (an area of hills and boulders in the Mary River Conservation Reserve, also near the Mary River Southern Part). At *Lalakgili* the Women Travelling initiated the Rainbow Snake and Turtle Dreamings, and made a canoe at *Garryili* which is still visible today. *Imalakan* is a women's site where men are forbidden to go. There, mermaids can be heard laughing at a distance.

115. As is demonstrated by Fig. 12, p 53 of the Anthropologists' Report, the Women Travelling Dreaming track covers a substantial portion of the claim area. As such, that Dreaming is associated with many of the recorded sites, which are detailed in the Site Register.

116. Another significant Dreaming is that of the Wild Dog (*ngilyi*). The Wild Dog track starts at Bulman (directly adjacent to the Mary River Northern Part), also known as Blackfella Island, from which a male and female (*Liyeyima* and *Wirmirnbul*) travelled to *Lidawi* (Beatrice Hill, where Windows on the Wetlands, an NT park reserve, is located). There are other sites in the vicinity of that place that relate to this Dreaming: Anthropologists' Report at [4.1.4.1], and members of the claim group have been given personal names associated with the Wild Dog Story: at [4.3.1]. This practice is also seen in relation to the Barramundi (*Luwanbi*) Dreaming located around Shady Camp and within the Mary River Northern Part; successive generations of male Kenyon family members have been given this name: Anthropologists' Report at [4.1.8.4].

117. Other Dreamings and associations with sites can be found in the Anthropologists' Report at pp 56–57. It is not necessary to set them all out. It is noteworthy that no instances of conflicting evidence were given among branches of the Limilngan group, despite limited communication between them: Anthropologists' Report at

[4.1.4]. The conception Dreamings of the claimants (affiliations with certain flora and fauna deriving from signs given by the country to their mothers) accord with these stories, and all claimants interviewed by the anthropologists could recall them: see the Anthropologists' Report at [4.4].

118. Rights to speak for country in respect of these sites is not unqualified. For example, less senior members of the Henry subset of the Limilngan claimants were required to seek permission from Victor Cooper, whom they described as their elder: Anthropologists' Report at [5.3.5].

119. Other indicators of primary spiritual responsibility for the claim area and surrounds are similar to those described above in relation to the Wulna claim group. This is unsurprising given the history of the claim area and principles of descent, which have in many instances resulted in dual membership of the Wulna and Limilngan. I do not need to repeat that evidence.

120. On the evidence canvassed above and in accordance with the Northern Territory's acceptance of traditional ownership in this Inquiry, it is clear that the Limilngan claim group holds primary spiritual responsibility for large swathes of the claim areas.

3.2.3. Uwynmil claim group

121. The Uwynmil have interests in country on both sides of the Mary and McKinlay Rivers. In the north, their country is said to run from Mount Bundey and Bark Hut to its southern-most point at or around Mount Mary Mine and George Creek. In terms of this claim, Uwynmil country is that land which is south of the Arnhem Highway (closest to the Mary River Southern Part).

122. It is detailed in the evidence that this group have, as is the case for the other groups to this claim, been previously recognised as traditional owners of parts of the claim areas in other contexts. For example, the Uwynmil are stated as being traditional owners of the southern portion of the Mary River National Park: see Mary River National Park Joint Management Plan 2015 (Exhibit A11), i. The group also performs 'Welcome to Country' ceremonies for visitors to the Mary River Wilderness Resort, and is permitted by the Resort to use the area for camping, hunting and maintenance of culture: Dr Clarke's Report p 7.

123. It was advanced by the Territory and accepted by the claimants that the Uwynmil are the traditional owners in respect of the area described above, but that certain members of the Limilngan claim group at present hold primary spiritual responsibility for the area as caretakers (*junggayi*) for the Uwynmil: Claimants' Submissions at [5]–[6]. This is consistent with the evidence, particularly that of Dr Clarke's Report, which contains acknowledgements by members of the Uwynmil, such as Darryl Tambling, to this effect. The Genealogies also show links between the Limilngan and Uwynmil. Consequently, senior members of the Limilngan

were required, in accordance with present levels of initiation, to assist when giving evidence in relation to spiritual responsibility for the claim area: Dr Clarke's Report p 5.

124. The present situation in relation to spiritual responsibility is demonstrated by the evidence in respect of the sites within or near the claim area which are associated with this group. For example, there is a "sickness country" to the north of Urakgi Hill (near McKinlay Block, about one kilometre from the Mary River Southern part and adjacent to the Mary River): Dr Clarke's Report p 5. Uragki Hill itself is associated with the Women Travelling Dreaming. As the most senior members of the Uwynmil are not yet initiated, access is not permitted to the sickness country: only senior Limilngan caretakers for that country can go there. Additionally, there are shared sites within Uwynmil country for which Limilngan are considered to be "boss", such as *Imalakan*.

125. The process by which the Uwynmil claimants will be initiated and thus gain primary spiritual responsibility is briefly described in Dr Clarke's Report at pp 5–6. It will involve initiation along moiety lines at certain sites in the Urakgi Hill area and north of the Arnhem Highway. At present, the Uwynmil claimants cannot go there, but Limilngan men such as Sampson Henry, who act as *junggayi* (caretaker) for Uwynmil country, can go there.

126. Nevertheless, it should be noted that there are several sites which, on the evidence, display the Uwynmil's common spiritual affiliations to the claim area, irrespective of their burgeoning level of spiritual responsibility. In particular, Dr Clarke's Report at pp 6–7 describes the importance of *Gurumadi*, a Catfish Dreaming site, which is located to the south-east of the Mary River Southern Part. The Catfish Dreaming follows the Mary River out into the sea through Limilngan country, connecting the Uwynmil to the Limilngan. *Gurumadi* is a place where the Catfish stopped. The Tambling family regularly access it, passing on stories and knowledge to younger generations as well performing ceremonies. Members of the claim group sing out to their past generations, whose clothes may be buried there, before visiting. This alerts the ancestors of their presence. Consequences may follow if this procedure is not adhered to, such as illness or less fish to eat.

127. However, the Northern Territory has only accepted traditional ownership in this Inquiry on the basis that the Uwynmil do not at present hold primary responsibility for any part of the claim areas. Instead, it said that certain members of the Limilngan in fact hold primary spiritual responsibility for Uwynmil country as trustees for the Uwynmil group. The evidence is in accordance with this view: indeed, many of the Uwynmil claimants do not consider themselves to have attained the requisite rights in relation to sites in or around the claim areas, and rely on knowledge held by those members of the Limilngan to substantiate their claim. Further, the claimants have accepted the Northern Territory's position: see Claimants' Submissions at [6], and the letter from the Northern Land Council to my Office dated 18 June 2019.

128. I accordingly find that those members of the Limilngan claimants specified in that letter (namely Sampson Henry, Irene Henry and Leo Goodman) are the traditional Aboriginal owners of the Uwynmil country under claim, currently holding primary spiritual responsibility for those areas as trustees for the Uwynmil group. While Harold Goodman was initially listed as one of those individuals, the claimants have accepted the contention of the Northern Territory that Mr Goodman is neither a traditional Limilngan owner nor a caretaker for the Uwynmil: see Claimants' Submissions of 18 December 2019 at [7].

3.3. RIGHTS TO FORAGE

129. The final element of 'traditional Aboriginal owners' as is meant by the ALRA is that the local descent group, in addition to having primary spiritual responsibility for the claim areas, must be 'entitled by Aboriginal tradition to forage as of right' over the land claimed: ALRA section 3(1)(b). It is clear on the evidence that this is satisfied in respect of all three claim groups, and thus only a brief description of the relevant evidence is necessary.

130. As is detailed above, the claim areas essentially consist of the beds and banks of several rivers and intertidal zones. While the claim areas and surrounds are largely inaccessible during the wet and therefore unsuitable for permanent living, the Anthropologists' Report at [3.1.2] notes that those areas are bountiful for hunting and fishing. The latter is prevalent in the area amongst the claimants and has given rise to their affiliated conception Dreamings: see, e.g., Anthropologists' Report at [4.4.3]–[4.4.4]. Barramundi is but one example of this.

131. In relation to the Wulna and Limilngan claim groups, their right to speak for country carries with it a right to grant access to others to the claim area for the purposes of hunting and foraging: Anthropologists' Report at [5.3.6]. Turtles, for example, have been the subject of such permission. Access has historically been granted to residents from areas such as Croker Island (in accordance with a tradition of trade and cooperation), Maningrida and Bagot.

132. Dr Clarke's Report details at pp 6–7 details how Uwynmil group members go to *Gurumadi* each Dry season for camping, hunting and fishing. This is also true in respect of the area surrounding Mary River Wilderness resort, where the claimants gather food as a part of passing on of knowledge to the younger generation.

133. It is clear from the evidence that each of the three claim groups in this land claim possess rights to forage over the claim area, in the sense required by section 3(1)(b) of the ALRA and the definition of traditional owners contained therein.

3.4. STRENGTH OF ATTACHMENT

134. Section 50(3) of the ALRA requires the Commissioner, when reporting to the Minister, to have regard to the strength or otherwise of the traditional attachment by the claimants to the land claimed.

135. The claimants made submissions in respect of the Commissioner's function as it relates to the claim groups' strength of attachment under section 50(3): see Claimants' Submissions at [32]–[33]. It is not necessary for me to comprehensively address each of these submissions.

136. I do however accept the claimants' contention that a strong traditional attachment is not a condition precedent to making a recommendation for a grant of land under the ALRA. So much is evident on a plain reading of section 50(1)(a)(ii), which requires only that there be a finding that traditional Aboriginal owners exist in relation to the land claimed before a recommendation is made.

137. I also accept the claimants' submission that, despite there not having been any on-country hearings of traditional Aboriginal ownership evidence, it is otherwise clear on the evidence that the claim group has a significant attachment to the land subject to claim. While evidence of this kind usually becomes apparent during the course of the Inquiry through such hearings, that evidence became unnecessary once the Northern Territory accepted that the claimants are, subject to the contentions in relation to the Uwynmil, the traditional Aboriginal owners of the claimed areas.

138. Nevertheless, I am statutorily required to have regard to the claim groups' strength of attachment to the land claimed. I will now briefly canvass the evidence in support of this proposition, so as to allow the Minister to make an informed decision in relation to this Report.

139. The task mandated by section 50(3) is non-formulaic and essentially subjective. As Toohey J as Commissioner observed in the *Daly River (Malak Malak) Land Claim Report No. 13* (12 March 1982) at [184]:

> Attachment is a difficult thing to measure and, it may be said, an invidious task for someone who is not part the claimant group. Nevertheless, it is something that has to be done… It involves looking at the evidence in relation to the land claim and drawing conclusions, as best they can be done, about the strength of attachment.

140. In that Report, his Honour adopted guiding factors such as living in or around the claim area, spiritual connections, economic benefit from the land and ceremonial life in determining strength of attachment. Emphatic identification of the area as belonging specifically to that claim group was also considered to be relevant: at [183].

141. Other factors adopted by past Commissioners include the degree to which traditional spiritual affiliation to various sites is still meaningful to the Aboriginal claimants; the extent to which the claimants access the claimed lands from time to time; the nature of the use of the claimed land; and the strength of the

traditional life of the claimants generally: see, e.g., *Ngaliwurru/Nungali (Fitzroy Pastoral Lease) Land Claim; Victoria River (Beds and Banks) Land Claim (Nos. 137 and 140) Report No. 47* (22 December 1993) at [5.1]–[5.7] per Gray J as Commissioner. The extent to which claimants have previously sought to have their interests in the claim areas recognised is also highly persuasive of a strong sense of attachment: see, e.g., *Maria Island and Limmen Bight Land Claim and part of Maria Island Region Land Claim (Nos. 71 and 198) Report No. 61* (28 March 2002) at [59] per Olney J as Commissioner.

142. It is also prudent at this point to once again bear in mind that the areas subject to claim comprise the beds and banks of several rivers and intertidal zones along sections of the coast. It is clear on the evidence that they represent only a small portion of the areas of which the three local descent groups consider themselves to be the traditional Aboriginal owners. It is also beyond doubt that they are recognised as such in various contexts outside of a grant of land under the ALRA, which have been detailed above. As an additional guiding factor, I consider that this evidence of recognition external to this Inquiry process indicates in favour of a strong attachment to the areas subject to claim.

143. As is detailed in the Anthropologists' Report and Dr Clarke's Report, the present claimants and their previous generations have both a historical and contemporary association with the claim areas through residing and working in close proximity to them. Claimants have, for example, lived at Humpty Doo, Jabiru and Narremu outstation (Kapalga). Others have lived and worked on Koolpinyah, Humpty Doo and Marrakai stations, or as Kakadu Park Rangers. Additionally, some of the claimants operate their own tourism businesses in or in the vicinity of the claim areas. For example, Graham Durrkmul Kenyon owns and operates Pudakul Aboriginal Cultural Tours across the Adelaide River floodplains, and Victor Guruwarlu Cooper owns and operates Ayal Aboriginal Cultural Tours in Kakadu.

144. Additionally, many of the senior claimants have a demonstrated history of formal representation of their groups through, for example, membership of the Northern Land Council and other management structures in respect of the Kakadu and Mary River National Parks: see the Anthropologists' Report at [6.1]. Claimants such as the Kenyons are also recognised as speaking for country when partaking in ceremonies and gatherings with other groups in the Top End. These roles are continuing manifestations of traditional attachment to the claim areas.

145. Spiritual connections and traditional life are strong amongst the claim groups. The claimants continue to observe traditional rules in relation to sites and conduct ceremonies at or in the vicinity of the claim areas, and express the desire to pass on knowledge to younger generations through regular site visits when possible. Such evidence is canvassed above and also demonstrates a strong attachment to the claim areas, so I do not need to repeat it in detail. It includes, amongst other things, the continuing of totemic naming practices; knowledge of and belief in conception stories; maintenance of rituals such as *gurlgurl* (head wetting), withholding of gender restricted evidence and maintenance of gender protocols in respect of

certain sites; and the retaining of rights to grant or refuse access to the claim areas. The evidence of the Uwynmil's level of spiritual responsibility, as contained in Dr Clarke's Report, is demonstrative of the claimants' view that the proper processes of initiation and passing of knowledge must be observed before traditional rights in relation to land are exercised.

146. In accordance with the approaches of past Commissioners and the evidence and submissions in this claim, I consider that there is no doubt as to the strong attachment of the claim groups to the claimed areas in this Inquiry. So much has been accepted by the Northern Territory.

3.5. ADVANTAGE OF A GRANT

147. Section 50(3)(a) of the ALRA also requires the Commissioner to comment on 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.

148. The Claimants' Submissions at [41] and the Amended Genealogies indicate that there are approximately 200 Aboriginal persons with traditional attachments to the land claimed in the Woolner LC. It is also said at [41] that there is likely to be other Aboriginal persons with traditional attachments outside of those specified in the claim group, including:

    (i) Non-claimants affiliated with a claimant group/s by more distant genealogical connections;

    (ii) Non-claimants connected to the claim areas through conception, place of birth or dreaming affiliation;

    (iii) Non-claimants with a strong historical link to the claim areas, perhaps through living or working on stations near the claim areas; and

    (iv) Non-claimants who are married to or are children of the claimants.

149. As has been the case in previous reports, I accept the claimants' contentions on this point, noting that the nature and extent of the advantage of the grant of the claimed lands under the ALRA accruing to an individual will of course vary according to the nature of the person's interest in the claimed area.

150. The principal benefit of a grant in this claim is that the claimants and other persons referred to above will be advantaged by the grant by obtaining a higher degree of control over the area than at present. For example, some senior claimants have expressed anxiety about large scale hunting and fishing operations taking place in the claim area without the permission of traditional owners: see the Anthropologists' Report at [6.2.1]. A grant would open up a formal avenue for resolution of these concerns. A grant also offers increased capacity for land management activities in the area and resulting sustainable management of resources, as well as putting the claimants in a position to better monitor the land and the condition of the sacred sites therein. In this sense it would help to

realise the claimants' desires for increased autonomy through participation in the protection, management and development of the claim areas.

151. It is also submitted that an additional benefit which warrants mentioning is that of the 'intangible advantage' resulting from formal recognition of the claimants' strength of attachment and value attributed to the claim areas. There has been little such formal recognition under the ALRA in respect of the three groups to this claim, save the Delissaville/Wagait/Larrakia Aboriginal Land Trust located near Humpty Doo, for which the Wulna claimants are among the traditional owners. In the *Malgin and Nyinin Land Claim to Mistake Creek Land Claim (No. 133) Report No. 50* (18 June 1996), Gray J as Commissioner at [6.2.3] said of these sorts of intangible advantages:

> A grant of land to a land trust is a recognition of the traditional rights of people whose forebears were dispossessed. Such recognition is at the highest level of Australian society. It carries with it an affirmation of the value of traditional rights and of places of cultural significance. It enables the traditional Aboriginal owners of land and others with traditional attachments to use the land as a focus for the further development of their community spirit and the maintenance and increase of their self-esteem. The importance of such an acknowledgment and such a focus for modern Aboriginal communities should not be underestimated.

152. The importance of recognising this advantage is amplified in the case of this claim group due to the heavy impacts of colonisation on them and their traditions, as explored above.

3.6. OTHER MATTERS FOR COMMENT

153. It should be noted that as the claims do not relate to alienated Crown land, section 50(3)(d) of the ALRA is not applicable.

154. For the sake of completeness, a brief comment must also be made in relation to section 50(4) of the ALRA. That section provides that the Commissioner, in carrying out their statutory functions, shall have regard to the following 'principles':

    (i) 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;

    (ii) 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.

155. The claimants did not make any submission nor lead any evidence relating to these principles, aside from detailing in the Anthropologists' Report at [6.2] the benefits of obtaining secure occupancy. These have been explored above. While I have had regard to these principles in producing this Report, I see no need to comment further.

3.7. FORMAL FINDINGS AND RECOMMENDATION

156. I conclude that the Limilngan, Wulna and Uwynmil claimants are local descent groups in the sense required by the ALRA.

157. I also conclude that the Limilngan and Wulna groups are the traditional Aboriginal owners of the claim areas, having common spiritual affiliations to sites on the land which place those groups under a primary spiritual responsibility for those sites and that land.

158. Each of the Limilngan, Wulna and Uwynmil groups are entitled to forage as of right over that land.

159. While the Uwynmil clearly have common spiritual affiliations to sites within or near the areas subject to claim, and are also entitled to forage as of right over those areas, on the evidence their level of spiritual responsibility is not yet sufficient to be regarded as traditional owners. As stated above, certain members of the Limilngan estate group (namely Sampson Henry, Irene Henry and Leo Goodman) are at present the traditional owners of the Uwynmil estate in the sense required by the ALRA, holding primary spiritual responsibility for those areas as trustees for the Uwynmil. This position has been accepted by the claimants.

160. I accordingly recommend to the Minister that the areas of Crown land the subject of this Inquiry should be granted to a Land Trust for the benefit of the Aboriginals who I have found to be traditional Aboriginal owners of that land. Those Aboriginals are entitled to the use or occupation of those areas of land, whether or not the traditional entitlement is qualified as to place, time, circumstance, purpose or permission.

161. In the event of a transfer of primary spiritual responsibility to the Uwynmil by those Limilngan, as is contemplated by Dr Clarke's Report, the necessary action to reflect this change of circumstance would appropriately be taken by the Northern Land Council within the context of its functions under the ALRA in relation to the granted land.

162. A complete list of the members of the Limilngan, Wulna and Uwynmil claimants is annexed to this Report as Annexure D.

4. DETRIMENT AND PATTERNS OF LAND USAGE

163. Section 50(3)(b) of the ALRA requires the Commissioner when reporting to the Minister and to the Administrator to comment on the detriment to persons or communities including other Aboriginal groups that might result if the claim were acceded to either in whole or in part. Section 50(3)(c) similarly requires the Commissioner to comment on the effect which acceding to the claim either in whole or in part would have on existing patterns of land usage in the region. This section of the Report addresses those matters. As I have done in previous reports, I shall refer to each of those matters collectively as 'detriment' until specific focus is required on the two matters dealt with under subclauses (b) and (c) of section 50(3).

164. In the section of this Report recounting the history of this Inquiry and in Annexure E, I have explored in detail the circumstances which led to some confusion as to the extent of the detriment interests in the Woolner LC. It is not necessary to repeat them. It suffices to say that these concerns were addressed by the re-opening of the Inquiry in respect of the affected areas: this afforded to all those affected the opportunity to be heard in respect of detriment.

165. Various submissions by the claimants and the Northern Territory were made in relation to the Commissioner's function under this section, as well as the meaning of 'detriment' under the ALRA. I shall deal with these before commenting on specific detriment concerns advanced in this particular Inquiry.

4.1. THE 'COMMENT' FUNCTION

166. The Northern Territory, in its submissions on detriment dated 8 November 2019 (NT Detriment Submissions), at [25]–[27] advanced several contentions about the 'comment' function of the Commissioner under sections 50(3)(b) and 50(3)(c) of the ALRA. In essence, in the view of the Northern Territory that task is confined to informing the Minister about the consequences which "might" flow from a grant of land to a land trust, such that the Minister is properly informed when considering whether to make such a grant. In the submission of the Northern Territory, the Commissioner is limited to making "an evaluation of the evidence", citing Deane J in *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1985-86) 162 CLR 24 (*Peko-Wallsend*) at 68. It is said at [7] of its submissions to follow that:

> The Commissioner's comment function is wholly separate and different from his s50(1) function and it is the latter under which judicial discretion yields a recommendation. Once a recommendation for grant is made, the Commissioner has no discretion as to, and must cease to guide or direct, an outcome and must simply provide the Minister with information based on his assessment of the evidence. At this point the Commissioner's function is confined to "comment", i.e., describe, assess and evaluate the factual evidence, remarking upon and describing his views of its effect as to the nature and degree of the detriment, the potential for it to be experienced, and the factors bearing on the fulfilment or alleviation of that potential.

