



**Gregory National Park / Victoria River  
Land Claim No. 167**

**Legune Area Land Claim No. 188**

**Report No. 74**

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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Dear Minister,

**RE: Gregory National Park / Victoria River Land Claim No. 167  
Legune Area Land Claim No. 188**

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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# 1. INTRODUCTION, HISTORY 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 two applications 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. The first of those claims is the Legune Area Land Claim, being the claim numbered 188 in the register of claims held by the Office of the Commissioner, and made by application on 27 May 1997. I shall call that the Legune Area LC.
3. The second of those claims is the Gregory National Park / Victoria River Land Claim, being the claim numbered 167 in the register of claims held by the Office of the Commissioner, and also made on 27 May 1997. I shall call that the Gregory NP/Victoria River LC.
4. The two land claims were heard together for the purposes of the inquiry with the support of the respective claimants, and the Northern Land Council, and the Northern Territory and the other persons or entities who or which participated in the inquiry. The two claims are contiguous and are about 400 kilometres south west of Katherine, in a monsoonal area with a wet season between about December to March in each year followed by an extensive dry season. The report of the anthropologist John Laurence, referred to in detail below, describes the banks of the Keep River and of the Victoria River near their mouths and flowing into the Joseph Bonaparte Gulf as being predominantly tidal mud flats with stands of mangroves, either River Mangroves in the lower areas and Freshwater Mangroves further up river. The River Mangroves are called *Marlmurr* and the Freshwater Mangroves are called *Birlilj* in the Ngaliwurru language, being one of the languages of the claimants.
5. The historical background to the claims is set out in some detail in the Anthropologist's report of John Laurence. As it is not contentious, I need note it only briefly. The sources for the following description may be found in his report.
6. The Victoria River district was explored and stocked during the reign of Queen Victoria. As Mr Laurence says, consequently, the use of Indigenous names was scarce and prominent features were generally named after the members of particular exploratory parties.

7. Phillip King carried out the earliest survey of the north western coastline of Australia in 1819, including entering Queens Channel at the mouth of the Victoria River. The first expedition to enter Victoria River was led by Captain John Wickham in HMS Beagle in 1839. On the journey to the tidal reach, led by his Lieutenant John Stokes and Mate Fitzmaurice, they saw some but not many signs of Aboriginal occupation and had some contact with Aboriginals. The North Australian Expedition, led by Augustus Gregory, arrived at the Victoria River in late 1855. It established a depot, now preserved as Gregory's Tree Historical Reserve, some 10 kilometres downstream from Timber Creek. There are extensive records of Indigenous usage in the Victoria River and surrounds from that time. There was also contact with the Aboriginal inhabitants, both cordial and aggressive thereafter.
8. Although Gregory reported of there being vast areas of grazing lands in that area, the Victoria River district was not settled by pastoralist activities until the 1880s, largely with cattle from Queensland and New South Wales. Auvergne was the first station to be established in the area, in 1886, and then Keep River in 1888, Carlton Hill in 1893, Bradshaw in 1894 and Legune in 1903. The Victoria River Depot was established in 1884 to receive goods by ship, which were then transported by donkey train to the stations. From 1919, large numbers of cattle were transported to the Wyndham meatworks and then exported.
9. During this period there was increasing conflict between settlers and the local Aboriginal people. It is well documented, including in the station records, notably that of the Bradshaw brothers operating from 1884 on Bradshaw. Those records identify and use quite extensive Indigenous toponyms in European maps. As Mr Laurence observes, 'Massacres of Aboriginal people and cattle killing continued to occur'. The available records show a dramatic decline in the Aboriginal population of the area in the late 1920s and early 1930s as a consequence of conflict with the European settlers and introduced disease.
10. The subsequent data, including a statement taken in the 1970s from Grant Ngabidj, deceased ancestor of the Wadaynbang local descent group in these claims, confirms the Gajirrabeng as occupying the general areas of the claims until they were dispersed as a result of shootings by Europeans and settled on cattle stations. Nevertheless, there continued a circulation between work on cattle stations and during the wet seasons a return to bush life to renew knowledge of the Dreaming and ceremony performance, hunting and fishing.
11. In 1953, Aboriginals in the Northern Territory became wards of the State and their names and identities were recorded in the Register of Wards. It notes the presence of both Gajirrabeng and Jaminjung people in the area of the claims at the time and thereafter.

12. The history provided by Mr Laurence also indicates that, following the introduction of equal pay for Aboriginal pastoral workers in 1968 and the greater introduction of mechanical aids, many of the members of the claimant groups were pushed off station life and moved elsewhere, both to Western Australia at Wyndham and Kununurra and locally to Timber Creek and Wadeye. There was some dissatisfaction ‘with the town lifestyle’ leading to some movement back to outstations, community living areas and stations acquired by the Aboriginal Development Commission or to properties granted under the ALRA. The majority of the present claimants live in the general area of the two claims in such locations.
13. It is also desirable to note briefly the nature and purpose of the inquiry.
14. Section 50(1)(a) of the ALRA requires me to ascertain whether those Aboriginals who have 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.
15. 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 on that aspect. It has been a relatively straightforward process, with one major qualification, referred to in the next four paragraphs of this report. I have also referred to the evidence adduced by a range of interested persons and who claimed that they might suffer detriment if the claim were acceded to, and I have reported on that potential detriment, and on the matter referred to in section 50(3)(c). It is not required that I report on the matter referred to in section 50(3)(d) of the ALRA.