167. The claimants, in their responsive submissions of 13 December 2019 (Claimants' Detriment Submissions) at [4] agreed with the general proposition that the Commissioner must only comment on asserted detriment, and that any comment does not play a role in the making of a recommendation under section 50 (1)(a) of the ALRA. However, considering that the Commissioner's comments on detriment are a mandatory topic to be addressed in the Report, it is plain enough that they are to indicate to the Minister matters for the Minister's consideration when deciding whether or not the state of satisfaction required under section 11(1)(b) of the ALRA, relating to the Minister's decision to accede to a grant, exists. The Minister must consider detriment when considering whether to accede to the recommended grant. Hence the claimants at [6] submitted that such comments should be:

> …evidence based, and should address such matters as the extent of the alleged detriment (including whether it is substantive, insubstantial, de minimis or speculative) the nature of the evidence tendered in support of the alleged detriment, means of mitigating or ameliorating the alleged detriment and whether the detriment accrued in the face of the claim.

168. As such, it was said that the Commissioner must only comment where 'satisfied of the reasonbl[e] possibility of detriment': Claimants' Detriment Submissions at [9].

169. The Northern Territory, in its responsive submissions of 14 January 2020 (NT Responsive Detriment Submissions), agreed with the basic importance of evidence-based assertions of detriment. It did however assert that, whereas the claimants had not sought during the course of the Inquiry in many instances to contest such evidence led by the parties who asserted some detriment if the claim were to be granted, the claimants were now seeking to do so in the Claimants' Detriment Submissions. It was asserted by the Northern Territory that therefore, 'the propositions and "evidence"' put forward in those submissions could not be 'tested': NT Responsive Detriment Submissions at [9]. AFANT made similar submissions in its submissions in reply of 22 January 2020: at [9].

170. The claimants did not respond to this contention.

171. It is clear, having regard to *R v Toohey; Ex parte Meneling Station Pty Ltd* [1982] HCA 69; (1982) 158 CLR 327 (*Meneling Station*) that the Commissioner, when deciding whether to recommend a grant of claimed lands, should not take into account matters of detriment. That principle is well settled. Instead, detriment is a matter for comment on the part of the Commissioner, and it is for the Minister to consider detriment in deciding whether to accede to a claim either in whole or in part. The Minister is not necessarily confined to detriment commented upon by the Commissioner, provided the circumstances justify fresh assertions of detriment, and the Minister is not obliged to accept the Commissioner's factual or qualitative comments about particular detriment contained in the Report of the Commissioner.

172. However, it does not follow that, when commenting on detriment, the Commissioner must mechanically recite all asserted detriment, leaving the Minister uninformed as to its significance in the circumstances of the claim at hand. The

requirement to comment, to be meaningful, involves giving those who might suffer detriment the opportunity to be informed of the claim and of the Inquiry, and the opportunity to present the claim for detriment through evidence and submissions, and for the claimants to be aware of the asserted detriment and to test those claims if so advised. The task necessarily requires some assessment of the evidence of that detriment in order to assist the Minister. In *Meneling Station*, Gibbs CJ at CLR 333 noted that the Commissioner regarded his duty under section 50(3)(c):

> was only to comment on [that matter] in a way that would be likely to assist the Minister in deciding whether or not to act on the recommendation.

173. The Chief Justice further said at 334:

> To enable the Minister to give proper consideration to those matters [including detriment], the Commissioner is required to comment, and it is to be expected that he will do so in a way that will enable the Minister to understand the issues involved and the judgment which the Commissioner has formed with regard to the matters upon which the comment is made.

174. Gibbs CJ's opinion in that case was complemented by the views of Brennan J at 361, who said:

> The Commissioner can, usefully and appropriately, be asked to ascertain the facts relating to these [detriment] matters and to comment upon them in the light of the knowledge he has necessarily acquired and the sensitivities he has necessarily developed in the course of his duties.

175. For Brennan J, this task necessarily incorporated an evaluative element: *Meneling Station* at 363, a position which Deane J endorsed in *Peko-Wallsend* at 68. Indeed, the Northern Territory acknowledged this: NT Detriment Submissions at [26].

176. It is clear therefore that the Commissioner's comments in respect of asserted detriment should be aimed towards assisting the Minister in making a decision as to whether a grant should be made. This is an evaluative, not merely descriptive, task. Here, the Territory and AFANT appear to be concerned about what they consider to be uncontested evidence led by the claimants in their responsive submissions. It suffices to respond with the simple fact that, according to the authorities cited above, it is the duty of the Commissioner to assess and evaluate that evidence of detriment and comment upon it if it would or might assist the Minister in the decision under section 11 of the ALRA, irrespective of whether that detriment is contested or not. Just as this task is appropriate in respect of assertions of detriment, it is also appropriate in respect of assertions refuting detriment. This approach is permitted by the views of Mason CJ and Brennan J in *Meneling Station*, the latter which was approved by Deane J in *Peko-Wallsend*.

177. In making comments on detriment in this Report, I have had regard to the evidence (and of the extent to which evidence has or has not been put in issue). That has been done in the light of all the submissions on detriment, including those of the Northern Territory and AFANT, both of which in their responsive submissions sought to contest many of the arguments advanced by the claimants in the Claimants'

Detriment Submissions. This was done on a paragraph-by-paragraph basis. That has provided an ample opportunity to appreciate where there is a dispute about whether any submissions do not have an appropriate evidentiary base.

4.2. WHAT IS 'DETRIMENT'?

178. The second and related point of debate in submissions was the meaning of 'detriment' as contemplated by the ALRA. Several points were raised which are necessary to address.

179. It was submitted by the Northern Territory in the NT Detriment Submissions at [9] and accepted by the claimants that detriment bears its ordinary and expansive meaning of harm or damage. This is not contentious: it is the well-known definition of the term adopted by Toohey J as Commissioner in the *Borroloola Land Claim Report No. 1* (3 March 1978) (Borroloola Report) at [174]–[175]. Further, the claimants accepted that only a 'reasonable possibility' of detriment is required before a comment should be made in the report: citing *Jawoyn (Katherine Area) Land Claim Report No. 27* (6 October 1987) at [190] per Kearney J as Commissioner.

180. However, in the view of the claimants there are certain qualifications to this meaning. Firstly, it was said that a factual basis for the detriment which might result must be established, and that mere possibilities or speculations regarding detriment should therefore not attract the Commissioner's comment: Claimants' Detriment Submissions at [11]. It was said to follow that 'consequences that might reasonably be described as speculative, far-fetched, fanciful or remote do not constitute detriment': Claimants' Detriment Submissions at [12].

181. Additionally, the claimants and the Northern Territory made contrasting submissions as to whether the need to comply with processes prescribed by the ALRA is to be considered as detriment, and whether, where the ALRA operates to protect extant interests, any inconvenience as a result of compliance with those processes is or can amount to a 'detriment' for the purposes of the ALRA.

182. Finally, opposing submissions were made as to the importance of the timing that an alleged detriment arose to establishing the significance of that detriment (or whether it in fact exists at all), and consequently the nature of the comment that such timing warrants. That is, in relation to an interest in land or expenditure in relation to an interest in land, whether the fact that that interest or expenditure existed or was incurred before or after the land claim was lodged, or before or after the notice of the Inquiry was given was said to be either relevant or irrelevant. Put simply, there was a dispute about the significance of prior knowledge or deemed knowledge of the claim in the comments to be made by the Commissioner on detriment.

183. It suffices to make the following general observations concerning those submissions.

184. Detriment is not authoritatively defined but I adopt the generally accepted definition of Toohey J as Commissioner in the Borroloola Report at [174]–[175], where he said:

> Detriment… must bear its ordinary meaning of harm or damage which need not be confined to economic considerations any more than the reference to 'advantaged' [in sub-section 50(3)(a) of the ALRA] need be so confined. And by speaking of detriment 'that might result' the Act invites the Commissioner to paint with a pretty broad brush rather than apply conventional standards of proof to the material before him. Nevertheless there must be some limit to the matters that may properly be the subject of comment.

185. His Honour added that to have no regard to such a limit would be to provide the Minister with 'a range of information so broad and tentative as to be of little use to him': at [175]. In light of that statement, I accept the claimants' contention that, in every case of asserted detriment, it is first necessary that there be evidence which establishes a reasonable possibility of that detriment occurring should a grant be made.

186. However, I also accept the contention of the Northern Territory that there is no specific basis in the ALRA for the Commissioner's discriminating between asserted detriments due to their timing or state of knowledge in making a comment. The weight to be given to any particular state of knowledge is a matter for the Minister. On the other hand, it might be surprising in the normal course if the Minister were to give much weight to a detriment which existed and was known to exist at the time the relevant interest or investment was undertaken by the person asserting detriment. There may be particular circumstances where such a detriment might nevertheless be significant.

187. Yet it remains the case that, as is explored above, the function of the Commissioner is to comment in an evaluative manner on detriment such that the Minister is or may be assisted in making a decision under section 11 of whether to make a land grant to a land trust. As such, I do not consider it inappropriate that, the detriment having been commented upon, an additional comment be made relating to the extent of that detriment or even a means by which that detriment might be minimised or resolved. Indeed, an example of the Commissioner providing a qualitative observation about detriment is provided by Gray J as Commissioner in the *Elsey Land Claim (No. 132) Report No. 52* (28 November 1997) at [6.3] where his Honour included comments of a descriptive character about the detriment and theoretical steps which might be taken to address it. It is for the Minister then to decide the weight to be given to that detriment when making their decision.

188. In this sense, I do not agree with the Claimants' Detriment Submissions at [14] that matters such as timing and knowledge go to the very existence of detriment for the purposes of the ALRA. However, it is permitted for the Commissioner to make some qualitative assessment of that detriment, which the Minister may then take into account. The timing that the alleged detriment arose and any state of knowledge possessed by that detriment party may be relevant to that assessment

by the Minister. As many do in such circumstances, in anticipation of the consequences to their putative interests or investments, there is a negotiation with the relevant Land Council with the objective of securing an agreement on behalf of the traditional owners to accommodate that concern.

189. It is also necessary, given that the areas subject to claim in this Inquiry essentially consist of intertidal zones and beds and banks of rivers, to briefly comment upon the approach I have taken in respect of asserted detriment that is related to the High Court's decision in *Blue Mud Bay*. The *Blue Mud Bay* decision is authority for the proposition that permission from the traditional Aboriginal owners of land granted to a land trust is required for access to tidal waters overlying Aboriginal land to the low water mark. In relation to this claim, and similar claims, the prevention of access to such areas is, according to the Northern Territory, the 'predominant detriment of any grant': NT Detriment Submissions at [15]. That position is understandable: the majority of the detriment asserted in this Inquiry relates to access to these kinds of areas.

190. While there is a reasonable argument that detriment which arises out of a misunderstanding of the law should not be considered within the scope of the ALRA, it is true, as the Northern Territory submitted at [13], that the approach of past Commissioners was to assume that the common law public rights to fish would be retained in respect of waters overlying Aboriginal land. However, from 1997 (when the proceedings ultimately leading to the High Court *Blue Mud Bay* case first commenced in the Federal Court of Australia and coincidentally when this claim was filed with my Office) that issue was at least contentious, and the uncertainty of the effect of that decision was acknowledged in reports from 2002 onwards, particularly those of Olney J as Commissioner: see, e.g., *McArthur River Region Land Claim (No. 184) and Part of Manangoora Region Land Claim (No. 185) Report No. 62* (15 March 2002) at [82]. The position at law was settled in 2008 and has been the subject of much publicity since then.

191. Several interim arrangements have been agreed to between the Northern Land Council on behalf of traditional owners and the Northern Territory during that time, yet a full resolution remains outstanding.

192. During the course of this Inquiry the Northern Land Council from time-to-time advanced solutions to the uncertainty and related detriment said to arise from the *Blue Mud Bay* decision. Many of these solutions in essence involved negotiation and agreements with traditional owners on reasonable terms to ensure access to the claim areas following any grant. The approach that I have adopted in this Report is that traditional Aboriginal owners are not to be assumed to be resistant to accommodating or diminishing asserted detriment, including by agreement making on reasonable terms. There is obviously scope for different perspectives on what is or may be reasonable. There is no reason, in the absence of specific evidence, to expect the traditional owners of the claimed land in this claim to be resistant to such arrangements.

193. Accordingly, the Minister may consider that submissions which ignore these kinds of avenues, which would have the effect of diminishing claimed detriment, cannot on their face be taken as necessarily demonstrating material detriment. The same may be said of the process of negotiating any agreement with the traditional owners.

194. That being said, I have commented upon and evaluated each assertion of detriment and any potential resolution of that detriment in the light of the evidence before me. Whilst I anticipate that my comments may be of assistance to the Minister, I repeat that – in the light of the recommendation in the Report that the Minister make a grant of the claimed land to the traditional Aboriginal owners – it is ultimately for the Minister to make the decision whether to do so.

195. I turn now to the claims of detriment in this Inquiry.

4.3. ROADS, BOAT RAMPS AND BARRAGES

196. It is proper to first comment upon claims of detriment that relate to roads in the claim areas, as well as related submissions in respect of boat ramps and barrages. I use the word 'related' because those assets involve the same considerations: that is, whether or not the boat ramps and barrages identified within the claim areas should be excluded from any grant as a 'road over which the public has a right of way', pursuant to sections 12(3)(a) and 12(3)(b) of the ALRA.

197. There are several road reserves in or partially within the claim areas which would be automatically excluded from the grant under those sections. They were identified in the NT Detriment Submissions at [81]–[87] and in the statement of Mr Garry Fischer (Director, Corridor Management, Department of Infrastructure, Planning and Logistics) dated 14 May 2018, and include Shady Camp Road; Croc View Road (of which there are two); Mary River Bridge; Rock Hole Road; and Couzens Lookout Road.

198. Whether those roads are included in a grant to a land trust is not at the discretion of myself nor the Minister. Their status as road reserves was not contested by the claimants.

199. The more controversial, yet by no means unfamiliar, issue is whether boat ramps and barrages in the claim areas attract the operation of section 12(3) of the ALRA. That is, whether these assets are automatically excluded from a section 11 recommendation to grant to a land trust. There are several such assets within the claim areas: as demonstrated below, of particular importance are Shady Camp Boat Ramp (which is connected to Shady Camp Road) and Shady Camp Barrage. Others include Mary River Boat Ramp and Shady Camp Fresh Water Boat Ramp, as well as Bobbies, Tyrrells and Crocodile Creek Barrages.

200. Submissions on this topic were received from the Northern Territory, AFANT, and PPP. Their submissions were in substance very similar, asserting that both boat ramps and barrages are roads over which the public has a right of way, and

that as such, they should be excluded from any grant. These contentions were resisted by the claimants, and the admissibility of some of their evidence as to their distinguishing characteristics was questioned by both the Northern Territory and PPP.

201. It is not necessary for me to decide that issue for the principal reason that I agree with the observations of Olney J as Commissioner in the *McArthur River Region Land Claim (No. 184) and part of Manangoora Region Land Claim (No. 185) Report No. 62* (15 March 2002). In that report Commissioner Olney noted that whether or not boat ramps or barrages are roads of the type referred to in section 12(3) of the ALRA is not a question on which the Commissioner can make a 'final judicial determination': at [167]. To the extent that this section of the ALRA is applicable, the claim areas, including any boundaries they share with public road reserves, will need to be identified by a survey based upon the appropriate formal principles prior to any grant being made.

202. I note however that evidence of public use of Shady Camp Barrage is limited, save for sporadic instances of recreational fishing.

203. If those assets are not determined by survey to be public roads, then the Northern Territory will suffer detriment should they be denied access to them for the purposes of maintenance and the like. This contention was advanced by Mr Fischer. However, as Crown assets or probably more accurately as features on unalienated Crown land, boat ramps and barrages within the claim areas may in fact fall within the remit of sections 14 and 15 of the ALRA.

204. Section 14(1) relevantly provides:

> Where, on the vesting in a Land Trust of an estate in fee simple in land, the land is being occupied or used by the Crown or, with the licence or permission of the Crown, by an Authority, the Crown or the Authority is entitled to continue that occupation or use for such period as the land is required by the Crown or the Authority.

205. Section 15(1) of the ALRA in effect provides that, if the use of the land protected by section 14 is not a 'community purpose' then certain rents may be payable by the Crown. A community purpose is defined in section 3(1) as 'a purpose that is calculated to benefit primarily the members of a particular community or group'.

206. These provisions may therefore in any event enable access by the Northern Territory for use and maintenance of the boat ramps and barrages, with the option of rent payable should they not be solely used for community purposes. Detriment would therefore be limited to a rental fee payable by the Northern Territory under section 15, which the Minister may consider to be a nominal detriment.

207. I also note the claimants' submission that the Northern Territory built Shady Camp Boat Ramp with knowledge of the claim. However, the claimants stated that they are in any case willing to negotiate an agreement with the Northern Territory for access to the boat ramps: this would have a similar effect as ALRA section 15 rent

in causing some but not great financial detriment, and accordingly is detriment of little substance.

208. Other assertions of detriment in relation to access to the boat ramps and barrages in the claim area, particularly in relation to recreational fishers' and pastoralists uses of those areas, are addressed below.

4.4. FISHING

209. Many submissions in respect of fishing were received in this Inquiry. These can be broadly characterised as falling into three categories: recreational fishing, commercial fishing, and the Northern Territory's 'whole of fisheries management' approach.

4.4.1. Recreational Fishing

210. The principal submissions on the subject of the detriment which might be occasioned to recreational fishers were a grant to be made were received from AFANT and the Northern Territory, both in its written submissions and through the evidence of departmental staff such as Mr Ian Curnow. AFANT's evidence, aside from its written submissions, included statements from Mr David Ciaravolo, who is the Chief Executive Officer of that organisation, Mr Ronald Voukolos, proprietor of Fishing and Outdoor World store in Darwin, Ms Melita McKinnon, coordinator of the Shady Lady Classic fishing competition, and Ms Kristen Nobel, coordinator of the Secret Women's Business Barra Challenge and secretary of the Palmerston Game Fishing Club. Mary River Houseboats, a business operating in the claim area, also made related albeit brief submissions on the topic of fishing competitions.

211. Before I turn to my substantive comments on detriment, one evidentiary matter must be dealt with. During the hearing of detriment evidence in Darwin on 26 June 2018 AFANT sought to tender a statement of Mr Ciaravolo and an accompanying Appendix A entitled 'AFANT – Shady Camp, Mary River, Wildman River & Channel Point / Peron Coast Land Claim Survey' (the Survey). As its title suggests, the Survey was said to be relevant to both this Inquiry and the Inquiry in respect of the Peron Islands Area Land Claim (No. 190) which, at the time of writing, is ongoing. I declined to receive both the Survey and the contents of Mr Ciaravolo's statement only to the extent to which they were based upon the Survey, and gave some short reasons for this decision. I then indicated that I would give more detailed reasons in the Report.

212. I now turn to those reasons.

213. The Survey and parts of Mr Ciaravolo's statement relying upon it were tendered for the chief purpose of demonstrating that the claim areas are popular for the fishing community, and that significant detriment would result should those areas

be closed by the traditional owners. The Survey contained a range of qualitative and quantitative data, obtained in response to a series of questions of both an 'open' (i.e., questions prompting further explanation) and 'closed' (questions with a limited range of answers which could be selected) nature. A number of the contentions advanced in Mr Ciaravolo's statement relied upon the 'evidence' contained in the Survey. AFANT obtained the responses to the Survey by sending it directly to its members via email, and it was also made available for response on AFANT's Facebook account. In total, there were 1886 responses.

214. While it is true that a Commissioner, in conducting an Inquiry under the ALRA, is not bound by the conventional laws of evidence applicable to proceedings in an Australian court, regard must generally be had to procedural fairness for the parties, including the claimants. I acknowledge that Mr Ciaravolo went to great effort to produce the Survey, yet it would have been unfair on the claimants for it to have been received for several reasons. This is firstly because the audience to whom the survey was exposed was a necessarily selective audience. Mr Ciaravolo claimed that the survey was a 'community survey': I find that argument difficult to accept when it was exposed only to a specific group of people who are already committed recreational fishers, rather than the wider community as a whole.

215. Additionally, those who responded to the Survey may well be those who feel most strongly about fishing in those areas. Indeed, it is quite possible that there are a range of other people, whether AFANT members or followers of AFANT on Facebook, who did not seek to participate. Mr Ciaravolo stated that AFANT has approximately 800 members and 4400 Facebook followers: the Survey received 1886 responses. That is, the data was potentially incomplete even amongst AFANT members and followers, let alone any wider 'community' of recreational fishermen. In short, the Survey did not meet the normal tests for independence of participation.

216. Second, the claimants did not seek to contest in any substantive way the social value and popularity of the claim areas for recreational fishing. So the Survey generally would only have confirmed what the claimants' acknowledged. They accepted that for many years there has been recreational fishing in these areas, and that to deprive the general recreational fishing community of access to these areas would result in a detriment to that large group of recreational fishers.

217. On the other hand, there was a potential detriment to the claimants by the general assertions in the Survey as it included some specific strong comments which could not be tested. The claimants also did in evidence posit solutions to the chief concern said to be raised by the Survey (that is, closure of the claim area to recreational fishing) which, without the expenditure of significant resources on cross-examination, could not be put to its participants. That prospect was put to Mr Ciaravolo. Thus, the attitudes of the individual participants in the Survey to the potential alleviation of their asserted detriment could not be fairly tested, unlike others who submitted detriment evidence in this Inquiry. It would have been, I think, a severely onerous burden to place upon them, given the uncontentious nature of the issue at hand.

218. Having given my reasons for the exclusion of that evidence from this Inquiry, I turn now to my substantive comments in respect of recreational fishing.