16. The course of the conduct of the claims was, to the point where the final submissions had been made, a common and well understood one. On the topic of traditional Aboriginal ownership, the Northern Land Council on behalf of the claimants in each claim had provided the proposed expert anthropological evidence to be relied on by the claimants to the Northern Territory, and it made a response with some queries, followed by the further exchange of information. That satisfied the Northern Territory of the principal issue in each claim. By letter from the Solicitor for the Northern Territory of 13 October 2016, and then at the commencement of the evidence in the inquiry on 17 October 2016 through counsel for the Northern Territory, the Northern Territory accepted that the traditional Aboriginal owners as expressed by the claimants at the time were accepted as being the traditional Aboriginal owners of the lands as then claimed.
17. At a much later time, after the close of final submissions, the Northern Territory sought leave to re-open the evidence on the inquiry into the Legune Area LC. The purpose was to assert that each of the land claims included claims over areas which were not available to be claimed, either because the particular land claim as expressed did not include part of what had been commonly understood until then as included within the land claim, or because such areas, if they were included in the claimed areas, were not available to be claimed as they were not 'land in the Northern Territory' within the definition of 'Crown land' in the ALRA itself. As the argument was ultimately expressed, that was either because of a limited meaning of the expression 'land in the Northern Territory' in the definitional section 3 of the ALRA, or because the areas the subject of challenge were not part of the land in the Northern Territory transferred to, and accepted by, the Commonwealth by the *Northern Territory Acceptance Act 1910* (Cth). As that contention raised a jurisdictional question, it was appropriate to give the Northern Territory leave to have the inquiry re-opened for that purpose.
18. Relevantly for present purposes, the contention was that the mouths of the Keep River and of the Victoria River where they flowed into the Joseph Bonaparte Gulf were further inland than the low water mark at the coast line and at a line drawn across the two adjoining headlands where the two rivers flowed into the Gulf. The Commonwealth and the Northern Territory said that the 'mouth' of each of the rivers was some distance inland from that line, in effect where the tidal waters of the sea reached upstream at the mean low tide. Hence, they said, that seaward of that defined 'mouth' the waters of the two rivers and their beds and banks were not available to be claimed.

19. The same point arose in the course of a subsequent inquiry being conducted into the Fitzmaurice River Region Land Claim, being land claim number 189 in the register of land claims held by the Office of the Commissioner (the Fitzmaurice LC). There followed extensive further evidence in the Legune Area LC, heard at the same time as the ongoing evidence in the Fitzmaurice LC, and extensive further submissions. Ultimately, I indicated that I did not accept that the Legune Area LC was so confined, and indicated that I would give reasons for that conclusion when providing this report to the Minister.
20. Subject to that issue, as I have noted, the matter to be addressed by section 50(3)(a) of the ALRA was not contentious. No participating person or entity in the inquiry made any submission on the issue other than the Northern Territory.
21. The detriment required to be reported on by s 50(3)(b) and the matters to be addressed by s 50(3)(c) became a matter of considerable focus in the evidence. It has been necessary to record some findings where there are a few areas of factual contest, or where the material supporting the claimed detriment is not fully explored. In some respects, the claimants indicated a means by which the asserted detriment could be accommodated so that a grant of the claimed land could be made, and in at least one respect the potential detriment was not of concern as there was, on the evidence, a realistic expectation that the claimants and the entity concerned would make an agreement under s 11A of the ALRA satisfactory to both the claimants/traditional Aboriginal owners and the entity concerned. The Northern Territory focussed attention on the potential impact of the grant of the claim areas on existing or proposed patterns of land usage in the region of the claim areas.
22. My report addresses all those matters for the attention of the Minister. It is not the function of the Commissioner to make recommendations to the Minister about how to address such detriment concerns, but I have made some comments on that topic where I felt that would be helpful or to assist the Minister in addressing the issue of detriment.
23. 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).
24. 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.
25. Subject to those comments, this report, as required, contains my findings and recommendations in respect of the Legune Area LC and the Gregory NP/Victoria River LC.

## **2. THE APPLICATIONS AND THE INQUIRY**

26. There have been a number of previous land claims in the region of these two land claims. Apart from the traditional Aboriginal owners whose country lies on Bradshaw, all of those claims have been successful. I note in particular the lands relating to the Timber Creek Land Claim Report No. 21 (19 April 1985), and the Ngaliwurru/Nungali (Fitzroy Pastoral Lease) Land Claim; Victoria River (Beds and Banks) Land Claim (Nos. 137 and 140) Report No. 147 (22 December 1993).
27. Both the Legune Area LC and the Gregory NP/Victoria River LC have a lengthy history.
28. It is helpful first to identify the general area of the two claims. They relate to the area in the northern western section of the Northern Territory, immediately to the east of the border with Western Australia. In terms of the nearest area of the sea, speaking generally, they are located in the area of coast and the river waters of the Keep River and the Victoria River where they run into the south eastern corner of the Bonaparte Gulf. Further to the north and east of the two claim areas along the coast is the area of the Fitzmaurice LC, again speaking generally where the Fitzmaurice River also flows into the south eastern section of the Bonaparte Gulf, and a little to the north of the present claim areas along the coast.
29. Immediately adjacent to the border in that area is the Spirit Hills Pastoral Lease (relevantly NTP 5774 and NTP 5775), bordered for present purposes by the borderline on its western side and the Keep River on its eastern side. The Keep River runs broadly from the south into the Gulf. At its southern extremities it splits into two arms, the eastern of which is called Sandy Creek.
30. The Victoria River runs into the Gulf further to the east.
31. On the eastern side of the Keep River and in the area running to the coast until the Victoria River is reached as one moves to the east is the Legune Station Pastoral Lease (NTP 798). The Victoria River runs roughly from the south east into the Gulf. South of the southern boundary of that pastoral lease, and still between the two rivers is a further section of the land of the Spirit Hill Pastoral Lease (NTP 1586 and NTP 5776). That section of that pastoral lease runs to the Victoria River to a point where Lalgang Creek runs on the opposite side of the river, from the east roughly west into the southern part of Victoria River. It is, at that point of the line across Victoria River, that the Legune Area LC ends. Further to the south east, the upstream section of Victoria River is relevant to the Gregory NP/Victoria River LC.
32. To the east of the Victoria River is another extensive sward of land roughly bounded on its south western side by the Victoria River and on its northern side by the Fitzmaurice River. That land is held by the Commonwealth and is called the Bradshaw Field Training Area (Bradshaw).

33. I refer first to the Legune Area LC.
34. An application was made on 27 May 1997 by the Northern Land Council on behalf of the claimants.
35. The areas then included in the claim were more extensive than are presently claimed, as it has been acknowledged some of those areas could not be claimed either because they were not unalienated Crown land, having been leased to the Northern Territory Land Corporation or the Conservation Land Corporation, or are a stock route: see section 67A(6)(d) of the ALRA, or could not otherwise be claimed as they were seaward of the low water mark: see *Risk v Northern Territory of Australia* [2002] HCA 23; (2002) 210 CLR 392. It was also accepted by the claimants in the Legune Area LC that the upper reaches of Sandy Creek and of the Keep River were also alienated at the time that claim was lodged, by the grant of the pastoral lease (Perpetual Pastoral Lease 1062) to Legune Land Pty Ltd. It will be a matter for surveying in due course to identify precisely where that alienation has effect to exclude those parts of Sandy Creek and of Keep River and their beds and banks from the grant of any land. It is common ground that the Surveyor-General of the Northern Territory will need to approve that survey, and that it will be accepted by both the claimants and the Northern Territory.
36. The relevant areas claimed in the application were:
  - (i) Intertidal Zone adjacent to Legune Station Pastoral Lease, described in the application as the land between the high water mark and the low water mark adjacent to that pastoral lease. It says the location of the land claimed is shown hatched on Map A attached to the application;
  - (ii) Beds and Banks of Sandy Creek and of Keep River, described in the application as all the area of land being the bed and banks of Keep River and of Sandy Creek, near Legune Station Pastoral Lease, commencing at the mouth of the Keep River and continuing generally slightly west of south or southerly of where Sandy Creek flows into Keep River and continuing to where the river and creek meet the boundary of Legune Station Pastoral Lease, including any islands located within the river of the creek. Again it is said that the location of the land claimed is shown hatched on Map A attached to the application;
  - (iii) Beds and Banks of the Victoria River, described in the application as all the area of land being the beds and banks of the Victoria River from its mouth and extending to where the east bank of the river meets Lalngang Creek and a line is drawn to the north eastern boundary of the Spirit Hills Pastoral Lease (and the south eastern boundary of the Legune Station Pastoral Lease), including any islands located within the river. Again, it is said that the location of the area claimed is shown hatched on Map A attached to the application; and



- (iv) Intertidal zone surrounding Northern Territory Portion 3439, being the area of land between the high watermark and the low water mark surrounding NTP 3439. The land itself is shown as an island within the Victoria River, and subsequent inquiries confirmed that it is leased by the Northern Territory Land Corporation. Again, it is said that the land claimed is shown hatched on Map A attached to the application.
37. Map A is a rough map, with hand lined hatching in each of the areas of the Keep River and the Victoria River. The areas of the claim are identified by a handwritten entry: for example, 'area 9(iv)'. The hatched area is not shown with any precision. The coastline itself is marked with a thick line, including along its indentations, and the line of the island in the Victoria River is also marked with a thick line. The hatched areas are identified and extend to a rough line across nearby headlands of the coast, although not with any precision. In the case of each of the Keep River and the Victoria River, the hatched area at its northernmost extent is labelled by hand as 'to mouth of river'. On the eastern side of the hatched area of the Victoria River is an island shown as 'NT Por 4171'. It was identified in the course of the evidence as Quoin Island. The entrance to Victoria River is at that point, and on a more detailed map showing the hatched area and prepared by the Northern Land Council to depict the claimed areas (enclosed with Exhibit A2, Anthropologist's Report on Behalf of the Claimants), the hatched area extends north to about half way along the western side of Quoin Island in what is called Queens Channel. On the eastern side of Quoin Island is what is called Gore Channel.
38. I note that the Northern Territory through the Surveyor General has prepared a map also depicting the claim areas, including the hatched areas and marking of the coastal claims (prepared on 5 November 2015, and modified on 30 September 2016 and 10 July 2017). It accords largely with the rough Map A in the application and with the map in the Anthropologist's Report. It has marked with a clear line the northernmost section of the hatched area for each river and has the words 'Mouth of River' in each instance. It is annexed to this report as Annexure A.
39. On the Victoria River, the claim then includes the beds and banks of the river extending south easterly to the point where the Lalngang Creek flows into the river on the eastern bank, and on the opposite or western bank lies the northern boundary of Bullo River Pastoral Lease. The straight line across those two points represents the southern or up river end of this claim and the commencement of the Gregory NP/Victoria River LC. It includes the intertidal areas around the island known as Entrance Island (Northern Territory Portion 3439) depicted in the maps.

40. The Gregory NP/Victoria River LC is not so complex. It too was made on 23 May 1997. Although it initially included five areas claimed, by the time of the inquiry four of those areas had been accepted as being not available to claim as they did not relate to unalienated Crown land. Moreover, as the claimed land was confined to upstream sections of the beds and banks of the Victoria River, the issue about where the ‘mouth’ of that river lay did not arise.
41. The relevant claim in the application is to the Beds and Banks of the Victoria River, described as all that land being the beds and banks of the Victoria River from where its east bank meets Lalong Creek and the west bank meets the southernmost point of the north eastern boundary of Spirit Hills pastoral lease, by a straight line, to where the river meets the boundary of the town of Timber Creek. That is, as noted above, upstream or south easterly from the part of the Victoria river claimed in the Legune Area LC. Again, there is a hatched map called Map A attached to the application.
42. The hatched area is not contentious. It follows the Victoria River upstream to Timber Creek. To the northern or north-eastern side of the Victoria River in that vicinity (and running along that bank of the Victoria River to where it runs into the Gulf), the former pastoral lease over that area has been surrendered and Crown Lease Term 2078 granted to the Commonwealth for defence purposes. I have referred to that as the Bradshaw area. In much of the evidence it was called the Bradshaw Field Training Area. Bradshaw Bridge crosses the Victoria River a short distance west of Timber Creek township and provides access to Bradshaw from the Victoria Highway (subject to the consent of the Department of Defence).
43. It is common ground that these two land claims were not prioritised for many years. They were periodically mentioned in the reviews conducted from time to time by the Commissioner, but other matters were given some priority.
44. On 19 May 2009, the Commissioner gave notice under section 67A(7) and (10) requiring the claimants to present their claim material in relation to each of the claims within 6 months. In circumstances which it is not necessary to recite in detail, that notice was withdrawn on 29 June 2010, 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.
45. The decision of the High Court in the Blue Mud Bay case: *Northern Territory v Arnhem Land Aboriginal Land Trust* [2008] HCA 29; (2008) 236 CLR 24, prescribed that the 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 those areas was not clear. Not surprisingly, both the Northern Land Council on behalf of the claimants and the Northern Territory indicated that it was preferable for any inquiry in relation to the claims (and other ‘beds and banks’ claims) should