219. As discussed above, parts of the claim areas are popular for the Northern Territory recreational fishing community. That popularity was not disputed. Shady Camp in particular is said to offer a unique experience due to a combination of its proximity to Darwin and its large numbers of barramundi. Tournaments such as the Shady Lady Classic and the Secret Women's Business Barramundi Challenge take place there. That area is also subject to the Mary River Fish Management Zone to encourage sustainable fishing practices.

220. Alligator Lagoon was also mentioned by Mr Ciaravolo as a place of significance. However, I note that that location is relevant to the part of the Woolner LC claim over the northern-most extent of the beds and banks of the Mary River contained within Northern Territory Portion 2708 (described in the application as claim area 'iii.a'). That part of the Woolner LC has been withdrawn by the claimants.

221. Submissions in respect of recreational fishing covered a range of topics. They are now described in turn.

222. Firstly, there were a significant number of assertions as to what may be termed amenity or social detriment primarily due to potential disruption to recreational fishing in the claim areas that might result from a grant and subsequent closure of access to those areas by the traditional owners. The loss of the social and mentoring benefits associated with the aforementioned tournaments, particularly for women (as they are women-only competitions), was referred to in this context by AFANT. Mary River Houseboats supports those competitions, and as such their benefit from use of the claim areas is shared. In response, the claimants submitted that those competitions commenced after the claim was made, meaning that the risk of a grant was voluntarily assumed such that no detriment would arise. Alternatively, it was said that the extent of the detriment would be minimal given the modest number of participants. A permit system was also proffered by the claimants as a solution.

223. Concerns also included possible relocation into more crowded areas if the claim areas were closed, and the special value of the Mary River and Shady Camp in particular. The recently built Shady Camp Boat Ramp was said by Mr Curnow to play a key role in attracting recreational fishers to that part of the Mary River. This was constructed at a 'significant cost': Statement of Ian Curnow at [29].

224. Mr Curnow further stated that access to places surrounding the claim area, extending from Cape Hotham to the Wildman River, could be jeopardised by a grant.

225. The claimants responded in their written submissions by saying that generally, there was mixed evidence of the extent of fishing in those areas and that Shady Camp boat ramp itself was built by the Northern Territory with notice of the claim.

They did however submit that in any case, they were willing to negotiate a permit system or access agreements to alleviate recreational fishers' concerns.

226. The topic of permits was anticipated in the submissions of the Northern Territory and AFANT, and as such the second area which attracted significant focus concerning detriment was that associated with any permit system being put in place. It is not necessary for me to recount in detail the content of these submissions, but common themes included uncertainty surrounding the terms of the permits as well as its continuation into the future, the reliability of the system, potential refusal to recreational fishers or capped numbers, their associated financial and temporal costs, delays and notice periods (although Mr Ciaravolo verbally accepted that the majority of fishing trips, in his opinion, did not take place on short notice), and fewer competitors in fishing competitions within the claim area.

227. As such, it was said that the best method to ensure access would be either an open areas declaration under section 11 of the *Aboriginal Land Act 1978* (NT), or a long term (permit free) access agreement.

228. In response, the claimants contended that there is no certainty of fishing rights anywhere in the Northern Territory from year to year, because the claim area is already subject to closures and limits under current regulatory practices. In this sense, it was said that permits would in fact provide some certainty, and that anglers were accustomed to obtaining them, whether in respect of this area or otherwise. Kane Bowden, who was at that time responsible for the development of the Northern Land Council Permit Management System (PMS), gave evidence in the Fitzmaurice Land Claim inquiry as to the workability of such a system for the general public. That evidence was adopted by the claimants in this claim. It is only of general significance, as the nature of any such PMS will inevitably evolve over time, and it is the PMS (if any) operating at the time the Minister comes to make a decision of the recommendation in this Report which will be relevant to the Minister.

229. While Ms McKinnon and Mr Voukolos verbally accepted during the course of the hearings that the permit system similar to that proposed by the Northern Land Council would likely satisfy their concerns, the idea of a permit system as a solution was generally resisted. AFANT in submissions rejected the contentions of the claimants in regard to any certainty of access to be provided by permits, and that obtaining permits for the area was routine. It also raised credibility issues in respect of Mr Bowden due to perceived contradictions with public statements of Mr Joe Morrison, then-CEO of the Northern Land Council: see Submission on behalf of AFANT dated 8 November 2019 at [9]–[11].

230. Other submissions included claims by AFANT that there would be detriment to the wider economy due to a grant preventing recreational fishing in the region. Specifically, it was said that angling clubs and local businesses would suffer. Mr Voukolos also that his business in Darwin would be impacted. While their concerns are understandable, little evidence in support of these contentions was led.

231. Mr Ciaravolo on behalf of AFANT and Mr Voukolos also posited the issue of 'cumulative' detriment in relation to other beds and banks and intertidal zone claims, an issue which was not pursued as vigorously in this claim as in the past. It was submitted that a relocation of the fishing effort from the claim areas due to closure by the traditional owners could put pressure on other fisheries and impact the experiences of anglers in other regions due to overcrowding. Again, little evidence was led in respect of this detriment. Further, in my view, such claims misconstrue the intent of the ALRA, which does not envisage a situation whereby prior claims might inhibit those of later claimants. It is not a 'first in, best dressed' system.

232. Were the claim to be acceded to by the Minister, the traditional Aboriginal owners would have the right to prevent access to the claim areas. I accept as a matter of logic that this could also prevent access to surrounding areas. While the numbers of anglers in the claim area are not clear on the evidence, I think it would be wrong to treat recreational fisher's concerns regarding continued access to the area as insignificant. Many anglers consider that Shady Camp, for example, is of special value, although the timing of the construction of the boat ramps there (i.e., post-lodging of this land claim) and its awareness of the claim raises questions as to whether any detriment to the Northern Territory should be given great weight (of course subject to the status of such works having regard to sections 14 and 15 of the ALRA, as noted above).

233. The Minister in any event may consider that all relevant concerns would be alleviated by putting in place a manageable and working permit system on the terms proposed by the NLC, as was accepted by some of the persons concerned about access in the evidence. This might include the ability for fishing competition organisers to apply on behalf of all competitors, thus reducing any detriment associated with that process.

234. While both the Territory and AFANT submitted that a permit system gives rise to detriment of its own, evidence of this is dubious. I do not consider there to be doubt as to Mr Bowden's credibility in relation to the proposed PMS: Mr Morrison's allegedly contradictory statements were not put in evidence during this Inquiry, and in any event were made in an entirely different context.

235. When the Minister comes to consider whether to make the grant of the claimed land as recommended by this Report, the Minister will give consideration to the various options canvassed in the submissions. It might be thought that an open area declaration gives AFANT and all amateur anglers an inappropriate priority status over that of the traditional Aboriginal owners of the land. It might be thought that it is preferable to simply make the grant of the land, leaving it to AFANT or the Northern Territory to negotiate access for amateur fishing. Or, in the light of the general proposal of the Northern Land Council on behalf of the claimants, it might be thought that the detriment to amateur fishers by the grant of the land would best be accommodated by a PMS. In that event, the Minister would have regard to the extent of access provided (protecting places of special significance to the traditional owners), protection of the environment, the ease of securing access permits, the range of permits available, the fees to be charged and the like.

236. Consequently, I am not convinced by AFANT's argument that an open areas declaration under section 11 of the *Aboriginal Land Act* or long-term, permit free access agreements would be necessary nor in fact desirable. Such arrangements would largely negate the benefit of an ALRA land grant. It was not contended that the claimants are not willing to negotiate with recreational fishers for access and use of the claim area on reasonable terms: indeed, it would be wrong on the evidence to conclude that. Likewise, the evidence of both the Northern Territory and AFANT suggests that they are also willing to have a seat at the negotiating table, consistent with past and ongoing practice. There is therefore no reason to think that a solution amenable to all parties cannot be reached.

4.4.2. Commercial Fishing

237. Submissions in respect of detriment that might be occasioned to commercial fishing interests in the claim area were received from the Northern Territory, including through Mr Curnow, and from Ms Katherine Winchester on behalf of the NTSC.

238. The principal topic was potential loss from, and uncertainty of the continued right to fish in the claim areas for commercial purposes, without permission from the traditional owners. Mr Curnow and the NTSC gave evidence as to the presence of mud crab fisheries in particular, and Mr Curnow stated that the adjacent areas such as the lower Mary River and Tommycut Creek were 'highly important' for mud crabbing: Statement of Ian Curnow at [19]. Ms Winchester stated that some members of the NTSC were based near Shady Camp.

239. An associated detriment which was said to potentially arise in the event of a grant of the claim areas was the loss of flexibility of commercial operators to respond to environmental and market conditions.

240. The claimants' primary contention in response to these concerns was simply that little evidence of commercial fishing in the claim areas was advanced by either the Northern Territory or the NTSC. Consequently, any assertion in respect of access uncertainty was speculative. Indeed, it was even said that the evidence provided by them was in contradiction to each other, with Mr Curnow's evidence purportedly demonstrating that minimal commercial fishing in fact occurs in the claim areas. This assertion was rejected by the Northern Territory and the NTSC in reply.

241. Additional submissions were made by the Northern Territory and the NTSC as to greater pressure on other fish stocks which might result from a grant of the claim areas. This was responded to by the claimants in the manner described above (i.e., that evidence in support of these propositions was lacking).

242. Finally, the NTSC made a minor submission as to the economic and regional effect of a loss of commercial fishing opportunities in the claim areas. Apart from the impact on existing commercial licensed fishers, discussed below, there is no reason to think that the traditional owners might themselves undertake the commercial activity as licensees to the extent that it was worthwhile.

243. In my view, it is not shown that detriment of much significance would be occasioned to the interests of commercial fishers in relation to the claim areas should a grant be made by the Minister. There was little evidence of commercial fishing (including the numbers of fish or crabs caught in the claim areas). There has been relatively little crab fishing in the area. The commercial barramundi fishery in the claim area has been closed since 2012. The latest figures provided by Mr Curnow showed activity in that year, and nothing provided by the NTSC went beyond that period in any specific way. Furthermore, nothing more than anecdotal evidence was given as to the number of licensed operators active in the claim areas. No commercial fishing license holder gave evidence or expressed concern during this Inquiry.

244. To the limited extent that commercial fishing is shown to have occurred in recent times in the claim areas, it can be said that loss of access would result in detriment in the sense that operators may, should the fishery be closed, be obliged to travel to different areas and fish for longer hours. Alternatively, licensed operators may negotiate to secure access by agreement with the traditional owners. The Minister may consider that their concerns would be remedied by access agreements with the traditional owners who, according to their submissions, are willing to negotiate on reasonable terms. There was no contention advanced that such negotiations would be other than realistic and in good faith.

245. There was also no evidentiary basis for asserting that pressure on other fish stocks would result from a grant of the claimed areas. I agree with the submissions of the claimants that the evidence demonstrated little commercial fishing activity in the claim areas: that undermines the contention of undue pressure on other fish stocks.

246. For the sake of completeness, it should be noted that I have treated statements claiming some kind of detrimental effect on the wider Northern Territory economy as speculative. No evidence in support of this was provided. The commercial fishing activities, to the limited extent to which they exist in the claim areas, might well continue under arrangements with the traditional owners, or indeed by the traditional owners.

4.4.3. Fisheries Management

247. Mr Curnow gave detailed and helpful evidence on the topic of fisheries management in the Northern Territory, as he has done in other claims. In his capacity as Director of the Department of Primary Industry and Resources (DPIR), he is responsible for administering the *Fisheries Act* and its related documents, including the Northern Territory's Harvest Strategy and Harvest Guidelines. These documents are aimed towards sustainable decision making in respect of ecological, social and economic aspects of fishing in the Northern Territory. In his statement at [8], Mr Curnow summarised the goal of the Harvest Strategy as providing:

> …a framework to ensure that fishery managers, fishers and other stakeholders have a shared understanding of the objectives of using a specific resource and work together to consider and document responses that will be applied to various fishery conditions (desirable and undesirable) before they occur.

248. Considering this objective, it was therefore said that there was a critical need to understand the impact of reduced or modified access to the claim area 'as it relates to overall management of fisheries as a natural resource': at [46], also known as the 'whole of fishery approach' to fisheries management. Thus, it was said, detriment may result from a grant due to permits and agreements under the ALRA imposing an additional regulatory regime to that already in existence.

249. Mr Curnow also said that any impediment to access following a grant would be contrary to the Harvest Strategy and Guidelines, especially in light of the 'whole of fisheries' approach and the subsequent need to consider fishing detriment on a 'Territory-wide' and therefore cumulative scale (citing the approach of Olney J as Commissioner in the *McArthur River Region Land Claim (No. 184) and part of Manangoora (No. 185) Report No. 62* (March 2002) at [169]). According to Mr Curnow, regional level disruption to the Strategy and Guidelines is possible, and financial detriment could be occasioned through forcing government buy back of fishing licenses to ensure that its goals could still be met.

250. The claimants rejected these contentions on various grounds. Firstly, it was said that the Harvest Strategy and Guidelines are not intended to override the interests of traditional owners. Secondly, the claimants submitted that the strategies contained in those documents would in fact facilitate the resolution of any detriment. Finally, it was again stated that the claimants are willing to work with the Northern Territory to ensure sustainable use, with access to be negotiated through agreements and permits. The Northern Territory in its reply did not directly traverse these points.

251. I have indicated above that I am cautious about accepting claims of cumulative detriment in the context of recreational fishing. The same can be said in respect of commercial fishing. Indeed, notwithstanding the lack of evidence in this Inquiry of a real risk of a significant diversion of fishing effort in the event of a grant of the claimed areas, the evidence also does not establish that a grant of the claimed areas would impact on the overall capacity of DPIR to actually manage the fisheries in accordance with the Harvest Strategy and Harvest Guidelines. Indeed, Mr Curnow verbally indicated that his department has been aware of the potential for further intertidal zones and beds and banks grants since the *Blue Mud Bay* decision, and that any change to access could be accommodated relatively easily if required. As the claimants submit, those documents were developed with an awareness of the claims under the ALRA still to be resolved, after the *Blue Mud Bay* decision, and its legal implications in mind. There is nothing to suggest that the traditional owners of the claimed areas would not be willing to negotiate in that respect.

252. It is therefore difficult to see where the detriment would arise in respect of fisheries management, aside from what the Minister may consider to be either relatively insignificant or even speculative detriment occasioned to the Northern Territory government as a result of the potential buying back of licences (notwithstanding the lack of evidence of licensed operators in the claim area in any event).

4.5. PASTORAL INTERESTS

253. There are several pastoral interests which abut the claim areas. These include Annaburroo Station (owned by Norbuilt Pty Ltd and located adjacent to the Mary River Southern Part, split by the Arnhem Highway), Woolner and Marrakai Stations (run as an integrated operation but owned and operated by Marrakai Pastoral and the Walker entities respectively, and correspondingly located near the Western Intertidal Zone at Chambers Bay, and adjacent to the left bank of the Mary River Southern Part to the east of Djukbinj National Park), and Melaleuca Station (owned and operated by PPP and comprising Northern Territory Portion 2708, which surrounds the Shady Camp area and is adjacent to the Mary River Northern Part). Annaburroo and Melaleuca are operated pursuant to Crown Perpetual Leases, whereas Woolner and Marrakai are operated under pastoral leases governed by the *Pastoral Land Act 1992* (NT).

254. Submissions of a more general nature were also received from Luis Jose Casimiro da Rocha, Executive Director of the Rangelands Division at the Department of Environment and Natural Resources at the Northern Territory Government, as well as Mr Paul Burke and Mr Ashley Manicaros of the NTCA.

255. I note that, to the extent that PPP would have suffered detriment due to its border with the most downstream stretch of the Mary River subject to claim (described as claim area iii.a in the originating application), the withdrawal of that area from the Woolner LC means that no question of detriment arises there. However, PPP also makes submissions in respect of that part of Northern Territory Portion 2708 which is adjacent to the beds and banks of the Mary River at or around Shady Camp (claim area iii.b or the Mary River Northern Part). These contentions are addressed in this section of the Report.

256. I also note that an interest in participation in the Inquiry on the issue of detriment was received by my Office from Mr Matthew Kelman on 29 March 2018. Mr Kelman was a part-owner of Carmor Plains, a livestock station and wildlife reserve which abuts the intertidal zone in the Mary River region immediately to the west of the Wildman River (claim area ii or the Eastern Intertidal Zone). On 14 May 2018 Mr Kelman submitted a further statement outlining his concerns in relation to the claim.

257. On 13 May 2019 Mr Kelman, through his solicitors Ward Keller, withdrew his interest from the Inquiry. In that same correspondence Mr Kelman also alerted my Office to a change of ownership of Carmor Plains, having sold the property that

month. He also noted that he wished for access to a memorial in the claim areas, placed there at some time between 8 May 2018 and 13 May 2019, to be preserved. I note that authority for Mr Kelman's placing of that memorial on Crown land was not established in evidence during this Inquiry. There is no basis identified upon which that memorial was said to have been placed on unalienated Crown land. It was placed there in awareness of this claim. It cannot give rise to any relevant detriment. In the event of a grant of the claimed areas, it will be a matter for the traditional owners to decide what is done with that memorial. Until that time, it is a matter for the Northern Territory to take such action, if any, as it considers appropriate.

258. The new owner of Carmor Plains may be taken to have been made aware of the claim by the vendor, having not provided any independent notice or submission of their own. The new owner of Carmor Plains also did not seek to participate in the Inquiry. It may be assumed that the grant of the claimed area is not a matter which causes the new owner of Carmor Plains any relevant 'detriment' concerns.

259. I also note, for the sake of completeness, that Opium Creek station, operated by Jerambak Holdings Pty Ltd, also adjoins the claim area. Apart from the public notice of the Inquiry, my Office sent by letter a Notice of Inquiry to Jerambak on 6 February 2018: no response was received. It may also be assumed that the grant of the claimed areas is not a matter which causes the owners of Opium Creek any relevant 'detriment' concerns.

4.5.1. Commercial Operations

260. There were several submissions pertaining to detriment that might be occasioned to pastoralists' commercial operations. These parties utilise the claim areas in similar ways, and as such there were many areas of common concern, principally in relation to loss of access to Crown land adjacent to the respective leases should a grant be made. Such concerns included loss of rights in respect of water usage and access pursuant to the *Water Act 1992* (NT), biosecurity concerns as a result of the inability to manage feral animals (such as buffalo and pigs) and weeds (such as Mimosa), and financial costs of erecting fencing to prevent the need for unauthorised stock retrieval. The latter was said by all parties to constitute significant detriment as the flood-prone nature of the claim areas would require that fences be frequently replaced. In the case of Woolner Station, similar logistical hurdles were said to arise in respect of the Chambers Bay intertidal zone.

261. Other submissions in respect of commercial pastoral operations were unique to certain parties.

262. Firstly, the location of PPP's Melaleuca Station means that a significant portion of its claimed detriment was related to any reduction in access to Shady Camp Barrage, which crosses the Mary River at Shady Camp Billabong. The Barrage was said to be crucial to Melaleuca's ability to transfer cattle between pastures, and that consequently loss of access would impact on Melaleuca's overall carrying capacity

and viability. Mr James Paspaley and Mr Rodney-Lee Beament also said that any reduced capacity at Melaleuca will negatively impact its integrated operations with Dry River Station in Katherine, reducing productivity and occasioning significant financial loss for PPP. Under this arrangement, cattle are bred at Dry River then fattened on Melaleuca's grasslands, where they cross the Barrage from east to west multiple times per year to graze different grasslands prior to sale.

263. The Station is also heavily reliant on water access via a pump that was permanently affixed to the Barrage by PPP in 2016, pursuant to an 'unofficial agreement' with the local ranger: see Statement of Rodney-Lee Beament (Exhibit R15), Annexure RLB-5. Mr Paspaley also said that other works have been made to Melaleuca Station over the past eight years without knowledge of the claim. It was not made clear whether these improvements relate to unalienated Crown land or, conversely, land held under PPP's Crown Perpetual Lease.

264. Other detriment associated with PPP's loss of access to the Barrage included impacts on the ability to take fresh water for stock from other parts of the Mary River (which is vulnerable to saltwater intrusion in some stretches) and loss of potential for mustering agreements with neighbouring stations such as Marrakai.

265. Thus, it was said that should access to the Barrage be curtailed, or the Barrage not be adequately maintained by the traditional owners, significant detriment would result. An agreement under section 11A of the ALRA, followed by a peppercorn rent arrangement, was said on behalf of PPP to be a sufficient means of mitigation.

266. In response, the claimants submitted that PPP had no legal right to access the Barrage, but that use thereof would nevertheless be accommodated by an appropriate licencing arrangement. They also submitted that reasonable due diligence on the part of PPP would have identified the existence of the claim and that as such, no detriment arises in respect of any improvements made. These contentions were rejected in reply.

267. Secondly, submissions unique to the Walker entities canvassed the integrated nature of operations at Woolner and Marrakai, Stations which are operated under pastoral leases. Marrakai is said to be totally reliant on direct access to the Mary River for its water supply and consequently, new bores would also have to be built at significant cost to the operators in order to support this operation should the claim areas be granted and access to the granted areas refused or limited. Further, a reduction in cattle herd size at Marrakai as a result of a lack of water access would result in a similar reduction at Woolner. This is because cattle are trucked to Woolner from Marrakai prior to export, and a reduced water supply at the latter location would necessarily impact the herd held at Woolner.

268. Finally, Mr Greg Thompson, Director of Norbuilt said that a grant of the claim areas would negatively impact the resale value of Annaburroo. There was little evidence in support of this contention, particularly in light of recent sales of other

pastoral properties in proximity to the claim areas, such as Carmor Plains. There was really no significant evidence to support that claim.