be deferred while negotiations were undertaken to explore overall resolution of the issues. The progress of those negotiations was periodically notified to the Commissioner. To date, those negotiations have not produced a long-term resolution. In the ongoing period, the Northern Land Council on behalf of the claimants indicated that it was preparing for an inquiry to be conducted.

46. The primary claim material, including the anthropologist's report referred to above, was lodged with the Commissioner on 10 June 2016. That material included an electronic document 'Report on the Status of Title'. It included a Submission on Status of Land Claimed. It is uncontentious. The enclosed documents confirm that the claimants accept that the only areas of the two claims which are in fact over unalienated Crown land, and so available to be granted if the claims succeed, are the areas set out above. The further material then lodged included a Sacred Sites Map for each of the two land claims, and a Site register for each of them. It also included the Claimants' Personal Particulars and the Genealogies for each of the claims (the details for each claim were separated but included in the same document).
47. The Northern Territory appropriately examined that material. It raised with the Northern Land Council on behalf of the claimants certain concerns about whether that material accurately or adequately demonstrated that the claimants in each claim were in fact the traditional Aboriginal owners of the claimed areas. As a consequence, the anthropologist Mr John Laurence provided a further document entitled 'Response to a letter from the Solicitor for the Northern Territory setting out concerns, queries or issues arising on the Anthropologist's Report', and an amended 'Madbag Group – Amended Genealogy' relating to the Jamenjun-Madbag Group. Subsequently, he also produced a further document 'Madbag Group – Exercise of Primary Spiritual Responsibility'. As appears below, the Northern Territory, after considering that material, did not contest it.
48. All that material was tendered as evidence at a preliminary hearing on 10 June 2016 or at the commencement of the formal inquiry on 17 October 2016, including the Claimants' Personal Particulars.
49. On 15 July 2016, the Commissioner 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 two claims. The notice of the inquiry was also publicly advertised in the Katherine Times on 27 July 2016, the Kimberley Echo on 28 July 2016, and in the Northern Territory News on the 23 and 30 July 2016. Apart from the proper interest of the Northern Territory in the identification of the traditional Aboriginal owners, the persons and entities who responded all were concerned on the matter of detriment. They are referred to in detail when addressing that issue.

50. The hearing then commenced at Timber Creek on 17 October 2016. Counsel for the claimants and for the Northern Territory were present as well as 28 persons identified by counsel as being either some of the claimants or their spouses. Several persons interested in relation to the issue of detriment also attended: Mr Neville Fogarty on behalf of Victoria River Cruises, Ms Fiona McDonald on behalf of the Timber Creek Hotel who gave a brief explanation of the concerns held in relation to the business of the hotel, and Mr Terry Downs as an interested amateur fisherman.
51. The Commissioner had also been notified by then of the interests of the Commonwealth, through the Department of Defence in relation to Bradshaw, and including the Bradshaw Bridge over the Victoria River, the Amateur Fishermen's Association of the Northern Territory, Beach Energy, the Seafarm Group in relation to what it called Project Sea Dragon, and the Western Australia Department of State Development in relation to the Goomig or Weaber Plain Development Project, part of the Ord River Stage 2 development. Following Western Australia machinery of government changes that Project was later administered by, and the relevant entity is hereafter referred to as, the Department of Primary Industries and Regional Development. By arrangement, those entities did not attend the initial day of the hearing.
52. Counsel for the Northern Territory formally accepted that the claimants to the two claims are the traditional Aboriginal owners of the claimed areas. He indicated that the Northern Territory did not intend to call any evidence on that issue in relation to either of the two land claims, and did not wish to cross-examine the anthropologist Mr Laurence or any of the claimants. No issue was raised about the extent of either of the two land claims. There was no suggestion that the geographical scope of the two land claims was unclear, or that the areas hatched in the Keep River of the Victoria River in the Legune Area LC and identified at their seaward ends as the mouths of the two rivers were not available to be claimed.
53. Counsel for the claimants then introduced the Aboriginal persons who were present, and said publicly to 'the detriment parties' that the purpose of the claim 'is not to frustrate the use of the river by third parties' referring in particular to amateur fishermen, tourists or locals or sightseers. He made it clear, though, that sensitive sites would have to be protected and that an agreement could be reached if a grant of the claimed areas were made which would enable the present activities to continue 'pretty much as they have in the past'.
54. The hearing then proceeded to a view of significant features of the Victoria River and its banks in proximity to Timber Creek. That site visit was principally to Big Horse Creek and Bradshaw Bridge. At a location called site 149, two senior claimants Jerry Jones and Alan Griffiths explained the significance of the site. The view related to the areas claimed in the Gregory NP/Victoria LC.