269. This last assertion aside, it is convenient for me to comment upon each of these alleged detriments in turn.

270. Firstly, as to the common assertions of detriment on behalf of pastoralists, the claimants accepted that curtailment of current rights of water usage under the Northern Territory Water Act is detriment within the meaning of the ALRA, and that such detriment would be significant. Instead, the claimants indicated the willingness to negotiate arrangements to facilitate the continuation of existing practices on reasonable terms. A similar approach was taken in respect of those specific detriments claimed by the Walker entities in respect of bores.

271. In those circumstances, it is apparent that the Minister, if satisfied that such an arrangement would be reached or has been reached, may consider that the detriment which the pastoral lease holders would experience in their pastoral activities if the claimed lands were granted to the traditional owners would readily be accommodated. In that event it would not be an obstacle to the grant of the claimed lands.

272. The same can be said of concerns in respect of needs for fencing. Financial detriment may result for pastoral operators should the need arise to build fences between the beds and banks of rivers or intertidal zones within the claim areas and land that is subject to pastoral operations (that is, non-Crown land). However, the claimants are, on the evidence willing to negotiate agreements such that fencing is not required.

273. The issue of biosecurity activities which rely on access to adjoining Crown land is, on its face, less clear. Having regard to the purposes of the *Pastoral Land Act* (PLA), conducting these activities could properly be characterised as both a right and an obligation of pastoral lease holders.

274. In respect of Crown Perpetual Leases, Mr James Paspaley submitted at the hearing that the terms of that lease placed an obligation on PPP to undertake such activities. Yet it remains the case that the land upon which these activities take place is often unalienated Crown land within the meaning of the ALRA, and that as such, it is not clear that there is an explicit legal basis upon which such access is founded. I do not need finally to decide that question.

275. However, while the claimants initially resisted the idea that the inability to conduct biosecurity activities would constitute a detriment as contemplated by the ALRA, this position was not pursed in the Claimants' Detriment Submissions in Reply of 13 November 2020. Instead, it was again noted that the claimants are willing to allow for these activities to be carried out via appropriate access agreements on reasonable terms. I consider this to be a sensible and pragmatic position which the Minister may wish to take into account when considering whether to make a grant.

276. I turn to the specific claims of detriment by individual pastoralists.

277. I first address PPP's assertions of detriment specific to Melaleuca's use of Shady Camp Barrage. The evidence is clear that the Barrage is of considerable importance to Melaleuca's operations, and this is not contested (although I do not consider the general estimates in figures provided in support of Mr Paspaley's predictions of financial loss to be of much assistance, without more concrete financial statements or evidence of that kind). Consequently, there will be a significant potential detriment to PPP in the event that the Minister adopts the recommendation in this Report, both in the operations of Melaleuca Station and in its operation in conjunction with Dry River station (also operated by PPP), and access to that area is consequently prevented. The claimants, whilst acknowledging that potential detriment, indicated that an appropriate agreement between PPP and them as the traditional owners would be a likely resolution of those concerns. That would be an agreement of the character applicable generally to the operation of cattle stations abutting 'beds and banks' claims, where the relevant pastoral lease runs to the top of the riverbank or the high water mark, and it is acknowledged that it would be appropriate by agreement to accommodate the normal operations of the cattle station in the access enjoyed to the banks below the top of the banks or to the low water mark. At present that access is of course across unalienated Crown land which is the subject of this claim.

278. I do not, however, add to that potential detriment for the purpose of commenting on detriment the disadvantage which might flow from any 'unofficial agreement' said to entitle PPP to access to water resources in and across unalienated Crown land. The letter from the Conservation Land Corporation annexed to the statement of Mr Rodney-Lee Beament (a long-term employee of Melaleuca Station) merely acknowledges the 'unofficial agreement with the Senior Ranger in charge of Shady Camp Reserve' for the station's use of the Barrage. While it is arguable that, as PPP submits, this constitutes recognition by the Northern Territory, it remains the case that the Barrage is unalienated Crown land and thus is available for claim under the ALRA. The letter does not involve any consideration passing from PPP to the Crown, but reads merely as an informal acknowledgement of an existing practice which the Conservation Land Corporation officer has referred to. The claimed area relevantly is not over land owned or occupied by the Conservation Land Corporation.

279. I have assumed in the preceding two paragraphs that, even if the Barrage itself is found to be a public road so that sections 14 or 15 of the ALRA might apply, there is an additional element of access over the claimed areas which might have the effect causing this specific concern to PPP.

280. I do not consider it necessary to make any additional recognition of the expenditure of PPP through Melaleuca Station in relation to the Barrage as a detriment, such as the installation of water pipes under that asserted agreement. Such expenditure should be considered as improving the value of the station and its efficient operability, but so long as the primary elements of the potential detriment are

accommodated by an appropriate agreement there will be no additional detriment to consider. In any event, if such expenditure was incurred on unalienated Crown land with no more than the informal letter from the Conservation Land Corporation, it can hardly be a relevant detriment as it should have been incumbent on PPP to identify that its expenditure was not on its station's land and to secure a more formal entitlement to the area where the improvements were carried out.

281. The same reasoning extends to any related business advantages accrued as a result of that expenditure, which (it is said) are potentially put at risk if the claimed areas are granted to the traditional owners.

282. It should be noted that PPP did not build the Barrage. As Mr Da Rocha said, Shady Camp Barrage has been in its current location since at least 1989, approximately 4 years prior to PPP's purchase of the lease and 8 years before this land claim was lodged.

283. The claimants in their submissions acknowledged that one of the main purposes of the Barrage is to provide access to the pastoral lease: see Claimants' Detriment Submissions at [126(a)].

284. Thus, while the loss of any associated benefit due to expenditure in relation to the Barrage (i.e., improved access to water) should not be considered a detriment in the sense contemplated in section 50(3)(b) ALRA for the reasons just given, I am of the view that significant potential detriment would result should PPP not be able to transport cattle across the Barrage. I have so concluded earlier in this section of the Report. As I also there noted, the Minister may consider it pertinent that the claimants are willing to negotiate with PPP for Melaleuca's continued use of the Barrage. This attitude was shared by Mr Paspaley himself, who acknowledged that PPP is accustomed to negotiating with traditional owners in many of its rural and remote operations. There appears to be a clear path to the resolution of PPP's asserted detriment in relation to the Barrage.

285. The concerns of the Walker entities in relation to the interrelated operations of Woolner and Marrakai Stations really falls into the same category. The normal pastoral activities carried out on those stations would expose them to potential detriment if the claimed areas were granted to the traditional owners, but those concerns are readily accommodated by an appropriate agreement with traditional owners as foreshadowed in the claimants' submissions. If such an agreement is made, then the benefits of the integration of operation of the two stations would flow in any event. There is no need to address any additional assertion of detriment by reason of the operating efficiency of those stations by the use of water resources as presently used.

4.5.2. Diversification Activities

286. The Northern Territory, NTCA, PPP, Marrakai Pastoral and the Walker entities made submissions in respect of financial detriment arising from any limitations on the generation of alternative sources of income by pastoralists. Such activities, which include, for example, tourism initiatives, can be termed 'pastoral diversification'. Detriment claimed in relation to pastoral diversification can be further divided into two categories: current and future.

287. It is apt to firstly address the question of legal entitlement.

288. In my view, it would be contrary to the scheme of the ALRA if the Minister under section 11 was required to consider claimed detriment based upon the impairment of interests that arise out of actions but which contravene legislation, or which are not authorised by any existing entitlement of the putative claimant. It would be extraordinary if the ALRA contemplated that the traditional owners of unalienated Crown land should be vulnerable to not receiving a grant of land because another person or entity has undertaken activities over that land without any entitlement to do so. The same can be said of expenditure in relation to these kinds of assertions: it was not money and time invested, but money and time gambled. The loss is suffered because the risk was taken.

289. Consequently, I do not consider that detriment arises if a certain claimed benefit derived from non-pastoral use of Crown land might be curtailed by a grant of land when there is no legal basis for that benefit in any event. This would be contrary to the objects of the ALRA. This is consistent with the approaches of past Commissioners: see, e.g., the *Warnarrwarnarr-Barranyi (Borroloola No. 2) Land Claim Report No. 49* (March 1996) at [6.1.1]–[6.1.7] per Gray J as Commissioner.

290. In assessing claims of detriment in relation to diversification efforts, whether current or future, it is therefore first necessary to determine whether the party claiming that detriment is entitled to conduct such operations under the terms of its lease or otherwise.

291. PPP operate Melaleuca pursuant to a Crown Lease in Perpetuity, under which tourism activities are permitted. It submitted that a grant of the claimed lands would reduce capacity for these activities, which at present includes day safaris run by Mr Matt Kelman. Such safaris rely upon use of the Shady Camp Barrage which, as canvassed above, is Crown land and therefore similar questions arise. In any event however, little concrete evidence was led as to the detriment to be suffered by PPP should a grant effect Mr Kelman's business, aside from vague 'tourism benefits' claimed in PPP's written submissions at [21.11]. Mr Kelman withdrew his own interest in the claim on 13 May 2019.

292. Marrakai Pastoral operate Marrakai Station pursuant to a pastoral lease governed by the *Pastoral Land Act 1992* (NT) (PLA). It was contended that detriment would be occasioned to Marrakai as a result of an impact on its Wildlands Wetlands

Safari Cruises tourism business, which runs tours during the dry season along the Mary River. It relies upon access to the beds and banks of that river. It was said that a grant would undermine Wildlands' business viability (including loss of employment) and result in the loss of a diversified operation at Marrakai. Mr David Walker estimated that revenue generated by Wildlands comprised 10% of Marrakai's overall revenue.

293. As a matter of logic, I accept that the loss of access to the beds and banks of the Mary River within the claim area would impact the Wildlands business. But it must be noted that very little evidence (for example, income or financial statements) was led in support of Mr Walker's claims of revenue impacts.

294. Additionally, and returning to the question of legal entitlement, section 85A(1) of the PLA provides that a permit must be acquired for use of a pastoral lease that is a 'non-pastoral purpose'. This was raised by the claimants, who cited Marrakai's lack of such a permit in arguing the no detriment could therefore arise, as well as the fact that Wildlands commenced operations in 2012, approximately 15 years after the claim was made and 4 years after the High Court's decision in *Blue Mud Bay*.

295. In reply, it was submitted by Marrakai that section 79 of the PLA protects Wildlands' use of the river through the pastoral property. This submission was not explained in great detail.

296. It suffices to simply say that even if Wildlands' operations on Marrakai's pastoral lease are permitted under the PLA over its leased area, Marrakai did not provide evidence of Wildlands' entitlement to use the adjacent Crown land which is the subject of this claim, and upon which it clearly relies in its operations. As the Northern Territory submitted, the standard practice is that commercial operators have a license permitting use of this kind: Northern Territory Detriment Submissions at [156]. Further, the right to conduct commercial tourism operations on Crown land is to be distinguished from any incidental rights of tourists to access to that land under the *Crown Lands Act* (NT) (CLA): see Northern Territory Detriment Submissions at [152]. For Marrakai to rely upon access to Crown land in the course of operating the Wildlands business is therefore a step too far. It is understandable that normal pastoral activities authorised under the relevant lease might be supported by access to the beds and banks of rivers and to the low water mark. But unless the lease expressly allows for diversification activities on the leased area, the fact that such unauthorised activities are carried out does not then enable that activity to attract a claim of detriment because it extends into unalienated Crown lands.

297. In any case, the claimants indicated their willingness to negotiate to provide a licence to support the Wildlands business over the relevant section of the claim areas such that it may continue to operate should the claim areas be granted. The fee associated with such a license would be a small detriment. Thus, the Minister may be of the view that the concerns of Marrakai in respect of its Wildlands business would be accommodated.

298. In any event, more generally, where there is a relevant diversification activity carried out on and from a pastoral lease area and requiring access to and use of the claimed areas or part of them, the Minister might readily take the view that the detriment to the operator of those activities in the event of a grant to the traditional owners should be borne by that operator, or alternatively that that operator should have to negotiate an agreement with the traditional owners for access to the relevant parts of the granted land.

299. It is also necessary to briefly comment upon claims of detriment occasioned to future diversification efforts in this Inquiry.

300. Mr Luis da Rocha stated that to his knowledge, 'while the lessees of Marrakai and Woolner Stations do not currently undertake any non-pastoral uses on the pastoral lease... there is *the potential* to do so [emphasis added]': Statement of Luis da Rocha dated 14 May 2018 (Exhibit NT4) at [13]. Additionally, the Northern Territory submitted that members of the public risk loss of future access to Crown land for 'low impact activities' which are permitted under the CLA, including 'fishing, bushwalking, hiking, picnicking, photography, bird-watching, bike riding, walking the dog etc': NT Detriment Submissions at [155].

301. The NTCA reiterated these concerns. Mr Paul Burke said that stations such as Marrakai and Melaleuca had much potential in respect of diversification. Mr Burke also provided a copy of a document titled 'Mary River Wetlands Visitor Action Plan', which was said to provide evidence of collaborative efforts between the Northern Territory Government and pastoralists to increase diversification in the area, particularly in tourism. The beds and banks of the rivers and intertidal zones were said to be 'critical for diversification efforts': Statement of Paul Burke at [19]. A grant of land would, according to Mr Burke, have cumulative impacts on both the pastoral industry and economic detriment to the region as a whole through reducing job creation and the like. Mr Walker of Marrakai also submitted similar points on this topic, although in the context of the wider effect of the claim on pastoral interests more generally.

302. NTCA in its written submissions of 26 October 2020 further argued that a grant of the claimed lands would impact on joint diversification efforts through impinging on certain rights of leaseholders to diversify under both the CLA and the PLA. It was said that rights to public access to Crown land to engage in 'low impact activities' incidental to diversification activities was preserved by section 13(1) of the *Validation (Native Title) Act 1994* (NT) (VNTA) and the High Court decision in *Western Australia v Manado* [2020] HCA 9, and that such access would be curtailed by a grant. Thus, detriment would arise through the necessity of having an agreement in place with the traditional owners, which was an additional regulatory hurdle.

303. It was further submitted by NTCA that investor insecurity would result through giving a pastoralist 'pause to seek to undertake the non-pastoral activity at all': NTCA Submissions of 26 October 2020 at [12].

304. These assertions may be dealt with relatively swiftly.

305. Firstly, I reject the NTCA's submission that the VNTA confers on pastoral operators (whether operating under a Crown perpetual lease or pastoral lease) any rights of access to unalienated Crown land adjacent to which diversification operations are being conducted. As was noted above, no evidence of general rights to access and use Crown land for pastoral diversification efforts was tendered in this claim.

306. Secondly, while there is no reason to doubt that documents such as the Mary River Wetlands Visitor Action Plan demonstrate that frameworks for diversification in the region exist, I accept the claimants' submission that no evidence of future plans of the pastoral interests to diversify in this claim was given. For this reason, it is also difficult to accept claims of investor uncertainty or wider regional economic impacts. Such claims are speculative, and no detriment arises in respect of them. In any event, a moments' pause suggests that the so-called detriment in respect of some putative future activity is not one that the ALRA requires the Commissioner to comment upon. It might otherwise be said that there is always a relevant detriment when there is any rational potential activity to be carried out on unalienated Crown land by arrangement with the Northern Territory, even one remote in time or extent. It is hard to see that the ALRA intended for such matters to be put forward as potential obstacles to the grant of unalienated Crown land to the traditional owners. Even if that were required, it is hard to see that such speculative proposals would be of significance to the Minister when deciding whether to make a grant of the claimed land as recommended in this Report. Such an intention would too strongly prioritise the nominal interests of the putative developers at the expense of the traditional owners.

307. Finally, and in any event, I reject the submission of the NTCA that agreements with the traditional owners of Aboriginal land granted under the ALRA are of themselves a relevant detriment. They are simply a process provided for under the ALRA. This is consistent with my approach above. The Minister may also consider that such potential agreements in fact provide an appropriate opportunity for the traditional owners to exercise their rights as traditional owners, and if they so decide to gain a benefit from their recognition as traditional owners of unalienated Crown land, on the submissions of the claimants, such agreements are likely to be reached in the event that the detriment parties seek to do so.

4.5.3. Lifestyle Detriment

308. The final topic for consideration in relation to pastoral interests is the detriment to be occasioned to members of the families and staff of pastoral operators in relation to recreational activities engaged in by them on Crown land abutting the pastoral leases. Annaburroo, Marrakai Pastoral and the Walker entities submitted briefly on this point.

309. In particular, it was said that the claim areas are used for fishing, which is 'a big amenity of station life': Statement of Greg Thompson at [20]. This is unsurprising given the submissions in respect of recreational fishing above.

310. The CLA permits use of Crown land by the public for 'low impact activities' which, as Mr da Rocha noted, includes fishing from the banks of rivers: Northern Territory Detriment Submissions at [155]. It can therefore be said that detriment would be occasioned to persons seeking to fish from the beds and banks should the land be granted to a land trust and access to them prevented by the traditional owners. However, the claimants have indicated their willingness to enter into agreements so that these activities may continue. The Minister may therefore consider that any detriment in this area will be addressed.

4.6. TOURISM

311. Some of the claim areas, which abut and are surrounded by the Mary River National Park, are popular tourist destinations. The Mary River National Park also provides a gateway to Kakadu National Park (although there were no submissions in this Inquiry that any detriment would be occasioned in respect of that Park). Submissions and evidence in relation to tourism in the claim areas were received from the Northern Territory, including from Ms Valerie Smith, General Manager of Destination Development in the Department of Tourism and Culture, Mr Lincoln Wilson, Acting Director Northern Australian Parks within the Parks, Wildlife and Heritage Division of the same Department, and Mr Ian Curnow, as well as several operators who abut the claim areas. These included statements from representatives of Mary River Park, Mary River Wilderness Retreat, Mary River Houseboats, Point Stuart Wilderness Lodge, and Wildman Wilderness Lodge.

312. Additionally, submissions were received from guided fishing tour operators (FTOs) including Frontier Fishing (operated by Mr Blane Simmons) and Spring Tide Safaris (operated by Mr Kaleem Qaiser). Mr Dennis Sten, President of the Northern Territory Guided Fishing Industry Association (NTGFIA) tendered a statement on behalf of that organisation, which is the peak body for FTOs. NTGFIA also tendered statements of Mr Paul Salotti, Mr Benjamin Currell, Mr Mick Hinchley, Mr Rohan Soulsby and Mr Brad McDougall. These individuals operate their own FTOs in the claim areas.

313. I note that Mr Terry Halse, owner and operator of Stuart Tree Fishing Camp located near Point Stuart, filed a notice of interest in this Inquiry on 4 April 2018. On 14 May 2018 Mr Halse provided an additional witness statement asserting detriment. On 14 September 2020 Mr Halse withdrew his interest via email to my Office, stating that his business was not located in the claim areas.

314. It is convenient to first address the concerns of tourism operators, then those of the FTOs.

315. Ms Smith identified a substantial list of operators within the area, many of whom also gave evidence individually as to detriment. The principal concern was any impact to their businesses as a result of an inability for tourists to access the claim areas upon which they often rely, in addition to any uncertainty of such access. According to some operators, consequent detriment was said to exist in the potential reduction in the value of leases or resale values due to fewer customers, and even closures of business entirely.

316. Mr Wilson submitted that Shady Camp was of particular importance in providing tourist access to Mary River National Park and the ocean.

317. Unsurprisingly, the cost of any permit system or agreement with the traditional owners was itself said to constitute a detriment to both tour operators and visitors, with some operators submitting that permanent, no fee access would be the most satisfactory and efficient way of addressing any impacts. Ms Smith made further submissions relating to permits, arguing that a grant of the claimed lands would lead to a 400% increase in applications for permits and thus present an unworkable strain on the Northern Land Council's permit system, and would negatively impact visitor numbers to the Mary River National Park due to additional costs and delays. It was said that potential visitors may choose to go to other parts of Australia, where no permits are required.

318. While the claimants argued in response that visitors to the claim areas are accustomed to obtaining permits when visiting this area, this contention was rejected in reply submissions. Indeed, it does not appear on the evidence that permits are presently required for access.

319. Various parties also submitted that the decrease in visitor numbers would have an adverse impact on nearby businesses (such as tackle shops and service stations) and tourism in the Northern Territory in general, particularly in relation to fishing, as well as the wider economy. Mary River Wilderness Retreat focussed on the benefits of its operations to the local community, including the Limilngan people, and that a grant of the claim areas would negatively impact that benefit.

320. It is questionable whether such benefits would outweigh or indeed contradict those of a grant of the claimed areas to the Limilngan estate group, however that is a matter for the Minister.

321. Similar arguments were advanced by FTOs, NTGFIA and Ms Smith on their behalf, who often utilise the claim areas for similar reasons as recreational fishers. Shady Camp is again of importance to these operations, understandably due to the quality of the fishing there. Indeed, Mr Qaiser submitted that there were no like for like alternatives. Accordingly, submissions were made as to reduction in pricing certainty, financial detriment and impacts on business viability due to the costs of any permit system or access agreement, and substantial losses of annual turnover and investment. NTGFIA contended that the loss of the Mary River for FTOs would result in industry wide detriment. FTOs who submitted statements through

NTGFIA also submitted that it would be impossible to relocate their businesses due to their intimate knowledge of the claim areas.

322. In response, the claimants submitted that notwithstanding the lack of legal entitlement of many of the tourism operators and FTOs to use and profit from the claim areas, the claimants did not intend to curtail these activities. They pointed to documents such as the Mary River Joint Management Plan in order to demonstrate that such economic opportunities would in fact be encouraged pursuant to agreements under section 11A or section 19 of the ALRA.

323. The evidence led during this Inquiry suggests that the claim areas are popular for tourists and that many tourist operators and FTOs rely on that area in the course of their businesses. As a matter of logic, the prevention of access to those areas would have some detrimental impact. However, two points must be raised in the context of this claim.