55. The following morning, a flight was undertaken with a number of the claimants present to point out features of the claim areas, and with Mr Laurence. It extended to the coastline and the areas where the two rivers appeared to flow into the sea. A number of sites were identified.
56. A summary of the site visit and of the flight over the land claims area was subsequently prepared and tendered by consent. It identifies all the sites visited by reference to the maps presented as part of the report of Mr Laurence. Of course, having been agreed to by the Northern Territory, I accept it accurately describes what was observed on those two occasions.
57. There was then some time before arrangements suitable to all could be made for the resumption of the hearing of the inquiry, concerning the detriment evidence. It took place on 9 and 10 August 2017, and then on 1 June 2018.
58. The detriment evidence and findings relating to it will be addressed in detail later in this report.
59. Following the completion of the hearing a timetable was fixed for the exchange of submissions. Before the completion of the submissions, the Northern Territory applied for leave to re-open its evidence to put in issue the matter referred to in the Introduction above. That is, it sought to introduce material to show that the Legune Area LC should be confined in its extent either because the expression ‘mouth of the river’ should be given a particular meaning which confined the extent of the claim, or because that meaning of ‘mouth of the river’ meant that the upstream low water mark of tidal waters marked the limits of the available unalienated Crown land either under the ALRA, or even the limits of the land of the Northern Territory itself.
60. I gave provisional leave to the Northern Territory to reopen the evidence on 18 November 2017 and the claimants and other parties the opportunity to resist that application if so advised. It was opposed. As I indicated above, as the issue involved a question as to the power of the Commissioner to recommend a grant of land in respect of the Legune Area LC to its full extent as apparently expressed in the application itself, I gave the Northern Territory leave to reopen its evidence on the topic.
61. That evidence was given, in conjunction with the evidence on the issue in the Fitzmaurice LC, on 26 to 28 February 2018. It was followed by written submissions, extending to 29 May 2018.

62. I indicated that I would formally rule on the issue at the time of reporting to the Minister and to the Administrator. I also indicated to the parties, so that the detriment evidence could be adequately addressed, that I did not accept the contention of the Northern Territory or of the Commonwealth on the issue. I formed the view that the application in the Legune Area LC extended beyond the 'mouth' of Keep River and of Victoria River as defined by the Northern Territory and the Commonwealth. This report explains later why that is so. I also formed the view that the term 'land in the Northern Territory' in the definition of 'Crown land' in the ALRA was not geographically so confined and that the same term in the *Northern Territory Acceptance Act 1910* (Cth) also was not so confined.
63. My reasons for concluding that the application itself in the Legune Area LC was not confined to the 'mouth' of Keep River or of Victoria River as defined by the Northern Territory and the Commonwealth are quite straightforward. I have set out above the wording of the claim areas. The words are clear.
64. The intertidal zone adjacent to Legune Station Pastoral Lease clearly runs along the coastline. It is marked on the attached Map A. Its extent is identified as being land between the high water mark and the low water mark. The second area: the beds and banks of Sandy Creek and of Keep River are said to commence 'at the mouth of Keep River' and continue southerly, as shown hatched on the attached Map A. The hatched area at its northernmost area has the words 'to mouth of river' and reflects a line to be drawn from the easternmost coastline on the land shown as Northern Territory Portion 5774.
65. Annexed to this report as Annexure D is my reasons for deciding that the expression 'land in the Northern Territory' in those enactments is not so confined. The Annexure will also be annexed to my report in relation to the Fitzmaurice LC.

### 3. TRADITIONAL ABORIGINAL OWNERSHIP: EVIDENCE AND FINDINGS

66. Although the traditional Aboriginal ownership of the claimed areas is not in issue (other than those areas which were the subject of the jurisdictional challenge which I have not accepted), it is still incumbent on the Commissioner to address the matters referred to in section 50(1)(a) and (3)(a) of the ALRA, including as to the strength of the traditional attachment of the claimants to the claimed land.
67. I have referred above to the material adduced on the inquiry which relates to those matters. I shall not repeat it. Principally, of course, it is material prepared by Mr Laurence whether in his initial report or the additional response provided regarding the concerns raised by the Northern Territory. I note that one of those concerns related to the question of patrilineal descent or cognatic descent. As Mr Laurence's report notes, there has been extensive anthropological research previously from the 1930s concerning this region including the current claim areas.
68. The two claims cover the countries of four languages: Gajirrabeng (gaj), Jaminjung (jam), Ngarinyman (ngarin) and Nungali-Ngaliwurru (ngal). They each have distinctive grammars and vocabularies. They belong to three language families as Jamingung and Nungali-Ngaliwurru are related. There are no longer any active speakers of Gajirrabeng or Nungali-Ngaliwurru. The younger generations now converse usually in a form of localised creole common in the wider region. The shortened descriptors are those used by Mr Laurence.
69. It is recorded in the report that the claimants have a clear sense of ownership over the beds, banks and waterways of the rivers in the claim areas. The bed of a dry river is known as *lalman* in Ngaliwurru, while the bed of a flowing river is known as *lirrik lirrik*. The bank is *warranang*. It points out that the claimants assert ownership over the beds and banks of the rivers in their countries, including the mudflats (*dinjirri* (ngal)/*bandij* (ngarin)), billabongs (*jalangga* (ngal)/*langgarna* (ngarin)), islands (*julu* (ngal)/*luju* (ngarin)), and mangrove forests.
70. The previous anthropological observations, described in section 3.1 of the report of Mr Laurence, are part of his description of the social organisation of the claimant groups. They had identified the kinship classification and terminology of the Indigenous people in the region including in the two claim areas. Those matters were consistent across the region despite the different languages. There are four distinctive terms at the grandparent generation: *gagung* (father's father), *jabuling* (mother's father) and *gagi* (mother's mother) and *ngajang* (father's mother). It is not necessary to record the generational names.
71. Mr Laurence notes the clear recording of individuals establishing affiliations to land and sites from their grandparents. The most important are to the country of the father (*ngajang*) from the father, from the father's father (*gagung*), and then

to a lesser extent from the mother's father (*jabulin*). Different associations give different rights and responsibilities. Ultimately each individual has spiritual rights and responsibilities towards four portions of land, but generally, save for the patriliates, those relationships may be mediated by personal factors such as the strength of relationship to country, participation, geographic and social closeness.

72. There are subsections as part of the social organisation, commonly referred to as skins. They may be patri- or matri- moieties which are exogamous and generational moieties which are endogamous. In the region, the subsections are explicitly matrilineal. That system is part of the prescribed rule for marriage relationships. They inform participation in ceremonial activities, and in the relationship to some Dreamings.
73. At section 4 of the report of Mr Laurence describes the extent of the common spiritual affiliation of the claimants to the claim areas, as part of the region generally. Their land tenure system centres on a religious belief that the landscape, its human inhabitants and flora and fauna were all created by ancestral beings – Dreamings – during the period of the Dreamtime. The ancestral beings also created a system of Law – *Yumi* – that ordered human relationships. In the languages of the claim groups, both the ancestors and the creative period are known as the *Buwarraja* or *Ngaranggarni*. Laurence describes the belief as to how the *Yumi* was instituted and its extent: rules for ritual, language, and social and economic behaviour. It includes the responsibility for caring (*woonyjoo*) for country. The ancestral beings then became part of the landscape or part of the flora and fauna, and are present and active to the present day.
74. During the creative period, the ancestral beings divided the country into discrete areas – for language, and for areas owned by individual descent groups. Some sites at the boundaries between countries are termed *jamararn*, where responsibility passes between groups.
75. There are Dreamings of extensive geographical scope as the ancestors travelled across and through the region, and some of more locally specific significance. They give rise to a significant number of sacred sites in the region including within the claim areas. They are well depicted in the two maps, one for each of the Legune Area LC and the Gregory NP/Victoria River LC. They are discussed in the report of Mr Laurence. There was no challenge to any of that material. I shall note them only briefly, although that will not demonstrate their extent and sophistication adequately. Mr Laurence in Section 4.2 of his report refers to the *Jooling* (Dingoes), *Warrba* (Flying Foxes) and *Jinimin* (Little Bat) Dreamings; to the *Ngurrghan* (Rainbow) and *Bilitman* (Green Lorokeet Women) Dreamings; to the *Marri Marri* and *Walgarabooga* (Pelican and Jabiru) Dreamings; to the *Marna* (Barramundi) Dreaming; to the *Walujabi* (Two Blackheaded Python Sisters) Dreaming; to the *Malajagu* (Goanna) Dreaming; and to the *Gunujunu* (ngal)/*Gurnangardngard* (jam) (Sea Eagle) Dreaming.



76. The definition of ‘traditional Aboriginal owners’ in section 3 of the ALRA is a local descent group who have two characteristics, namely that they have common spiritual affiliations to a site or sites on the claimed land, being affiliations that place the group under a primary spiritual responsibility for that site or those sites and for the land, and secondly that they are entitled by Aboriginal tradition to forage as of right over that land. The term ‘Aboriginal tradition’ is also defined in section 3. I do not need to set it out.
77. The local descent groups and the countries to which they are affiliated are described fully in section 6 of the report of Mr Laurence. His conclusions largely echo earlier findings in land claims to areas of land in the region which have already been determined. I have referred to them above. Section 5 of the report sets out the principles for recruitment to membership of the particular local descent group.
78. The four lines of descent are father’s father, mother’s father, father’s mother and mother’s mother. Whilst it is possible to inherit rights to country through all four grandparents, the ‘primacy’ is the taking of country through the father’s father. In the case of the Jaminjung-Madbag group in the area of Timber Creek, descent is cognatic because of the doubtful future of the patriline in that group. That is a topic upon which the Northern Territory raised a query, and Mr Laurence responded in some detail before the Northern Territory expressed its satisfaction with the views he expressed (see Exhibits A2A and the revised genealogy for that group in Exhibit A6A).
79. Affiliation to the country of one’s father’s father and mother’s father establish automatic rights and complementary responsibilities between cousins (*thamany*). The normative principle of recruitment into the local descent group is patrification, subject to the comment earlier in this section, and individuals with ties to country from their father’s father form the core of the local descent group.
80. That descent line then informs the corporate and ritual responsibility for the property of the local descent group: its songs, rituals, objects and care responsibilities. The spiritual responsibilities include: passing on spiritual and ritual knowledge of the estate to others, to educate; ensuring that the appropriate ritual and associated song cycles take place in the manner dictated by the ancestral beings; ensuring that sites are not damaged; granting of permission for meetings to be held, for developments to take place, or for other land use activities to take place; and ensuring the natural resources of the estate are utilised and managed appropriately.
81. Recruitment through one’s mother’s father entitles full membership of the local descent group, but normally those rights and responsibilities do not then pass through generations.

82. The spiritual rights and responsibilities of matrifiates include: ensuring that ritual and the associated song cycles are performed in the manner prescribed by the ancestral beings, in particular for adherence to designs, ritual and people; ensuring that the spiritual knowledge of the estate is maintained and passed on; and ensuring that sites are not damaged and imposing punishment on those who do damage them.
83. As I have noted above, personal factors of remoteness, disinterest or on the other hand active interest may be elevated in relation to certain ‘mediated’ rights and responsibilities. Factors such as place of conception, place of birth, place of death/burial of an important relative, kinship ties may be of significance in relation to the secondary rights and responsibilities, although some anthropological research suggest ties of conception, birth and death are not of real significance.
84. The anthropological research, not surprisingly, also recognises that the viability of a local descent group may be important to the succession or accession of rights and responsibilities, as is the case in the Jaminjung-Madbag local descent group in relation to that area around Timber Creek. There may also be other means of ensuring that a weakened group’s spiritual responsibilities are preserved through recruitment from neighbouring descent groups who may share a common Dreaming track. There are no relevant instances of such succession in relation to the two land claims under consideration.
85. I turn to refer to the local descent groups themselves. They are described in section 6 of the report of Mr Laurence.
86. Based on that material, which draws extensively from earlier anthropological research, it is appropriate to describe each of the estate groups as areas of country traditionally recognised by reference to some kind of patrilineal descent group forming the core of the territorial group. As the estate groups for the two claim areas describe their country to include the incidents of Dreaming stories and tracks, they use the terms *dage*, *ngurra* (ngal) and *yagbali* to describe that relationship. In the language, the term *dagebang* then means the persons belonging to the particular country or estate. As Mr Laurence says, and not surprisingly, the respective estates or countries are often ambiguously bounded and are essentially defined by a cluster of loosely grouped named sites. There are some more exact lines or identifications of the areas of estates where a key site (*jamarrarn*) marks where the handover of responsibility for the tracks of the ancestral being passing through country takes place. Given the somewhat imprecise areas of some estates, there are some areas described by the claimants as shared or ‘fifty’. In those cases, the shared sites and shared rights and interests are described as being ‘company’ (*jurrak gaj*). This sharing of responsibility is more common where shared estates involve an important Dreaming. The example is given of the Nungali-Ngaliwurru estates upstream of Big Horse Creek sharing the Barramundi Dreaming.