324. Firstly, there was a lack of evidence led by all parties asserting detriment as to the numbers of tourists visiting the area. While I do not doubt the genuineness of their concerns, any purported impact of a grant of land on business operations in the claim areas is therefore unclear at best. It should also be noted that little evidence was led as to the role of permits in relation to this detriment, including impacts on visitor numbers. It follows that the claims are largely speculative.

325. Secondly, I again note that the question arises about claims of detriment where the activity involves access to and reliance on beds and banks and intertidal zones for the operation of the business but where there is no legal entitlement to that access. It is really a claim of detriment based on a foundation which is not shown to be a substantive legal one. Unlike pastoralists, there is no adjacent legal occupation of property. The most that can be said is that there is a use of the river waters, and of the adjacent unalienated Crown land comprising those beds and banks, and intertidal waters, to support that use of the river waters. There was no evidence that there was any particular arrangement with the Northern Territory about access to and use of the rivers themselves. In addition, particularly since the High Court's decision in *Blue Mud Bay*, it would be surprising if tourism operators and FTOs were unaware of that decision and its implications, especially given its publicity and the level of awareness of it which was demonstrated during this Inquiry. If so, that too may be relevant to the Minister's decision whether to make a grant of the claimed areas.

326. Notwithstanding these points, it is prudent to note that the claimants have once again indicated their willingness to negotiate such that these activities would be able to continue, including those which rely on access to Shady Camp. Section 11A agreements under the ALRA would, in my opinion, appear to address any uncertainty in regard to accessing the claim areas following a grant of land to a land trust. Section 19 agreements would operate similarly post-grant.

327. As I have stated above, I do not consider that any meaningful detriment arises in relation to complying with the provisions of the ALRA. Accordingly, any detriment said to be limited to financial detriment associated with the process of obtaining a permit or access agreement should such a system be implemented is in my view a nominal detriment, if it qualifies as a detriment at all, and one which the Minister might think should not of itself impede a decision to make a grant of the claimed areas.

4.7. MINERAL AND PETROLEUM TITLES

328. The Northern Territory made submissions relating to effects on mineral and petroleum titles in the claim areas. These respectively took the form of statements by Mr Allan Holland, former Director, Mineral Titles, in the Mines Division of DPIR, and Ms Victoria Jackson, former Executive Director, Energy, in the Energy Division of DPIR. A submission was also received from Berno Brothers Pty Ltd, a sand extraction business which operates in the vicinity of the claim areas pursuant to several mineral titles.

329. I firstly turn to detriment which is said to arise to the holders of mineral titles.

330. Mr Holland said that several mineral titles, including Exploration Licenses (ELs) and Extractive Mineral Permits (EMPs), have been granted in the claim areas. These confer different rights and obligations. ELs confer rights on the holders of such licenses to 'conduct exploration activities in connection with minerals': Statement of Allan Holland at [5], however they do not provide for access rights: at [7]. Thus, it was said that should the claim areas be granted, detriment would be occasioned to the holders of those licenses in the form of compliance with Part IV of the ALRA in order to ensure access, in addition to the separate processes under the *Native Title Act 1993* (Cth).

331. Similar detriment was said to arise in respect of future applications for ELs.

332. Mr Holland further said that ELs in the claim area included those held by Primary Minerals NL and Halkitis Bros Pty Ltd. Neither of these entities made independent submissions in this Inquiry as to detriment which would be occasioned to them or their operations.

333. Mr Holland also said that there are several EMPs either wholly or partially within the claim areas, all of which are held by Berno Bros Pty Ltd. An EMP confers rights upon the holder to occupy the relevant area, as well as certain rights to extract 'soil, sand, gravel, rock or peat from the title area': at [12]. Consequently, Berno Bros argued that any impact on the ability to conduct their sand extraction business would necessitate cessation of its operations.

334. Additionally, in a manner similar to his submission in respect of ELs, Mr Holland stated that ALRA processes, such as the requirement for the consent of traditional

owners, would impose an additional burden for holders of an EMP which did not apply when such holders were granted the EMPs.

335. In respect of petroleum titles, Ms Jackson said that Exploration Permit Application (EPA) 303, which is adjacent to parts of the claim area in and around Chambers Bay, was made by MBS Oil Pty Ltd on 12 June 2012. An outcome of that application was yet to be determined at the time that statement was tendered. Associated detriment was said to include compliance with the ALRA, particularly in relation to the renewal of any license.

336. Ms Jackson also said that a grant would mean that easements for pipeline licenses under the *Energy Pipelines Act* (NT) would have to be negotiated in the future.

337. I refer to the claimants' submissions in respect of the mineral titles within the claim areas, noting that the existing rights of the holders of those titles will be protected in the event of any grant by a combination of sections 3(1), 66 and 70(2) of the ALRA until they expire. Thereupon Part IV of the ALRA will apply.

338. I do not consider the potential inconvenience that may arise from compliance with those provisions and their related procedures, legislated for by Parliament, to be detriment of any particular significance. This is in accordance with the approaches of past Commissioners: see, for example, the *Cox River (Alawa/Ngandji) Land Claim Report No. 18* (30 November 1984) at [41] per Kearney J; *Finnis River Land Claim Report No. 9* (22 May 1981) at [278]–[283], [320]–[322] per Toohey J. Such inconveniences are not detriment resulting from a potential grant to a land trust, but rather, a quarrel with the ALRA itself.

339. In relation to petroleum titles, I accept the claimants' submissions that EPA 303 was made after the claim was lodged and, I should note, after the *Blue Mud Bay* decision, therefore exposing its outcome to a risk of detriment in the event of a grant. The claimants' submission that an agreement under section 11A of the ALRA would provide certainty for that interest is also noted. In any event however, and as Ms Jackson acknowledged, that application has not been accepted. Accordingly, no detriment can arise.

340. The same can be said of detriment in relation to future activities in respect of both mining and petroleum titles. As no evidence of any plans to grant interests in the future was led during the Inquiry, it is difficult for me to accept claims of detriment in relation to them. Such arguments are speculative and therefore no relevant detriment would arise following a grant to a land trust. The preclusion of the rights of traditional owners in accordance with speculative future titles is not contemplated by the ALRA. Put another way, it is not the intention of the ALRA that a grant of land to the traditional owners should be refused because at some time in the future another entity might want to engage in an activity which might be impaired by its proximity to that land, so as to justify the Minister's refusal to make the grant.

341. Accordingly, the Minister may consider that little detriment of weight arises in respect of mineral and petroleum titles in the context of this claim.

4.8. WATER GAUGES

342. Evidence in relation to water management in the claim areas was received from Mr Simon Cruickshank, then Acting Deputy Executive Director in the Water Resources Division of the Department of Environment and Natural Resources. Mr Cruickshank identified five water gauging stations and one expired surface water extraction license. Two of these gauging stations are not currently in use.

343. Mr Cruickshank asserted that detriment would be suffered by the Department should contractors not be able to access the area for water monitoring, as well as for maintenance of related infrastructure.

344. It should be noted that both the Northern Territory and the claimants submitted that access to water gauging stations within the claim area is likely to be protected by section 14 of the ALRA. These provisions operate to guard certain government uses of Aboriginal land vested in a land trust. Where that use is not a 'community purpose', being 'a purpose that is calculated to benefit primarily the members of a particular community or group': ALRA section 3(1), rents are payable by the Crown: ALRA section 15(1).

345. Accordingly, the Northern Territory submitted that should water gauging not constitute a community purpose, rents payable under section 15 would be a detriment. This was not contested by the claimants, although they considered that it would be nominal.

346. The claimants also submitted that section 70(2A) of the ALRA establishes a defence for officers and employees of the Northern Territory to the offence of entering and remaining on Aboriginal land under section 70(1) of that Act, where they are performing functions or exercising powers in that capacity.

347. As is noted by the Northern Territory in the Northern Territory Detriment Submissions at [70], it has been the consistent approach of past Commissioners to regard access to and use of water gauging stations as being protected under the ALRA. I agree with that approach.

348. It is not for me to decide whether such use is a 'community purpose' within the meaning of the ALRA. In any event, I accept the claimants' submissions that any rents payable to the traditional owners for continued access and use do not constitute a significant detriment, should that obligation arise.

349. The Minister may also consider it pertinent that the claimants in their submissions indicated their willingness to negotiate open access agreements with the Department. Thus, it appears that there is a path for resolution of the possible detriment asserted by the Northern Territory.

4.9. EXISTING AND PROPOSED PATTERNS OF LAND USE

350. For the sake of completeness and as noted earlier in this Report, the topic as to the effect which acceding to the claims either in whole or in part would have on the existing or proposed patterns of land usage in the region is prescribed as a relevant topic for comment, distinct from detriment, by section 50(3)(c) of the ALRA. There was little focus on the concept of land usage, as it is used there.

351. Two exceptions in this Inquiry were the submissions of the Northern Territory that future diversification efforts by pastoralists come within the remit of section 50(3)(c), i.e., that such efforts might be affected by a grant. The contentions in respect of that topic have been commented upon above: I do not need to repeat them.

352. Similarly, Mr Ian Curnow submitted on the topic of land usage in the context of the *Blue Mud Bay* decision, noting that claims to the beds and banks of rivers and subsequent grants 'give rise to a significant risk that existing or proposed patterns of land usage associated with recreational and commercial fishing will be detrimentally impacted upon if widespread access is withdrawn or restricted': Statement of Ian Curnow at [43]. Again, I consider myself to have commented upon these matters in sufficient detail above.

353. It is appropriate to again note here that the claimants are willing to enter into negotiations for access agreements, be it a permit system, or under section 11A or section 19 of the ALRA, such that the existing patterns of land use in the claim areas associated with fishing, tourism, pastoral activities and mining may continue.

5. CONCLUSION

354. In accordance with my functions under section 50 of the ALRA, I have presented earlier in this Report my finding that the Limilngan, Wulna and Uwynmil claimants are local descent groups in the sense required by the ALRA. I have also concluded that the Limilngan and Wulna are the traditional Aboriginal owners of the claimed areas. It has been accepted that certain Limilngan group members currently hold primary spiritual responsibility for Uwynmil country.

355. I have noted that the Limilngan, Wulna and Uwynmil groups are able to forage as of right over the claim areas.

356. For these reasons, I recommend that the whole of the land claimed in Woolner LC, as described at [52] of this Report, be granted to a single land trust for the benefit of the Aboriginal people entitled by Aboriginal tradition to the use or occupation of those areas of land. A list of those persons is contained at Annexure D to this Report. It is not intended to be an exhaustive or static list: that is a matter for the Northern Land Council.

357. Pursuant to sections 50(3) and 50(3)(a) of the ALRA, I have had regard to and commented upon the strength of the traditional attachment of the claimants to the land claimed as well as the number of Aboriginal people who might benefit from the Woolner LC being acceded to. On the evidence, it is beyond doubt that that attachment, having survived a difficult set of historical circumstances, remains strong. There are also a significant number of other Aboriginal persons who would be advantaged by a grant of land.

358. I have also commented upon submissions relating to sections 50(3)(b) and 50(3)(c) of the ALRA, that is, matters of detriment and effects on patterns of land usage. As the above discussion indicates, there are a range of interests which can properly assert detriment in the event of a grant of the claimed land.

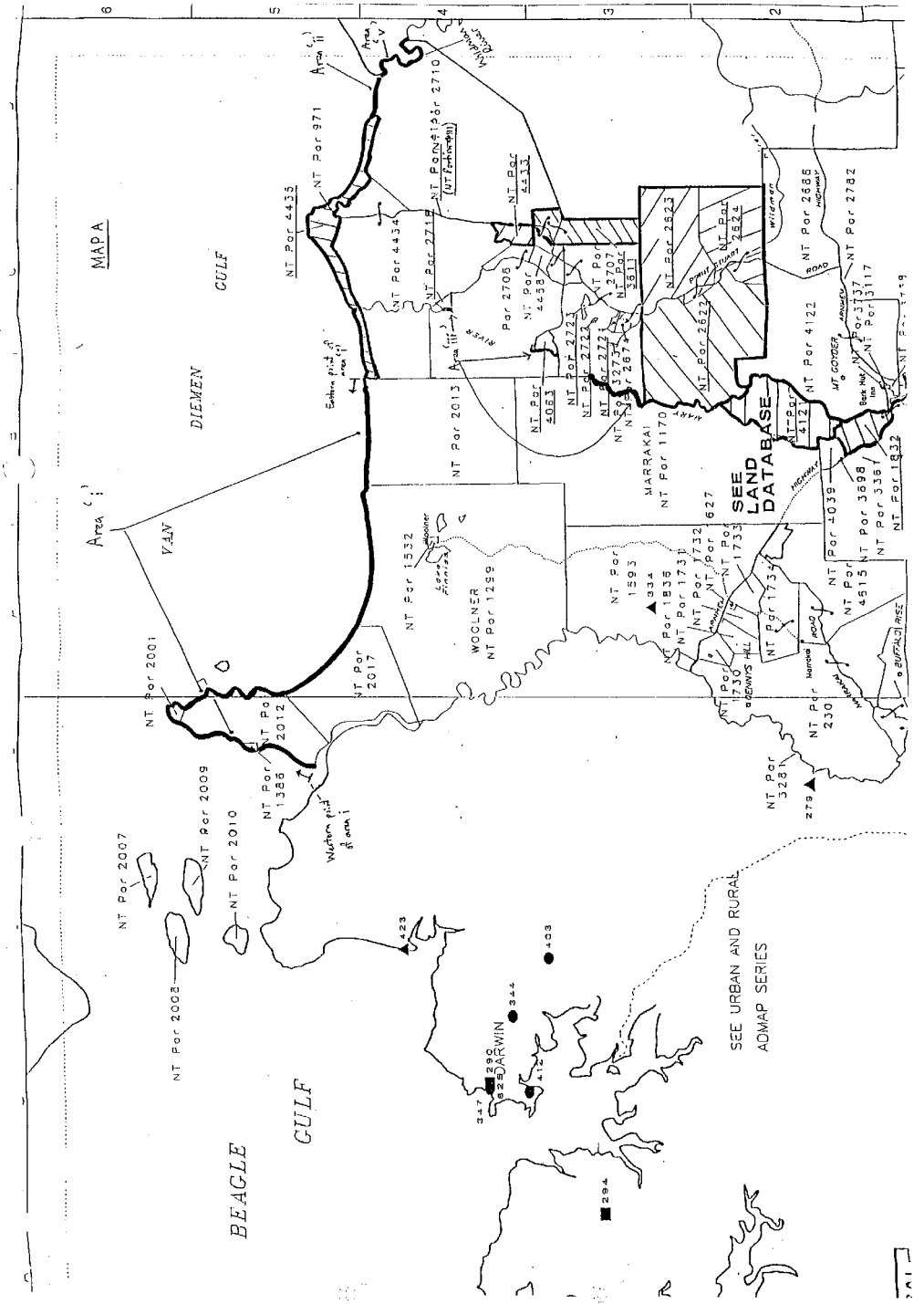
359. Some concerns will be resolved when the necessary survey work is carried out for the purposes of a grant.

360. The concerns of those engaged in fishing activities are real. The claimants have offered a path to accommodate them in the case of recreational fishers by introducing a controlled access structure. If that is a sensible and efficient one, the Minister may consider that to be an appropriate structure which recognises the traditional owners and their interests but accommodates recreational fishing in an appropriate way. The extent of commercial fishing is such that the Minister may feel it is appropriate to leave the commercial fishers to seek access to the particular claim areas by agreement with the traditional owners.

361. The interests of adjacent pastoralists in respect of traditional pastoral activities would be accommodated by the access arrangements proposed by the claimants. That would include, in this instance, the use of related pastoral properties and access to the Barrage. Other more diversified activities, the Minister may consider, should be left for negotiation with the traditional owners, including the activities carried out by independent fishing tour and other tour operators.

362. The balance of the asserted detriment and the potential impairment of the patterns of land use, as raised by the Northern Territory, might be considered by the Minister to present no significant obstacle to the grant of the claimed land. The purpose of the ALRA would be frustrated if any prospective use of the claimed areas took priority over the interests of the traditional Aboriginal owners. In relation to existing uses, as well as prospective uses, over the claimed areas – largely access to support commercial enterprises (and in some cases unauthorised uses) – the capacity for agreement-making between the traditional Aboriginal owners and the persons or entities making use of the claimed areas might be seen by the Minister as providing a satisfactory basis for accommodating such detriment.

ANNEXURE A: MAP OF WOOLNER LC FROM ORIGINATING APPLICATION



Source: Northern Land Council

ANNEXURE B: MAP B FROM SUBMISSION ON STATUS OF LAND CLAIMED

Source: Northern Land Council

ANNEXURE C: PROCEDURAL MATTERS

1. Legal representatives

Party	Name
For the claimants:	Mr P Willis SC, Ms S Kelly, Mr D Avery, Ms M Hunt (Northern Land Council)
For the Northern Territory:	Mr P Walsh, Ms E Furlonger, Ms K Gatis (Solicitor for the Northern Territory)
For Marrakai Pastoral Co Pty Ltd:	Mr B Torgan (Ward Keller)
For Northern Territory Cattlemen's Association (NTCA):	Mr B Torgan (Ward Keller)
For Paspaley Pearls Properties Pty Ltd (PPP):	Mr R Sanders (HWL Ebsworth)
For DE Walker Properties Pty Ltd, David Eric Walker, and David Walker (NT) Pty Ltd ('the Walker entities'):	Mr B Torgan (Ward Keller)
For the Amateur Fishermen's Association of the Northern Territory (AFANT):	Mr B Torgan (Ward Keller)
For Ms Therese Lynn Frost:	Mr R Levy, Ms C Osborne (Hunt & Hunt)
For Berno Bros:	Mr B Torgan (Ward Keller)
For Mr T. Halse:	Mr B Torgan (Ward Keller)
For Carmor Plains Station:	Mr B Torgan (Ward Keller)
For Norbuilt Pty Ptd:	Mr B Torgan (Ward Keller)

2. Anthropologists

Party	Name
For the claimants:	Dr Phillip A. Clarke, Ms Erika Cherola, Mr Adrian Peace (Northern Land Council)
For the Northern Territory:	Mr Kim Barber

3. Notices of Interest

Individual, Group or Entity	Date Received
Northern Territory Government	19 February 2018
PPP	21 February 2018
Berno Brothers Pty Ltd	23 February 2018
NTCA	23 February 2018
Marrakai Pastoral Co Pty Ltd	23 February 2018
The Walker entities	23 February 2018
Northern Territory Seafood Council	26 February 2018
AFANT	26 February 2018
Ms Therese Lynn Frost	26 February 2018
Mr Terry Halse	26 February 2018 (interest withdrawn on 14 September 2020)
Mary River Houseboats	23 March 2018
Wetland Cruises	23 March 2018
Wildman Wilderness Lodge	23 March 2018
Tourism Top End	23 March 2018
Mr Matthew Kelman (Carmor Plains Station)	29 March 2018 (interest withdrawn on 13 May 2019)

4. List of witnesses

Interest	Name (Position, Organisation)
Traditional Aboriginal ownership:	N/A – no hearing of evidence on traditional Aboriginal ownership
Detriment:	Mr Kane Bowden (Northern Land Council)
	Mr Ian Arthur Curnow (Director of Fisheries, Department of Primary Industries and Resources, Northern Territory Government)
	Ms Victoria Jackson (Executive Director, Energy Division, Department of Primary Industries and Resources, Northern Territory Government)
	Mr Luis Jose Casimiro Da Rocha (Acting Executive Director, Rangelands Division, Department of Environment and Natural Resources, Northern Territory Government)
	Mr David Ciaravolo (Chief Executive Officer, AFANT)

Interest	Name (Position, Organisation)
	Mr Dennis Sten (Northern Territory Guided Fishing Industry Association, adopting statements of Paul Salotti, Benjamin Currel, Mick Hinchey, Rowan Soulsby)
	Mr Ronald James Voukolos (Fishing and Outdoor World)
	Ms Valerie Smith (General Manager, Destination Development and Executive Director of the Convention Bureau, Department of Tourism and Culture, Northern Territory Government)
	Ms Terri Barnes (Northern Territory Guided Fishing Industry Association)
	Mr Lincoln Paul Radcliffe Wilson (Director of Australian Parks)
	Ms Melita McKinnon (Coordinator, Shady Lady Classic Fishing Competition)
	Mr James Nicholas Edward Paspaley (Executive Director, Paspaley Pearls Properties Pty Ltd)
	Ms Katherine Winchester (Chief Executive Officer, Northern Territory Seafood Council)
	Mr Ashley Manicaros (Chief Executive Officer, NTCA, adopting statement of Mr Paul Burke)

5. Exhibits

Exhibit Ref.	Tendering party
A	Tendered on behalf of the claimants
NT	Tendered on behalf of the Northern Territory
R	Tendered on behalf of persons or entities claiming detriment

Access to exhibits marked 'R' is restricted by direction of the Aboriginal Land Commissioner

Exhibit No.	Restricted	Title of exhibit
A1		Submission on the Status of Land
A2	R	Anthropologist's Report on behalf of the Claimants by Erika Charola, Phillip A. Clarke and Adrian Peace, 22 December 2017
A2(A)	R	Supplementary Report of Dr Philip Clarke dated 8 March 2019
A3	R	Site Register prepared on behalf of the Claimants by Phillip A. Clarke, 22 January 2018
A4	R	Genealogies prepared on behalf of the Claimants by Phillip A. Clarke, January 2018
A4(A)	R	Document Entitled Amended Genealogies dated March 2019
A5	R	Claimant's Personal Particulars prepared on behalf of the Claimants by Phillip A. Clarke, January 2018
A5(A)	R	Document Entitled Amended Personal Particulars dated March 2019
A6		The Northern Territory Fisheries Harvest Strategy Policy December 2016
A7		The Guidelines For Implementing Northern Territory Harvest Strategy Policy December 2016
A8		Statement of Tania Moloney dated 28 September 2017 headed in relation to The Fitzmaurice River Region Land Claim No. 189
A9		Transcript of Evidence of Kane Bowden given in the Fitzmaurice River Land Claim on 25 June 2018
A10		Statement of Kane Bowden dated 29 May 2018 tendered in the Fitzmaurice Land Claim as Exhibit A33 on 25 June 2018
A11		Mary River National Park Joint Management Plan dated March 2015
NT1		Statement of Ian Curnow and attachments dated 16 May 2018

Exhibit No.	Restricted	Title of exhibit
NT2		Letter from Northern Territory to the Land Commissioner dated 22 June 2018 with two attached maps
NT3		Statement of Victoria Jackson dated 28 May 2018 together with annexure
NT4		Statement of Luis Da Rocha relating to pastoralism dated 14 May 2018
NT5		Statement of Luis Da Rocha relating to rangelands dated 14 May 2018
NT6		Statement of Valerie Smith with three attachments dated 18 May 2018 subject to matters excluded by reason of objection and in light of information given
NT7		Statement of Lincoln Wilson dated 14 May 2018 with attachments
NT8		N/A – No exhibit NT8
NT9		Statement of Allan Holland dated 14 May 2018
NT10		Statement of Simon Cruickshank dated 24 April 2018
NT11		Statement of Garry Fischer and annexures dated 14 May 2018
NT12		Media Release Entitled Blue Mud Bay Waiver Extension dated 15 November 2018
NT13		Media Release Entitled Intertidal Zone Permit Waiver Extended for Six Months dated 4 December 2018
R1		Letter and statement of David Ciaravolo, AFANT, dated 14 May 2018 excluding paragraphs based upon the contents of the survey
R2		Statement of Dennis Sten and attachment dated 9 May 2018 together with the attached Economic Contribution of Fishing Tour Operators In The Northern Territory July 2012 prepared by the Northern Territory Government
R3		Statement of Ronald Voukolos dated 11 May 2018
R4		Statement of Paul Salotti dated 12 May 2018
R5		Statement of Benjamin Currell undated
R6		Statement of Mick Hinchey, signed by Dennis Sten, dated 9 May 2018
R7		Letter of Rohan Soulsby dated 9 May 2018
R8		Statement of Therese Lynn Frost dated 14 May 2018 (owner of land at Mary River)
R9		Statement of Christopher John Banson date 9 May 2018
R10		Statement of Bronwyn Bayard dated 14 May 2018
R11		Statement of Blane Simmons dated 18 May 2018

Exhibit No.	Restricted	Title of exhibit
R12		Statement of Kaleem Qaiser dated 28 June 2018
R13		Statement of Melita McKinnon dated 4 May 2018
R14		Statutory declaration of James Paspaley dated 11 May 2018 and annexures
R15		Statement of Rodney-Lee Beament dated 11 May 2018
R16		Statement of David Walker dated 23 April 2018
R17		Statement of Katherine Winchester with annexure dated 27 April 2018
R18		Statement of Dean and Nadine McFarlane dated 17 May 2018
R19		Statement of Matthew Kelman dated 7 May 2018
R20		Statement of Jack Berno dated 8 May 2018
R21		Statement of Greg Thompson dated 14 May 2018
R22		Statement of Terry Halse dated 8 May 2018
R23		Statement of Kristen Nobel dated 9 May 2018
R24		Statement of Paul Burke dated 11 May 2018
R25		Email to the Land Commissioner from Gerald Goodhand dated 16 April 2018
R26		Statement of Brad McDougall dated 9 May 2018

ANNEXURE D: LIST OF CLAIMANTS

Limilngan – Group A

Names of Claimants
Limilngan/Minidja (1) (deceased)
Nagalugun (deceased)
Limilngan/Minidja (2) (deceased)
Alangurradj (deceased)
Tommy Margalagi (deceased)
George Luwanbi (deceased)
Marrakai Nanmurrang Alex (deceased)
Jimmy Linman (deceased)
Willy Miminiki Diyal
Ernest Duluarki Jim (deceased)
Tony Luwanbi Kenyon (deceased)
Adrian Nanmurrang Gumurdal
Thomas Linma Hull (deceased)
Neddy Warniymirl Lurnbin (deceased)
Mabel Warniwi Ulupengmirl (deceased)
Felix Iyanuk Holmes (deceased)
Lena Wuraki Henry (deceased)
Ali (deceased)
Captain Linman Bishop (deceased)
Caroline Wandi Kenyon
Brian Kenyon (deceased)
David Wanirr Kenyon
Graham Durrkmul Kenyon
Teresa Henda
Stephen Kenyon/Gaden (deceased)
Henry Jigugj Yates
Derek Yates
Denise Kenyon
Adrian Jnr Gumurdul
Yvonne Alderson/Gumurdul
Gabby Gumurdul
Nipper Gumurdul
Victor Guruwarlu Cooper
Eileen Bulakiya Henry (deceased)
Robert Henry (deceased)
William Henry (deceased)
Sampson Henry
Don Henry (deceased)
Irene Henry
Elizabeth Henry (deceased)
Jeanie Lunbirr Bishop (deceased)
Joseph Linman Bishop (deceased)

Names of Claimants
Richard Nowell/Kenyon
Brian Jnr Kenyon
Bronwyn Kenyon
Barbara Kenyon/Thompson
Leroy Kenyon
Bruanna Kenyon
Esther Rose Jnr Kenyon
Danvid Jnr Darrnarlpi Kenyon
Tony Jnr Luwanbi Kenyon
Kathy Nedey Kenyon
Davina Kenyon
Helen Joan Kenyon/Wright
Rodney Kenyon
Travis Kenyon
Natasha Kenyon/Yates
Preston Kenyon
Grace Kenyon
Tarizma Jade Muggabuddy Kenyon
Deanne Goonarre Kenyon
Seilna Quollwalnee Kenyon
Tianna Kenyon
Jack Daly
Mikim Daly (deceased)
Jasmine Daly
Mariah Daly
Stephen Jnr Kenyon
Leanne Kenyon
Jamesie Kenyon
Telanna Kenyon
Kirsty Kenyon
Lane Luwanbi Yates
Ronnie Jaranadjbi Yates
Francianna Amalakidj Yates
Dereanne Yates
Dale Yates
Dwight Yates
Ronnie Yates
Nathan Yates
Aran Yates
Kaela Yates
Derek Jnr Yates
Natasha (2) Yates

Names of Claimants
Anthony Gumurdul
Bridgette Gumurdul
Sonya Gumurdul
Marjorie Gumurdul
Dale Gumurdul
Justin Goodurin Cooper
Cynthia Marulngan/Miyanmilla Cooper
Savannah Alecia Yalkbamel Cooper
Byron Bikko Cooper
Alice Cooper
Eliza Cooper
Rhonda Goronak Henry/Camfoo
Tarlina Henry/Moore
Robert Lamelel Henry
Sampson Jnr Dukkil Henry
Laura Arrinyagerr Henry
Leo Goodman
Robert Goodman
William Goodman
Cara Goodman
Cadell Cambarl Goodman
Ernest Uwangwinmil Goodman
Neville Jnr Morton
Linda Campbell
Victor Campbell
Samantha Campbell
Tanya Bishop
Essena Bishop
Titus Bishop
Dominic Bishop
Jake Kenyon
Birna Jnr Kenyon
Marcia Humbert (deceased)
Mark Humbert
Cedella Humbert
Shane Humbert
Noel Campbell
Shaun Campbell
Thomas Campbell
Friona Campbell
Anna Marie Campbell
Charlton Campbell

Names of Claimants
Neville Campbell
Monique Campbell

Wulna – Group B

Names of Claimants
Anyulnyul (deceased)
Wulna (deceased)
Finity (deceased)
Robert Wulna (deceased)
Old Roger Adiyit (deceased)
Jack Wandi (deceased)
Topsy Garramnak Drysdale (deceased)
Chooky Gulukboy (deceased)
Fred O'Brien Anmaranjima (deceased)
Hilda Gunmunga (deceased)
Mary Minmarrima (deceased)
Frlora Menabirrina (deceased)
May (deceased)
Rosie Malamgiin (deceased)
Nancy Moo (deceased)
Lorna Lee Talbot (deceased)
Ernest Jim Dulnarki (deceased)
Joan Meniyen Kenyon
Jeanie Lunbirr Bishop (deceased)
Johnny Fejo (deceased)
Raymond Rankin (deceased)
Richard Rankin
Robert Browne (deceased)
John Browne
Edward "Teddy" Browne
William "Willy" Browne
Patricia "Paddy" Browne
Dorothy "Dotty" Browne
Rodney Browne (deceased)
Douglas Browne (deceased)
Peter Browne
Phillip Browne
Joseph Lee Browne
Albert Browne
Christine Browne/Jenner
Emmanuel Eugene Jnr Talbot
Philip Gary Talbot
Edward Eugene Talbot
Daphne Talbot
Trevor John Talbot
James Francis Talbot
Robert Charles Talbot
Jackson Browne
Carmel Anne Browne
Maximillian Browne
Crystal Browne

Names of Claimants
Daniel Talbot
Pamela Talbot
Jennifer Jean Talbot
Caroline Kenyon/Wandi
Brian Kenyon (deceased)
David Wanirr Kenyon
Graham Durrkmul Kenyon
Teresa Henda/Kenyon
Stephen Kenyon/Gaden (deceased)
Henry Jigudj Yates
Derek Yates
Denise Kenyon
Neveille Jnr Morton
Linda Campbell
Victor Campbell
Samantha Campbell
Linda Fejo
Gregory John Fejo (deceased)
Sammy John Fejo
Sheila Rankin
David Jackson
Donna Marie Jackson
Robert 'Jodie' Jenkins
Amy Browne
Robert Jnr Browne
Bryan Browne
Vanessa Browne
Natalia Browne
Emily Browne
Sarah Jane Browne
Emily Browne
Leanne Brown
Kelly Browne
Amanda Browne
Theresa Browne
Nigel Browne
Peter Jnr Browne
Sheldon Browne
Jade Brown
Hayden Browne
Lisa Ann Browne
Jared Lucas Browne
David Jnr Darrnarlpi Kenyon
Tony Jnr Luwanbi Kenyon
Kathy Nedey Kenyon
Davina Kenyon

Names of Claimants
Jade Browne
Kristen Browne (deceased)
Albert Coonan
Saven Browne
James Vincent Browne (deceased)
Nelson Douglas Browne
Philip Jnr Talbot
Briane Jnr Allia
Ian Joe Allia (deceased)
Irene Allia
Leanne Allia
Yvette Talbot
Nicole Talbot
Alana Talbot
James Talbot
Justin Talbot
Dale Talbot
Dallas Talbot
Riana Talbot
Lorna Jnr Talbot
Rebecca Talbot
Carly Talbot
Peter Talbot
Daphne Talbot
Kyle Talbot
Robert Jnr Talbot
Natasha Grant
Matthew Grant
Manuel Talbot
Ian Thomas
Shaun Thomas
Dennis Thomas
Richard Nowell/Kenyon
Brian Jnr Kenyon
Bronwyn Kenyon
Leroy Kenyon
Brianna Kenyon
Ester Kenyon
Shaun Campbell
Thomas Campbell
Fiona Campbell
Anna Marie Campbell
Charlton Campbell
Neville Campbell
Monique Campbell
Patrice Talbot
Cheyanne Minscin

Names of Claimants
Helen Joan Kenyon/Wright
Rodney Kenyon
Travis Kenyon
Natasha Kenyon/Yates
Preston Kenyon
Grace Kenyon
Terizma Jade Muggabuddy Kenyon
Deanne Goonarre Kenyon
Selina Quollwalnee Kenyon
Tianna Kenyon
Jack Daly
Mikim Daly (deceased)
Jasmine Daly
Mariah Daly
Stephen Jnr Kenyon
Leanne Kenyon
Jamesie Kenyon
Telanna Kenyon
Kirsty Kenyon
Lane Luwanbi Yates
Ronnie Jaranadjbi Yates
Francianna Amalakidj Yates
Dereanne Yates
Dale Yates
Dwight Yates
Ronnie Yates
Nathan Yates
Aran Yates
Kaela Yates
Derek Jnr Yates
Natasha Yates
Jake Kenyon
Brian Jnr Kenyon
Marcia Humbert
Mark Humbert
Cedella Humbert
Shane Humbert
Noel Humbert

Uwynmil – Group C

Names of Claimants

Alangurradj Uwynmil (deceased)
Neddy Walaparnda Tambling (deceased)
Tom Badambip Tambling (deceased)
Daisy Mubunga Tambling
Madeline Wajiba Tambling (deceased)
Angus Wirdidi Tambling (deceased)
Darryl Bornumbu Tambling
Betty Tambling (deceased)
Valarie Ngulkbang/Bunalamj Tambling
Jennifer Garrlmar Talmbling
Stella Marbul Tambling (deceased)
Charmaine Tambling/Yates
Jason Snr Angujin Tambling (deceased)
Tommy Tambling
Gayle Tambling
Ned Jnr Tambling
Philip Angujin Tambling
David George Garruwak/Wadidi Yates
Esther Rose Snr Danyimil Yates (deceased)
Graham Snr Ganwaduk Yates (deceased)
Antonia Yates/Knapp
Evelyn Yates/Knapp
Ricky Benmala Henda (deceased)
Elaine Henda (deceased)
Andrew Jnr Henda
Teresa Henda
Eddie Henda (deceased)
Thomas Almanganil/Wajawaja Tambling
Leroy Tambling
Darryl Jnr Tambling
Misilas Roberts
Richard Tambling
Michael Jnr Manski
Lachlan Manski
Ethan Manski
Leikiesha Tambling
Erica Tambling
Kelly Tambling
Takia Tambling
Shonta Tambling
Thomas Jnr Tambling
Jaylen Tambling

Names of Claimants

Travis Tambling
Leanah Tambling
Priscilla Jaliynmara Yates
Geoffrey Gapiya Yates
Kathleen Anmelel Yates
Georgina Yenbul Yates
Esther Rose Jnr Garinyi Yates/Kenyon
Petrina Dabuyl/Mimirti Yates
David Georrge Jnr Ganngurdak/Nayingal Yates
Philip Jnr Gajamol/Neidji Yates
Cecilia Gurnayn Yates
Trevina Bgatgali Yates
Graham Jnr Nickiie Yates
Jeremy Yates/Knapp
Robert Yates/Knapp
Wendy Yates/Knapp
Darryl Jnr Yates/Knapp
Natasha (2) Yates
Roger Jnr Yates
Lisa Ahfat
Lewis Ahfat
Kenny Ahfat
Joseph Ahfat
Gayle Ahfat
Delene Ahfat
Craig Ahfat
Tommy Benmala Henda
Ricky Jnr Henda
Timothy Arrbang Henda (deceased)
Vanessa Raburaba/Henda
Gabriel Raburaba/Henda
Wayne Henda
Jack Daly
Mikim Daly (deceased)
Jasmine Daly
Mariah Daly

ANNEXURE E: REASONS FOR RULING – BOUNDARIES OF CLAIM AREA

1. On 21 August 2020, by letter to the parties to the Woolner LC, I indicated I would rule on the issue of the boundaries of the claim area in my report to the Minister following the completion of the Inquiry. These are my reasons for that decision.

2. Although I have briefly provided some background to the dispute in the body of the Report, it is useful to first set it out in more detail here. The expression 'claimed areas' relates to the areas claimed by the Northern Land Council on behalf of the claimants at the time of the Anthropologists' Report of 22 December 2017, and as set out in Figure 9 of that Report. As described at [1.4] of that Report, the full stretch of the Mary River as originally claimed has been reduced to three segments of the Mary River beds and banks. A copy of Figure 9 showing those three areas is attached to this Annexure as Appendix 1.

3. That depiction in Figure 9 shows three separate areas or stretches of the Mary River as the claimed areas, described as Area iii.a adjacent to Sampan Landing, Area iii.b by Shady Camp Reserve, and Area iii.c (from north to south) by Wildman Reserve, Mary Delta Block, Bundey Hills and McKinlay Reserve. For the sake of brevity, I will call the Area iii.c the Mary River Southern Segment. It also shows Areas i, ii and iv as described in the Report itself. Areas i and ii are the Western and Eastern Intertidal Zone areas respectively, and Area iv is the area along the Wildman River which was not pursued as it is (or is to become) part of the Kakadu National Park.

4. In the course of the Inquiry, on 22 June 2018 the Surveyor-General of the Northern Territory provided to my Office an advice (the 2018 Advice) which sought to clarify which of the claimed areas along the Mary River in the Woolner LC were available for claim under the ALRA. Attached to the 2018 Advice were two maps titled 'Indicative Boundaries in relation to Land Claimed LC 192' (Boundary Map) and 'Revised Indicative Boundaries in relation to Land Claimed LC 192' (Revised Boundary Map). Copies of the 2018 Advice and the accompanying Boundary Map and Revised Boundary Map are attached to this Annexure as Appendix 2, Appendix 2A and Appendix 2B respectively. As can be seen, the areas by the Sampan Landing (Area iii.a) and significant portions of the Mary River Southern Segment (Area iii.c) were excluded from the available land. For mapping purposes in Appendix 2, the Mary River Southern Segment was broken into 6 parts numbered 1 – 6 sequentially from north to south.

5. The Boundary Map identify in red those areas which were said to have been confirmed as available for claim. The Revised Boundary Map identifies in red those same areas, and also indicates in grey those areas which were understood to be located within land portions adjacent to the river. Those grey areas were said to be unavailable for claim. The 2018 Advice contains a table reflecting the Revised Boundary Map, and consequently states that certain stretches of the Mary River, being 'contained within' certain Northern Territory Portions, are not available for claim.

6. Those excluded areas were referred to in the table as 'iii.a' adjacent to Sampan Landing, also depicted in Enlargement A, and in the Mary River Southern segment as 'iii.c.1', 'iii.c.2' and 'iii.c.4'. Each was marked 'Not claimable'. The areas marked 'iii.c.3', 'iii.c.5' and 'iii.c.6' were and remain accepted as claimable areas.

7. The Boundary Map and Revised Boundary Map also showed in green those parts of the Wildman River which were to be scheduled under the ALRA as part of Kakadu National Park, and so not requiring to be addressed in this Report as part of the claimed areas.

8. Not surprisingly, the contents of the 2018 Advice were orally accepted by counsel for the claimants on 26 June 2018. The advice and its accompanying maps were thereafter received into evidence as Exhibit NT2.

9. At a directions hearing in Darwin on 16 May 2019, I made directions relating to a timetable for final submissions and responses on the issue of detriment and traditional ownership. During that hearing, counsel for the Northern Territory indicated, in accordance with the 2018 Advice, that supplementary compiled plans from the Surveyor-General showing in greater detail the boundaries of the claim areas would be provided. Those plans were intended to have the force of section 63 of the *Licensed Surveyors Act 1983* (NT), which relevantly provides:

> In any legal proceedings under a law in force in the Territory a map, plan or copy of a map or plan relating to the Territory or a part of the Territory or a certificate relating to a location in the Territory purporting to be certified by the Surveyor-General as correct shall be accepted as evidence of the matters to which they relate without the production of original records and without the personal attendance of the Surveyor-General or proof of his or her signature.

10. In effect, the compiled plans could thereafter be taken, on their face, to demonstrate which areas were available for claim in the Woolner LC, subject to any challenge to the contrary.

11. Counsel for the claimants consented to this course of action during that hearing, and noted that any areas not available for claim would be formally withdrawn by letter following the receipt of those plans.

12. The Northern Territory provided draft plans by email on 27 September 2019, to which the Northern Land Council on behalf of the claimants and the solicitors for Paspaley Pearls Properties responded with minor comments on 11 October 2019. Following this exchange, on 25 October 2019 the Northern Territory provided the final versions of those plans (the 2019 Plans). There were 13 such plans, including those marked as 6a and 6b. They were marked as indicative only, and showed in yellow those areas which were not available for claim.

13. Those areas marked as not available for claim in the 2019 Plans reflected the 2018 Advice, being areas marked in Exhibit NT 2 as 'iii.a', 'iii.c.1', 'iii.c.2', and 'iii.c.4'. They were depicted in greater detail in numbered plans 5, 7, 8 and 9, and 10 respectively. Again, each area was marked with a yellow line, demonstrating its purported location within the adjacent portions.

14. On 5 November 2019, the Northern Land Council on behalf of the claimants and on the basis of the 2018 Advice and the 2019 Plans formally advised by letter to my Office (the Withdrawal) that those areas of the Mary River, identified in the 2018 Advice and the 2019 Plans as being unavailable for claim, were thereby withdrawn. A copy of that letter is attached to this Annexure as Appendix 3. The Withdrawal is expressed in similar terms as the 2018 Advice, stating that the parts of the claim areas that are 'contained within' the boundaries of the relevant portions adjacent to the Mary River were withdrawn. Those portions were specified as Northern Territory Portion (NTP) numbers 2708, 1170 and 4121.

15. They relate to Melaleuca Station (NTP 2708), Marrakai Station (NTP 1170), and Mary River National Park (NTP 4121, held by the Conservation Land Corporation).

16. The areas specified in the Withdrawal accorded with areas identified in the 2018 Advice and the 2019 Plans as unavailable for claim, being areas 'iii.a' (said to be 'contained within' NTP 2708), 'iii.c.1', 'iii.c.2' (each said to be contained within NTP 1170), and 'iii.c.4' (said to be contained within NTP 4121).