87. Each estate group is identified by one or more sites on their particular country called the ‘big name’ or sometimes by the name of a senior elder, living or deceased, attached to the group.
88. Each of the estate groups relevant to the two land claims under consideration is local, in the sense that each is associated with a relatively discrete parcel of land and sites, and a set of ancestral beings that give meaning to that land and sites.

### **3.1. THE ESTATE GROUPS**

89. There are ten local estate groups (with subsets for one of the groups) who have responsibility for parcels of land within or in the vicinity of the Legune Area LC or within the Gregory NP/Victoria River LC. Their areas and names are depicted in Figure 6.1 in the report of Mr Laurence.

#### **3.1.1. Group 1: Wadaynbang – Gajirrabeng language**

90. The Wadaynbang local descent group is the western most group in the general region. Its country extends into Western Australia. It then extends from the Western Australia/Northern Territory border to the west bank of Keep River. That includes the area of the Spirit Hills Pastoral Lease. The traditional owners have been recognised as the original owners of that station area under the *Native Title Act 1993 (Cth)* (Native Title Act) in 2010. That area, of course, was not unalienated Crown land by reason of the grant of the pastoral lease, and so was not available for claim under the ALRA. Their relevant claim is within the area of the Legune Area LC.
91. A significant number of Dreamings cross the Wadaynbang estate, including *Walujabi* (Black Head Python), Old Man *Mulalibugu* and Dingo, Flying Fox, Pelican and Jabiru Dreamings. Within their claim area, *Walujabi* created a number of features along the beds and banks of Keep River including the island *Nyanbinki*, which was the birthplace of Grant Ngabitj, *Boolbilga* (Green Swamp), *Woorroongoo*, a rocky outcrop and crossing in Keep River (shared ‘fifty’ with the Goorbijim local descent group), *Boonoolboolngal*, another rocky outcrop and crossing in Keep River (shared ‘fifty’ with the Goorbijim local estate group), and *Giyarringgi*, also a rocky bar on Keep River (also shared ‘fifty’ with the Goorbijim local descent group). *Ngalba*, the crossing of Keep River on the Legune Road, is the point where the Wadaynbang local descent group hand over responsibility for the *Walujabi* business to the neighbouring Goorbijim local descent group. The *Walujabi* is said to have crossed back and forth across this stretch of Keep River as they roamed around the country. Old Man *Mulalibugu*

and the Dingos travelled east into Wadaynbang country from the south side of the Weaber Range. After hunting and eating Flying Fox, they headed upstream from the crossing known as *Ngalba*, a little upstream of *Giyarringgi*, and out of Wadaynbang country.

92. One of the focal locations of the Wadaynbang estate are three islands just over the border in Western Australia: Pelican Island, Rocky Island and Shady Island. The islands are associated with a Pelican (*Marri Marri*) Dreaming which then travels east into the claim area. Other Pelicans continue east through Calf Spring where they formed rocky outcrops known as *Mirrimirr* along Skull Creek (*Miyirrne*) and further east to *Karralga* and *Wantawul* on the Legune Pastoral Lease area. Pelican Island is also a site on a Lightning and Storm Water Bird Dreaming that travels west from the island known as *Warraraga* (Turtle Point) in the north of the Legune Pastoral Lease area to Pelican Island and the Ord River over the border.
93. The Jabiru (*Walgarabooga*) Dreaming is also associated with the northern coastline of Wadaynbang country. *Walgarabooga*, like Pelican, also emerged from The Needles/*Barlwoo* and headed east, creating a series of springs along the mudflats. Close to the area Brolga camped at Skull Creek and Oakes Spring (*Bilgooying*). Brolga follows Keep River upstream and out of the Wadaynbang estate group's area of primary spiritual responsibility.
94. The various sites referred to and the Dreamings are marked on the detailed map of the Dreamings, including Local Dreamings, and Group Interests which is included as an Appendix to the report of Mr Laurence. It amply demonstrates the course of the major Dreamings across and within the claimed areas in the Legune Area LC, including around the area marked (or hatched in the application) as the mouths of Keep River and Victoria River across to Quoin Island, and extensively then upstream in Keep River branching also into Sandy Creek and upstream within Victoria River including to and past Entrance Island. That map then also extends upstream to the vicinity of Timber Creek. That latter area is the area of the Gregory NP/Victoria River LC. A further map attached to the report of Mr Laurence also contains a more detailed depiction of those matters in relation to the more limited areas of that land claim. Having referred to the particular features of the area of the Wadaynbang local descent group, it is appropriate to identify the significance of those maps at this point.
95. Members of the Wadaynbang group are descendants of two classificatory brothers Linmirr (deceased) and Dambilk (deceased). Linmirr had three children. The family tree, as it evolved, is described in the report of Mr Laurence at pp 52-58. It is also set out in detail in the genealogy for the group contained in Exhibit A6. It is not contentious. I shall not repeat that.