17. By a letter dated 20 January 2020, counsel for Paspaley Pearls Properties (owners of Melaleuca Station) raised concerns about the status of the 2019 Plans and their role in the Inquiry. It took issue with the fact that some of those plans (specifically plans 6a and 6b) appeared to show an area available for claim that was larger than the area contained in the original application for the Woolner LC. On 28 February 2020 the Northern Territory responded, noting that it was treating the 2019 Plans as indicative only, as marked, and were to be used for the purposes of identifying which areas of the Woolner LC were available for claim. It also stated that it is standard practice that following a recommendation for a grant of land under section 11 of the ALRA, the Commonwealth undertakes any necessary survey work prior to the land being granted to a land trust.

18. By letter dated 11 March 2020, the Northern Land Council on behalf of the claimants agreed with the Northern Territory's position. However, it also sought to raise the possibility that some of the areas contained in the Withdrawal were in fact available for claim. It appears to have been subsequently accepted that the area claimed as part of the beds and banks of the Mary River adjacent to Sampan Landing and described as area 'iii.a' was not available for claim. It also appears to have been subsequently accepted that the area claimed as part of the beds and banks of the Mary River and described as area 'iii.c.4' was not available for claim. The Claimants at no later time have made any submission to the contrary.

19. Their primary contention was that areas referred to as areas 'iii.c.1' and 'iii.c.2' (the disputed areas) in the 2019 Plans and in the 2018 Advice with the maps in Exhibit NT2 were not 'contained within' NTP 1170 as previously understood, due to the operation of section 4 of the *Control of Waters Act 1978* (NT) (the relevant legislation then in force). That section provides that the beds and banks of a watercourse, where the watercourse forms the boundary of land alienated by

the Crown, are preserved as Crown land. In the view of the claimants, the disputed areas thereby remained Crown land when the historic Pastoral Lease Nos. 746 and 786 were granted by the Crown over neighbouring portions 1170 and 1209, because the Mary River forms the boundary between those portions. The disputed areas were therefore available for claim, being unalienated Crown land. The letter also queried whether further clarification from the Northern Territory might assist in resolving this issue.

20. No references to the availability of the areas 'iii.a' or 'iii.c.4' (relating to Northern Territory Portions 2708 and 4121) for claim were contained in that letter.

21. On 13 March 2020, the solicitors for Marrakai Pastoral Co Pty Ltd (Marrakai Pastoral), Northern Territory Cattlemen's Association, and Amateur Fishermen's Association of the Northern Territory (the private detriment interests) objected to the Northern Land Council's letter. They argued that any consideration by the Aboriginal Land Commissioner of the Northern Land Council's letter would be prejudicial to those parties, who had led their respective detriment cases on the basis that the disputed areas were not available for claim.

22. On 9 April 2020, the Northern Territory responded to the Northern Land Council's letter of 11 March 2020. That letter listed the methodology followed by the Surveyor-General in preparing the 2019 Plans, and importantly sought to reaffirm that 'The information provided in Exhibit NT2 [the 2018 Advice] is correct'.

23. On 14 May 2020, the Northern Land Council on behalf of the claimants responded to the 13 March 2020 letter from the solicitors for the private detriment interests and the 9 April 2020 letter of the Northern Territory. That letter is attached as Appendix 4 to this Annexure. The letter re-stated the effect of the *Control of Waters Act* on the disputed areas. It also asserted that that section 12(2) of *Water Act 1992* (NT) had had a similar effect to its predecessor legislation. That section provides:

> In a grant or lease of land made after the commencement of this section, the bed and banks of a waterway forming the boundary of the land shall remain the property of the Territory except to the extent that they are contained within the boundaries of the land surveyed for the purposes of the registration of the title to the land under the *Land Title Act 2000*.

24. As such, it was said that when the historic pastoral leases over the relevant portions were granted to Marrakai Pastoral in 1993, the disputed areas remained available for claim under the ALRA. The Northern Land Council asserted that the 2018 Advice was incorrect due to errors in the Surveyor-General's methodology, which did not account for the effect of that legislation. It was therefore said that there had been no withdrawal of the disputed areas, because they were 'not part of NT Portion 1160': accordingly, the Withdrawal was 'ineffective' to the extent that it related to the disputed areas.

25. The Northern Land Council then stated:

> On the basis that the Land remains available for claim, and that the claim is not withdrawn, we propose that the Commissioner issue directions inviting parties to make further written submissions on detriment and patterns of land usage regarding the Land only. The Claimants would not object to the provision of further evidence by detriment parties, provided there is an opportunity for cross-examination, if desired.

26. By a letter dated 2 July 2020, the Northern Territory confirmed that the disputed areas were in fact available for claim. A copy of that letter is attached to this Annexure as Appendix 5. It also accepted that these circumstances warranted the re-opening of the Inquiry insofar it concerned detriment evidence relating to the disputed areas.

27. The Northern Territory made no reference in that letter to the areas referred to as 'iii.a' adjacent to Sampan Landing and 'iii.c.4' in the Mary River Southern Segment.

28. On 10 July 2020, the solicitors for the private detriment interests indicated their objection to the 'withdrawal of the withdrawal', arguing that the claim, in so far as it related to area 'iii.a' and the disputed areas, could not continue. A copy of that letter is attached to this Annexure as Appendix 6. In support, the letter cited section 67A(5)(a) of the ALRA, which provides for the final disposal of claims where withdrawn, and the decision of the Federal Court of Australia (Olney J) in *Roberts v Minister for Aboriginal Affairs* (1991) 29 FCR 38 (*Roberts*). *Roberts* was said to be authority for the proposition that 'A claim disposed of cannot be revived by withdrawal of a withdrawal'.

29. On 21 August 2020, in accordance with the positions of the Northern Land Council and the Northern Territory, I invited parties to provide additional detriment submissions in relation to the disputed areas. I preliminarily indicated that I considered the circumstances in *Roberts* to be different from those in the Woolner LC Inquiry, noting that I would provide a substantive ruling in this Report. I also established a timeline for responses to the 10 July 2020 letter from the solicitors for the private detriment interests.

30. On 20 October 2020, counsel for the claimants provided submissions in response to the solicitors' letter of 10 July 2020 (Claimants' Submissions on the Claim Boundaries). The solicitors for the private detriment interests provided submissions in reply on 2 November 2020 (Solicitor's Response). The issue of the claim boundaries was thereupon closed to further submissions.

31. Additional submissions on the issue of detriment as it related to the disputed areas were received from the Northern Territory on 22 October 2020 and from the solicitors for the private detriment interests on 26 October 2020. The solicitors for Paspaley Pearls Properties did not file any further submissions. The Northern Land Council provided a response to those concerns on 13 November 2020.

32. A final reply submission on detriment was received from the solicitors for the private detriment interests on 27 November 2020, and related solely to Marrakai Pastoral interests. On 3 December 2020 the Inquiry was completed.

33. The primary area of contention and the subject of these reasons is whether the disputed areas have been withdrawn from the Woolner LC. That question should be answered in the negative.

34. There is no dispute as to the inaccuracy of the 2018 Advice and 2019 Plans, insofar as they relate to the disputed areas.

35. There is also no argument about the terms of the Withdrawal as it related to the areas referred to as 'iii.a' and 'iii.c.4', which were identified as unavailable for claim in the 2018 Advice and 2019 Plans. Nor is there any dispute as to withdrawal of those areas termed 'Beds and Banks of the Wildman River'. It can therefore be said that those areas have accordingly been withdrawn. I have proceeded on that basis, in the absence of any submission that I should not do so.

36. The claimants firstly argue that there has been no withdrawal of the disputed areas, and that accordingly, section 67A(5)(a) of the ALRA does not apply to the present circumstances. That section relevantly provides:

> Subject to subsections (6), (7), (8), (9), (12) and (17), a traditional land claim shall be taken not to have been finally disposed of in so far as it relates to a particular area of land until:
>
> (a) the claim, or the claim, in so far as it relates to the area of land, is withdrawn; or
>
> (b) the Governor-General executes a deed of grant of an estate in fee simple in the area of land, or in an area of land that includes the area of land, under section 12; or
>
> (c) the Commissioner informs the Minister, in the Commissioner's report to the Minister in respect of the claim:
>
> (i) that the Commissioner finds that there are no Aboriginals who are the traditional Aboriginal owners of the area of land; or
>
> (ii) that the Commissioner is unable to make a finding that there are Aboriginals who are the traditional Aboriginal owners of the area of land; or
>
> (d) where the Commissioner finds that there are Aboriginals who are the traditional Aboriginal owners of the area of land, or of an area of land that includes the area of land—the Minister determines, in writing, that the Minister does not propose to recommend to the Governor-General that a grant of estate in fee simple in the area of land, or in an area of land that includes the area of land, be made to a Land Trust.

37. Sections 67A(6), 67A(7), 67A(8), 67A(9), 67A(12) and 67A(17) provide for circumstances in which claims may be finally disposed of, such that estates or interests granted in land subject to claim are not rendered invalid. It is not contended that any of these provisions apply to the present circumstances.

38. In short, it is said that no part of the disputed areas is contained within the boundaries of the relevant land portions: accordingly, there has been no relevant withdrawal of those areas.

39. The claimants submit that the combined effect of the *Control of Waters Ordinance 1938*, the *Control of Waters Act 1978* and the *Water Act 1992* (NT) is such that the disputed areas are unalienated Crown land (contrary to the 2018 Advice and 2019 Plans), and thus are available for claim under the ALRA. It follows therefore that there has been no withdrawal of the disputed areas, either orally at the hearing of 26 June 2018 or in writing in the Withdrawal. This is because, contrary to the 2018 Advice, no part of the disputed areas fall within the boundaries of the relevant portions. Indeed, that Advice was later accepted to have been inaccurate to the extent that it demonstrated the disputed areas as being "contained within the boundary of NT Portion 1170": Claimants Submissions on the Claim Boundaries at [2.8].

40. Thus, section 67A(5)(a) of the ALRA is said to have no application to the present circumstances, given that no withdrawal has taken place. Accordingly, the claimants argued that *Roberts*, which involved an unambiguous formal deed and notice of withdrawal, is distinguishable from these circumstances.

41. In the alternative, the claimants submit that the Withdrawal was vitiated by the error contained in the 2018 Advice; an error which was 'acknowledged by all concerned': Claimants' Submissions on the Claim Boundaries at [4.2]. It follows that the Withdrawal should, in their opinion, by treated as void ab initio and ineffective. It is not clear whether that argument is in respect of the totality of the Withdrawal, or the Withdrawal as it relates solely to the disputed areas.

42. Conversely, the solicitors for the private detriment interests submit that, irrespective of the inaccuracy of the 2018 Advice, the Withdrawal has the effect contemplated by section 67A(5)(a) of the ALRA. That is, the disputed areas have been finally disposed of as a result of the Withdrawal.

43. It is said that 'A mistaken belief as to the boundaries does not vitiate the withdrawal': Solicitor's Response at [10], citing *Svanosio v McNamara* (1956) 96 CLR 186. The solicitors also submit that a withdrawal cannot itself be withdrawn: at [11], citing *Roberts*. Accordingly, the disputed areas are no longer within the Commissioner's jurisdiction under the ALRA.

44. As I have stated above, I am not persuaded that the Withdrawal, insofar as it relates to the disputed areas, was effective in withdrawing the disputed areas from the Woolner LC.

45. I note that, given that the 2018 Advice has been accepted by all relevant parties as inaccurate to the extent that it indicated the disputed areas as being unavailable for claim, I do not need to consider the effect of the *Control of Waters Ordinance 1938*, the *Control of Waters Act 1978* and the *Water Act 1992* (NT). Irrespective of that effect, it is now generally understood that the disputed areas have at all relevant times been available for claim under the ALRA.

46. Accordingly, the first step, I think, is to have regard to the terms of the Withdrawal itself. It referred to the 2018 Advice and the 2019 Plans, then stated:

> Subject to this advice, I advise that parts of the land subject to the Woolner/Mary River Land Claim No. 192 have been identified as not being available for claim. Accordingly, the claimants withdraw their claim over the following parts of Area (iii):
>
> 1. The portion of the bed and banks of the Mary River that is contained within the boundary of NT Portion 2708;
> 2. The portion of the bed and banks of the Mary River that is contained within the boundary of NT Portion 1170; and
> 3. The portion of the bed and banks of the Mary River that is contained within the boundary of NT Portion 4121.

47. Relevantly, point two concerns the disputed areas: Claimants' Submissions on Claim Boundaries at [2.5]. It was withdrawn to the extent that it is '*within the boundary of* NT Portion 1170' (emphasis added).

48. However, it is clearly the position for the purposes of this Inquiry that the disputed areas are available for claim for the purposes of the ALRA, contrary to prior understanding. The Northern Territory accepts that to be the case. It follows that the disputed areas were not within the boundary of NTP 1170.

49. Accordingly, I agree with the claimants' submission that there has been no withdrawal of the disputed areas for the purposes of section 67A(5)(a) of the ALRA.

50. It follows that the issue at hand is not whether there has been any withdrawal of a withdrawal, as the solicitors for the private detriment interests submit. The circumstances are significantly different from those seen in *Roberts*.

51. That case concerned an application brought under the *Administrative Decisions (Judicial Review) Act 1977* (Cth) for review of a proposed decision of the Minister to exercise his functions pursuant to section 11(1) of the ALRA; being a recommendation to the Governor-General that a grant of land to a land trust be made following a report of the Commissioner pursuant to section 50(1)(a). That report was made in relation to a land claim known as the Mataranka Area Land Claim, and was referred to as the 'Mataranka report'.

52. The Mataranka report contained a recommendation to the Minister that three parcels of land be granted to a land trust. Following the provision of the report, the Minister received from the Northern Land Council a document titled 'Notice of Withdrawal', stating that those three parcels had been withdrawn from the land claim. Its terms were unambiguous in identifying those three parcels. The withdrawal was effected pursuant to a formal deed of settlement between the claimants and the relevant land holding parties, which provided for the withdrawal of the claim in exchange for the granting of an estate in fee simple in the three parcels to the claimants, pursuant to the *Crown Lands Act 1947* (NT) (the relevant legislation then in force).

53. Several months later the Northern Land Council on behalf of the claimants wrote to the Minister expressing concerns about the terms of settlement and requesting that the notice of withdrawal itself be treated as withdrawn. I do not need to repeat those concerns. It suffices to say that the Minister, having received notice of the withdrawal, considered himself unable to recommend to the Governor-General that the three parcels be granted to a land trust.

54. The applicants argued that the Minister was not limited by the notice of withdrawal and section 67A(5)(a) of the ALRA. Instead, it was contended that the Minister could nevertheless act upon the Commissioner's findings in the Mataranka report and subsequently recommend to the Governor-General, pursuant to section 11, that a grant of the three parcels be made.

55. The Court (Olney J) rejected that argument. Having considered the statutory scheme in detail, Olney J at 46 expressed the question at hand as being:

> … whether the purported withdrawal of a claim to land after the Commissioner has recommended that the land be granted in accordance with ss 11 and 12 affects the power of the Minister to recommend to the Governor-General that a grant of that land be made to a Land Trust.

56. Olney J found that the land claim had been finally disposed of due to the combined effect of the notice of withdrawal and the operation of section 67A(5)(a). He considered that 'a traditional land claim can be withdrawn at any time either before or after the Commissioner has reported on the claim': at 48.

57. However, I am not persuaded by the arguments of the solicitors for the private detriment interests that either section 67A(5)(a) of the ALRA or *Roberts* applies to the present circumstances. That is because, as the claimants submit, the formal deed and notice of withdrawal in *Roberts* were made in entirely unambiguous terms. The three parcels to be withdrawn were concretely identified: that is not the case here. That having been done, there was no question of what in fact had been withdrawn.

58. That situation is to be contrasted with the present. Here, the terms of the Withdrawal of 5 November 2019 were qualified and at best imprecise, merely noting that those area 'contained within' NTP 1170 were withdrawn. The Withdrawal merely advised that, to the extent that the disputed areas were contained within land not claimable under the ALRA as indicated by the Surveyor-General in the 2018 Advice and 2019 Plans, that part of the land claim was withdrawn. It has emerged, in admittedly awkward circumstances, that there are in fact no such parts of the disputed areas that are 'contained within' land which has been alienated by the Crown. That fact has been accepted by the parties.

59. It follows that this is not a case of a purported withdrawal of a withdrawal, as it was in *Roberts* and as the solicitors for the private interests contend. It is, as the claimants argue, a case where no withdrawal of the disputed areas was in fact made.

60. It is for this same reason that I am not persuaded by the argument that 'A mistaken belief as to the boundaries does not vitiate the withdrawal': Solicitors' Response at [10]. There having not been any withdrawal, no question of vitiating factors arises. I do not consider that *Svanosio v McNamara* sheds light on the application of section 67A(5)(a) of the ALRA to the present circumstances: that case, as the solicitors recognise, was concerned with the effect of a mistaken belief on a contract for sale of land.

61. It is therefore not necessary for me to consider the claimants' alternative argument that the Withdrawal is void ab initio and of no effect.

62. I accordingly find that the disputed areas were not withdrawn at any point during this Inquiry. The parts of the Woolner LC which relate to that land (namely, the beds and banks of the Mary River bounded by NTP 1170) remain within the jurisdiction of the Commissioner. That ruling is reflected in the contents of the Woolner LC Report.

63. In addition, although it is not necessary formally to decide the question, I do not accept that the circumstances of the Withdrawal, even if expressed in somewhat less ambiguous terms or different terms, would have prevented the claimants from pursuing their claim over the disputed areas.

64. There are a number of rhetorical questions which suggest that the Commissioner's role is not automatically brought to an end.

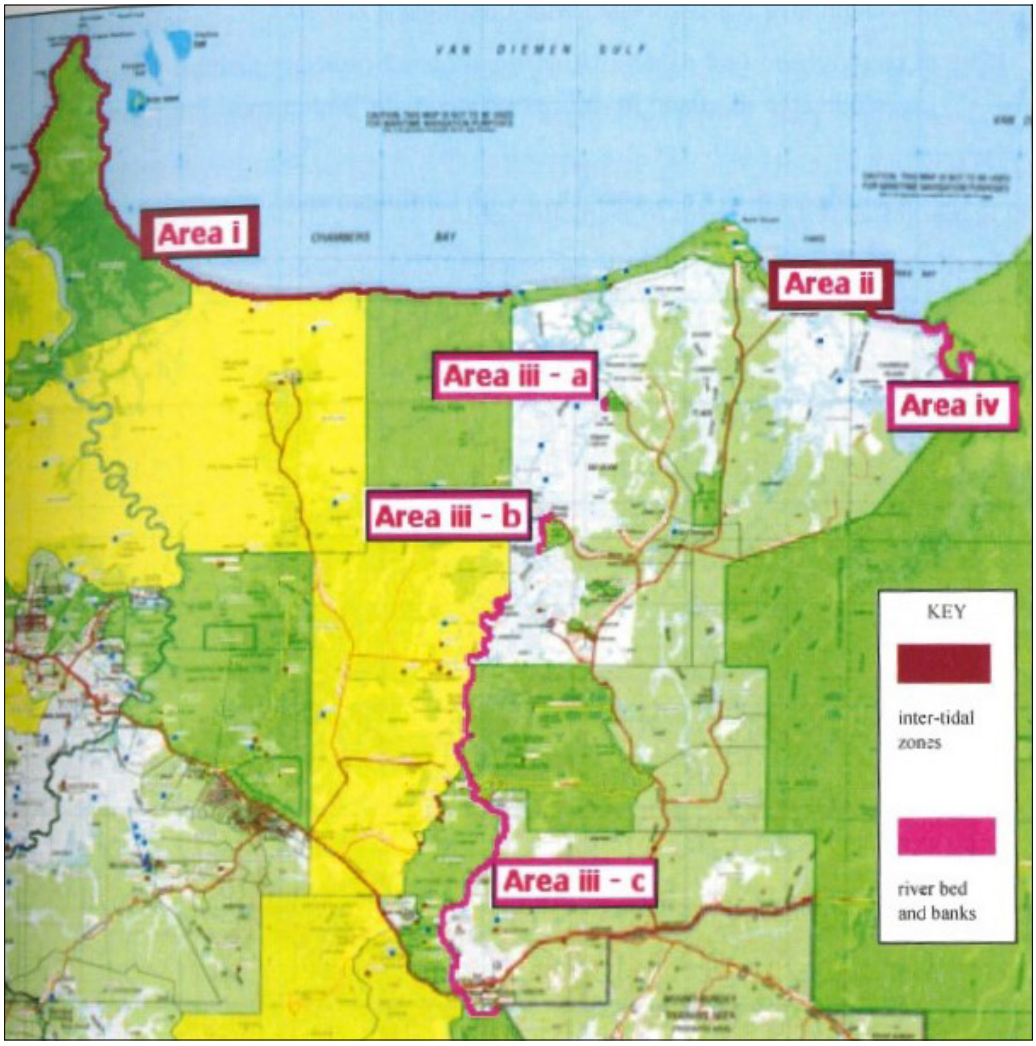
65. It is clear that the claimants' decision to 'withdraw' certain parts of their claim was based upon a false understanding about the availability of the disputed areas to be claimed: that is, the status of the disputed areas as unalienated Crown land. That understanding was induced (obviously entirely innocently) by the communications from the Northern Territory of the incorrect status of the disputed areas. It is hard to conceive of section 67A(5)(a) in those circumstances operating to preclude the further consideration of the claim over the disputed areas. Indeed, the Northern Territory accepted that. What would the position be if the Northern Territory had asserted that, despite its error, the Commissioner could no longer entertain the claim over the disputed area? Should the error of the Surveyor-General be the foundation for depriving the traditional owners of the claimed area of their entitlement? In my view, the concept of withdrawal in that provision involves some communication upon which the Commissioner has relied, perhaps by the Report to the Minister. There is an indication to that effect by section 50(1)(a)(i) of the ALRA, which requires the Commissioner to determine whether the claimants 'or any other Aboriginals' are the traditional owners of the claimed areas. The claimants, during the course of an Inquiry, may determine that they do not wish to proceed with the claim over all or part of the claimed area and 'withdraw' it. Is it intended that the Aboriginal Land Commissioner should then have no power to continue with the inquiry even though the evidence at the time might point towards other Aboriginals being the traditional owners of all or part of the claimed land? Or does the function of the Commissioner persist, unless and until the Commissioner

accepts the 'withdrawal' as finally determining the claim? What if the 'withdrawal' was intended to relate to particular specified land, but by error – even a typing error – identified the wrong NTP? Should such an error not be redeemable, provided any unfairness to other interested persons or entities be overcome?

66. In short, I think it is clear enough that the ALRA does not intend to deprive the traditional owners of their entitlement to unalienated Crown land, or of the opportunity to be granted such land on the decision of the Minister, by a mistaken communication of a 'withdrawal' of part of the claimed area, particularly when the mistake is primarily that of the Northern Territory by the Surveyor General in indicating that the land is not unalienated Crown land.

67. For the reasons already given, it is not necessary in this instance to finally decide that question.

Appendix 1 to Annexure E



Source: Northern Land Council

Appendix 2 to Annexure E

NORTHERN TERRITORY GOVERNMENT

DEPARTMENT OF THE ATTORNEY - GENERAL AND JUSTICE

Solicitor for the Northern Territory

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68 The Esplanade
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E elizabeth.furlonger@nt.gov.au

File Ref: 20180461

22 June 2018

Office of the Aboriginal Land Commissioner
GPO Box 9932
DARWIN NT 0801

Attention: Anna Gilfillan
Via Email: anna.gilfillan@network.pmc.gov.au

Dear Anna,

WOOLNER/MARY RIVER REGION LAND CLAIM (NO. 192) – BOUNDARIES IN RELATION TO LAND CLAIMED

The Northern Territory sought clarification from the Acting Surveyor-General in relation to the land boundaries adjacent to the areas claimed in the Woolner/Mary River Region Land Claim No. 192 Application. The process of determining the location of parcel boundaries required an examination of historical material which has taken some time. We apologise for the delay.

Based on the land tenure and survey information available, the Acting Surveyor-General advises the following:

Claim Area LC No. 192	Status of Land	Comments
(i)	Claimable	Area claimed between mean low water mark and mean high water mark is available for claim.
(ii)	Claimable	Area claimed between mean low water mark and mean high water mark is available for claim.
(iii).a	Not claimable	This section of the Mary River is contained within the boundary of NT Portion 2708 being that the boundary of NT Portion 2708 is the right bank of the Mary River.
(iii).b	Claimable	This section of the Mary River is unalienated land available for claim. In respect of this section of the river, NT Portion 2708 extends to the left bank of the Mary River and NT Portion 4063 extends to the right bank of the Mary River.
(iii) – c - 1.	Not claimable	This section of the Mary River is contained within the boundary of NT Portion 1170. The grant of NT Portion 1170 extends to the right bank of the Mary River and the grant of NT Portion 2707 (on the eastern side of the river) also extends to the right bank of the Mary River.
(iii) – c - 2.	Not claimable	This section of the Mary River is contained within the boundary of NT Portion 1170. The grant of NT Portion 1170 extends to the right bank

Source: Northern Territory Government

		of the Mary River and the grant of NT Portion 2622 (on the eastern side of the river) also extends to the right bank of the Mary River.
(iii) – c - 3.	Claimable	This section of the river is available for claim. The grant of NT Portion 4121 extends to the left bank of the Mary River and the grant of NT Portion 2622 (on the eastern side of the river) extends to the right bank of the Mary River.
(iii) – c - 4.	Not claimable	This section of the Mary River is contained within the boundary of NT Portion 4121. The grant of NT Portion 4121 extends to the right bank of the Mary River and the grant of NT Portion 4122 (on the eastern side of the river) also extends to the right bank of the Mary River.
(iii) – c - 5.	Claimable	This section of the river is available for claim. The grant of NT Portion 1832 extends to the left bank of the Mary River and the grant of NT Portion 4122 (on the eastern side of the river) extends to the right bank of the Mary River.
(iii) – c - 6.	Claimable	NT Portion 4425 extends to the left bank of the Mary River and the freehold parcels (NT Portions 3570, 6976, 6464 and 6465) extend to the right bank of the river.

The enclosed (*) plan "Indicative Boundaries in relation to Land Claim 192" identifies in red the sections of the Mary River which have been claimed and are confirmed to be available for claim. Those sections of the Mary River identified in grey are within the boundaries of adjacent land parcels and therefore not claimable.

The second enclosed (*) plan "Revised Indicative Boundaries in relation to Land Claim 192" depicts in red the areas now confirmed as available for claim.

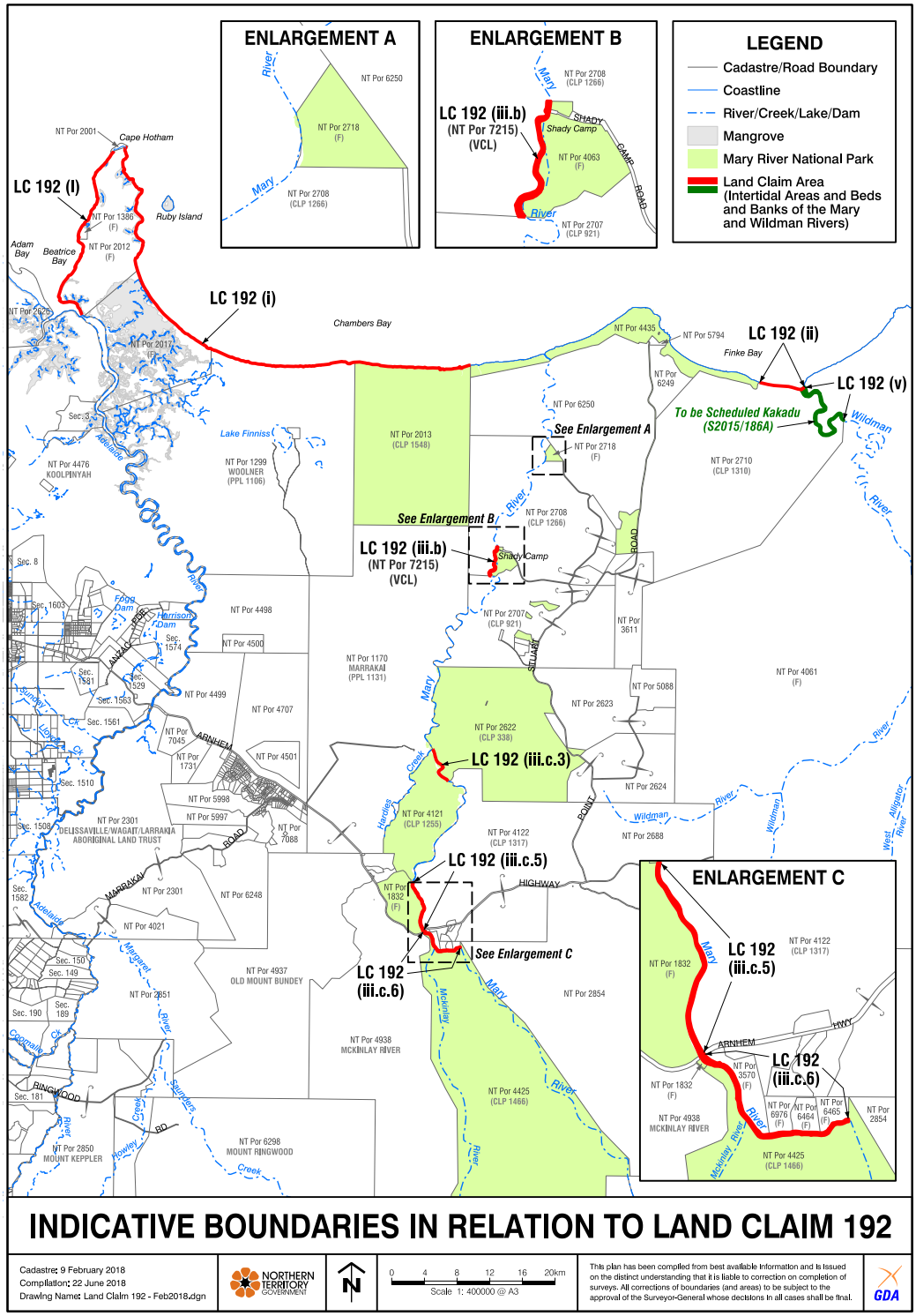
We have consulted with Mr David Avery in relation to this advice and he confirms that the advice of the Acting Surveyor-General is accepted. We have agreed that a compiled plan showing the boundaries in relation to the claimed sections of the Mary River would assist all parties. The Surveyor-General's Office is undertaking the preparation of those plans.

Yours faithfully
SOLICITOR FOR THE
NORTHERN TERRITORY

LIZ FURLONGER

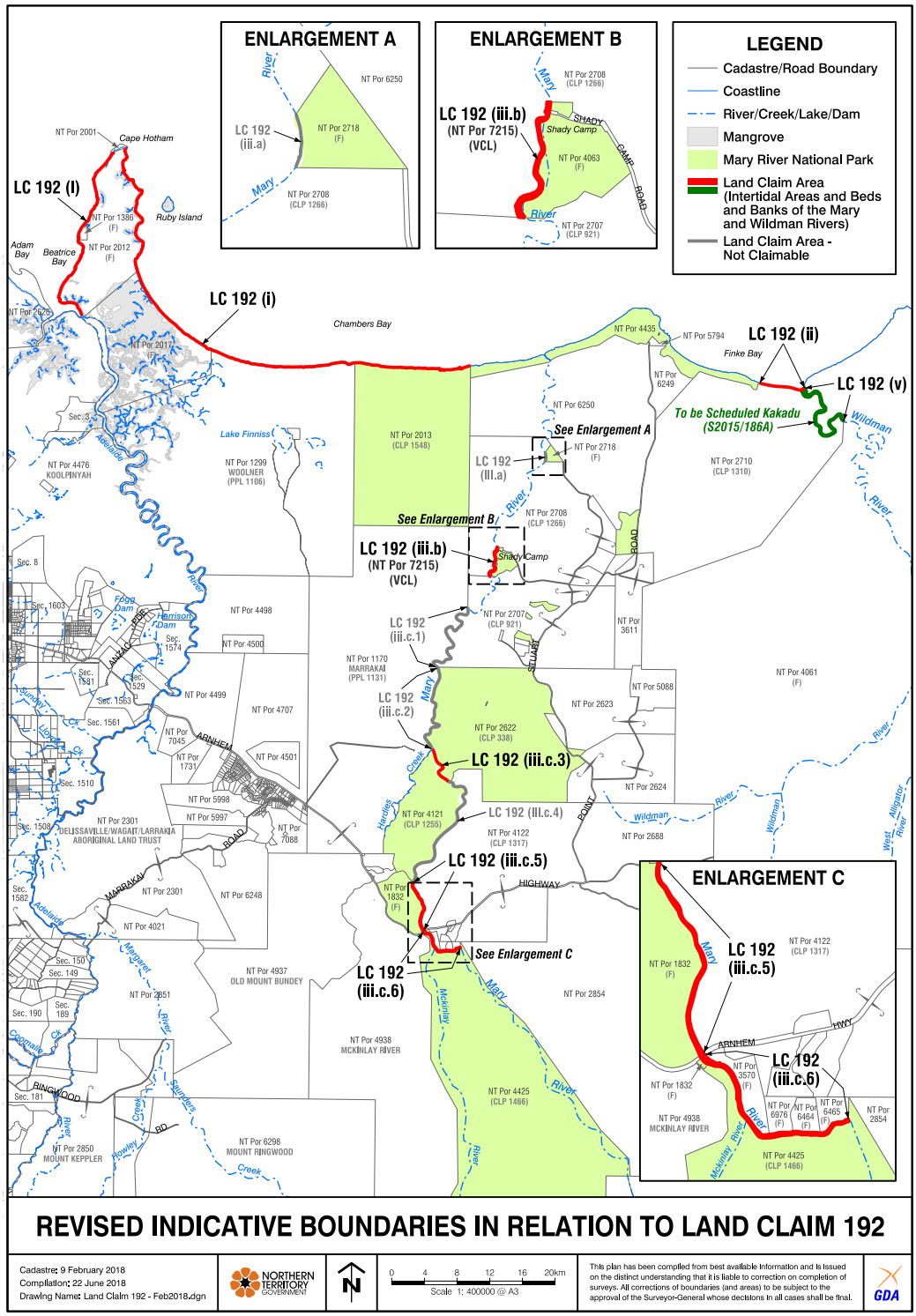
Source: Northern Territory Government

Appendix 2A to Annexure E



Source: Northern Territory Government

Appendix 2B to Annexure E



Source: Northern Territory Government

Appendix 3 to Annexure E

NORTHERN LAND COUNCIL
Our Land, Our Sea, Our Life

Address all correspondence to:
Chief Executive Officer
GPO Box 1222 Darwin NT 0801
45 Mitchell Street Darwin NT 0800
P: 08 8920 5100 • F: 08 8945 2633
Freecall: 1800 645 299
www.nlc.org.au
ABN 56 327 515 336

5 November 2019

The Hon John Mansfield AM QC
Aboriginal Land Commissioner
Level 4 Jacana House
39-41 Woods Street
DARWIN NT 0800

By email: AboriginalLandCommissioner@network.pmc.gov.au

Dear Commissioner

WOOLNER/MARY RIVER REGION LAND CLAIM NO. 192 – CORRECTION

I refer to my letter dated 2 November 2019 which sought to withdraw parts of the claim area in the Woolner/Mary River Land Claim No. 192. I advise that the letter contained two errors:

- It incorrectly identified the claim over the bed and banks of the Wildman River as Area (iv). This claim is Area (v); and
- It mistakenly identified NT Portion 4122, instead of NT Portion 4121.

This letter is intended to correct and replace the letter of 2 November 2019.

I refer to correspondence from the Territory dated 22 June 2018 providing advice from the Acting Surveyor-General on the boundaries of the claim areas and their availability for claim, and the compiled plans provided by the Territory on 25 October 2019.

Subject to this advice, I advise that parts of the land subject to the Woolner/Mary River Land Claim No. 192 have been identified as not being available for claim. Accordingly, the claimants withdraw their claim over the following parts of Area (iii):

1. The portion of the bed and banks of the Mary River that is contained within the boundary of NT Portion 2708;
2. The portion of the bed and banks of the Mary River that is contained within the boundary of NT Portion 1170; and
3. The portion of the bed and banks of the Mary River that is contained within the boundary of NT Portion 4121.

I also advise that the claimants withdraw their claim to Area (v) over the bed and banks of the Wildman River on the basis that this area has been scheduled as Aboriginal land in the *Aboriginal Land Rights (Northern Territory) Act* 1976.

Yours sincerely

Tamara Cole
Acting Principal Legal Officer

Cc: Anna Gilfillan: Anna.GILFILLAN@network.pmc.gov.au
Poppi Gatis: Poppi.Gatis@nt.gov.au
Elizabeth Furlonger: Elizabeth.Furlonger@nt.gov.au

Appendix 4 to Annexure E

14 May 2020

Hon Justice John Mansfield AM QC
Office of the Aboriginal Land Commissioner
Level 4, Jacana House, 39-41 Woods Street
Darwin NT 0800

By email: AboriginalLandCommissioner@official.niaa.gov.au

Dear Commissioner,

WOOLNER/MARY RIVER LAND CLAIM NO. 192

We refer to the above land claim and, in particular:

1. The Claimant's letter dated 11 March 2020 regarding the availability for claim of the parts of Area (iii) marked "iii.c.1" and "iii.c.2" on the map entitled 'Revised Indicative Boundaries in Relation to Land Claim 192' [Exhibit NT2] (**the Land**);
2. the Territory's letter dated 9 April 2020; and
3. the letter from Mr Torgan of Ward Keller dated 13 March 2020.

In our submission and for the reasons set out below, the Land is not part of NT Portion 1170 but rather, vacant Crown land and thus remains under land claim. It follows that the notice of withdrawal dated 5 November 2019 is ineffective insofar as it relates to the Land.

The Territory's letter included the Surveyor-General's response to the points raised by the Claimant's letter of 11 March 2020, which was the first we were made aware of the methodology adopted by the Surveyor-General, and were able to discern the flaws in it.

The primary point raised by our letter was the effect of section 4 of the *Control of Waters Act* to preserve the bed and banks of a watercourse as Crown land where the watercourse forms the boundary of land alienated by the Crown. It does not appear that the Surveyor-General gave consideration to the effect of that provision.

Further, it does not appear that the Surveyor-General gave consideration to the effect of section 12 of the *Water Act 1992*, the applicable provision when PPL 1131 was granted in 1993 to replace PL 746, despite finding that NT Portion 1170 had not been surveyed. Section 12(2) provides that, in the absence of a survey for the purpose of registration of the title to the land under the *Real Property Act* (the predecessor of the *Land Title Act 2000*), the relevant bed and banks remained the property of the Crown.

The Noting Plan and the Index Plan provided by the Territory appear to be administrative documents. They are not survey plans. In any event, on close examination they do not support the contentions of the Surveyor-General. Given the application of the relevant water legislation to

determine Crown ownership of the bed and banks, we see no need to address the details on this aspect at this point, but can do so, if required. In our view, it is sufficient to observe that, in reliance on the map comprising Exhibit NT2, the Claimants and other respondent parties were misled by the Territory.

On the basis that the Land remains available for claim, and that the claim is not withdrawn, we propose that the Commissioner issue directions inviting parties to make further written submissions on detriment and patterns of land usage regarding the Land only. The Claimants would not object to the provision of further evidence by detriment parties, provided there is an opportunity for cross-examination, if desired.

It is unfortunate for all parties that detriment will not be dealt with cohesively in this matter, and although preparation of further submissions may cause some irritation, the Claimants are entitled to pursue their claim. It is not their fault that an error on Exhibit NT2 led to a misunderstanding as to the availability of the Land for claim.

Accordingly, we request that the inquiry into the *Woolner/Mary River Land Claim No. 192* be extended to enable the parties, including the Claimants, to finalise detriment submissions in respect of the Land.

Should you have any questions or wish to discuss, please contact me on 0438 795 330.

Yours sincerely

Matilda Hunt
Lawyer

Cc:

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Appendix 5 to Annexure E

NORTHERN TERRITORY GOVERNMENT | Department of THE ATTORNEY-GENERAL AND JUSTICE

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2 July 2020

Our Ref: **20180461**

The Hon John Mansfield AM QC
Aboriginal Land Commissioner
Office of the Aboriginal Land Commissioner
Level 4, Jacana House, 39-41 Woods Street
DARWIN NT 0800

Via email:
Anna.Gilfillan@official.niaa.gov.au

Dear Commissioner

WOOLNER / MARY RIVER REGION LAND CLAIM NO. 192

We refer to our letter dated 1 June 2020 in response to the NLC letter of 14 May 2020 indicating that the Territory was looking into the issues raised in the NLC letter with the intention to respond as soon as possible.[1]

The Territory has since considered the NLC letter and is now in a position to advise that the claim area comprising areas (iii).c.1 and (iii).c.2 as depicted on Exhibit NT 2 (the Land) is available for claim.

Accordingly the Territory agrees with the Claimants that the Commissioner should thereby proceed to reopen the inquiry to the extent required to address any detriment evidence in relation to the Land.

Please contact the writer if you have any queries.

Yours faithfully

Solicitor for the Northern Territory

STEWART BRYSON
Senior Lawyer

cc.

Northern Land Council Attention: Matilda Hunt huntma@nlc.org.au	Ward Keller Lawyers Attention: Bradly Torgan Bradly.torgan@wardkeller.com.au	Paspaley Pearling Pty Ltd HWL Ebsworth Lawyers rsanders@hwle.com.au

[1] Our letter incorrectly referred to the NLC letter as dated 15 May 2020.

Appendix 6 to Annexure E

Ward Keller

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10 July 2020

By Email: AboriginalLandCommissioner@official.niaa.gov.au
The Hon John Mansfield AM QC
Aboriginal Land Commissioner
Office of the Aboriginal Land Commissioner
Level 4, Jacana House, 39-41 Woods St
Darwin NT 0800

Dear Commissioner Mansfield

WOOLNER/MARY RIVER REGIONAL LAND CLAIM NO 192

We refer to the correspondence from Matilda Hunt of the NLC on behalf of the claimants dated 11 March 2020 and subsequent correspondence on the subject. Notwithstanding the correspondence from Stewart Bryson on behalf of the Northern Territory Government dated 2 July 2020, Ms Hunt's attempt to withdraw the withdrawal of portions of the Woolner/Mary River Region Land Claim No 192 is ineffective. The withdrawal, dated 5 November 2019, must stand.

While the withdrawal, provided by Tamara Cole of the NLC on behalf of the claimants, is couched in terms of NT Portions, the intent of the withdrawal is clear as to what portions of the claim as they have come to be identified were withdrawn; LC 192(iii.a), LC192(iii.c.1), and LC 192(iii.c.2). The withdrawal of these portions of the claim disposes of them and they cannot be renewed.

Pursuant to section 67A(5)(a) of the *Aboriginal Land Rights (Northern Territory) Act 1976*, "a traditional land claim shall be taken not to have been finally disposed of in so far as it relates to a particular area of land until: the claim, or the claim, in so far as it relates to the area of land, is withdrawn". The withdrawal of 5 November 2019 disposes of the claim as it relates to areas LC 192(iii.a), LC192(iii.c.1), and LC 192(iii.c.2).

Disposal is a final action. A claim disposed cannot be revived by a withdrawal of a withdrawal. See *Roberts v Minister for Aboriginal Affairs* (1991) 29 FCR 38.

Please contact me if you have any questions

Yours faithfully
WARD KELLER

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