### 3.1.2. Group 2: Goorrbijim – Gajirrabeng language

96. This estate group has been recognised under the Native Title Act as the traditional owners of three areas adjacent to the claimed areas in the Legune Area LC: parts of the Spirit Hills Pastoral Lease area and the Legune Pastoral Lease area and the Bullo River Pastoral Lease area, all in 2010. It has two distinct areas of primary spiritual responsibility within both the Legune Area LC and the Gregory NP/ Victoria River LC. They are both primarily associated with the *Walujabi* (Black Head Python) Dreaming.
97. From the site *Ngalba* where *Goorrbijim* takes on responsibility for the *Walujabi* ritual from Wadaynbang, Goorrbijim country includes the intertidal zone and waters along the eastern bank of Keep River and western Bank of Sandy Creek, including the tidally affected mudflats and mangroves to the north of the black soil plain between Keep River and Sandy Creek. Its estate crosses Sandy Creek at *Manbarram*, a Quail (*Jibijung*) Dreaming site where they are ‘fifty’ with the Boolinjinja local descent group.
98. In the northern area, Goorrbijim *Walujabi* sites along the bank of Keep River include *Ngalba*, *Guyarringgi*, *Wooboongoo*, *Wooyinji*, *Jawool*, *Mooyoonggi*, *Biwinja*, *Barrambarra* and *Gawinningala*. The last-mentioned site is also associated with *Jibijung* (the Quail Dreaming). They then passed through a number of sites along the western bank of Sandy Creek including *Woolminjoongool* and *Manbarram*. Upstream from there, the *Walujabi* Sisters paths diverge – southerly out of the claim area through *Goonooramoom* along Sandy Creek and then east along Paperbark Creek towards Victoria River. They entered Victoria River at *Jalmin*, within the Gregory NP/Victoria River LC claim area, and then (joined by *Dalwak* – Rock Cod) travelled towards the sea. Within that claim area, they called the mouth of Paperbark Creek *Binbirr*, and at the junction of Lalngang Creek still within that claim area they passed Dingoes stuck in the mud on the little islands (*Bandi*). At around that point, the little Sister turned back upstream at *Jirribalam*, whilst the others continued towards the sea. Rock Cod metamorphosed into Indian Hill (*Goorroongoorroog*), around the high water inlet of Victoria River. The other Sister continued downstream, stopping at Entrance Island (*Wirrmi*), before returning westwards. The younger *Walujabi* Sister continued upstream as a large rock at *Wadwadja*, and then continued to *Goolaliny* and went onto Bullo River at its mouth into Victoria River at *Roobirr* and continued upstream in Bullo River.
99. The Goorrbijim local descent group are the descendants of an unknown Goorrbijim ancestor whose children included a daughter *Dindulk* (deceased) and two sons *Djungman* and *Hwanbainy* (both deceased). Again, in the circumstance, it is not necessary to record the succession to the present day, as it is not contentious. It is set out in the report of Mr Laurence at pp 60 – 62.

### 3.1.3. Group 3: Jarrajarrany/Boolonjinja – Gajirrabeng language

100. The Jarrajarrany/Boolonjinja group have country extending from Victoria River into the Legune Pastoral Lease and then the Bullo River Pastoral Lease. Their status in that capacity has been recognised by the Legune and Bullo River consent determinations under the Native Title Act. For present purposes, their country includes part of Keep River and then part of Victoria River included in the Legune Area LC and it extends further south and east along Victoria River into part of the Gregory NP/Victoria River LC.
101. The Jarrajarrany/Boolonjinja group has primary responsibility for a number of relevant sites. Along the banks of Keep River and Sandy Creek, their country includes the island *Warraga* (Turtle Point) at the extreme north eastern headland of Keep River on the Lightning and Storm Water Bird Dreaming Tracks, continuing west to Pelican Island. Further upstream, its sites include the Flying Fox Dreaming site *Woorroogoobarni* on the eastern side of the hatched area to the marked mouth of the river in the application, and then further south at *Malganangangga* on the Keep River and *Gibyawoo*, *Giralibool* and *Manbarram* on Sandy Creek.
102. Along Victoria River, its country includes the *Walujabi* sites *Wandoorroo* (Forsyth Creek), and further upstream *Wirrimi* and *Yibaya* and *Goorroongoorroog*, the resting place of *Dalwak* (Sleeping Cod) and certain sites at *Boorrooloon*, *Doydbirr* and *Barrangala* and *Jirribalam*, both at about the point where the Legune Area LC and the Gregory NP/Victoria River LC meet. And then upstream is *Yalami* in the Gregory NP/Victoria River LC. *Boorrooloon* is the final resting place of Rainbow (*Ngurrrgban*) and his daughters. Then further upstream is where Little Bat (*Jinimin*) then travelled through *Mudbirr* to *Doydbirr*, before sinking into the bank of the river. *Boorrooloon* is also the vicinity where Butcher Bird (*Kadburrkadburrr*) called to Peregrine Falcon (*Mijijung*), who swoops and saves fire from extinguishment.
103. The apical ancestor of this local descent group is Barney Nyunmirr (deceased) who married Mary Yilmarriya of the Goorbijim local descent group, and they had one child Nyuninginyi/Yilyilyi (Charlie Mullighan, deceased). I will not then recite the succession within this group for the same reasons as above. The details are set out in the report of Mr Laurence at pp 64-65.

### 3.1.4. Group 4: Madbag – Jaminjung language

104. This local descent group has country along the eastern bank of Victoria River from Lobby Creek downstream to Blunder Bay, and relevantly is mainly within the Gregory NP/Victoria River LC. Madbag Springs is adjacent to the Lalngang Creek where it flows into Victoria River, on the Dingo Dreaming track where he carried out a ritual with Butcher Bird. The Dingos shadowed Barramundi from here upstream chasing Little Bat and Flying Fox. The estate includes the spring known as *Binjili* at the head of Mistake Creek, and the spring further downstream (*Mularriburrurni*) opposite the junction of Victoria River and Bullo River, which is associated with the Dingo and Barramundi ancestral beings. Further upstream is the site *Marriwan* (Palm Creek). To the east, not in the relevant claim area, is the site of the spring and waterfall where Rainbow leaped to *Doydbirr* referred to above. Madbag shares primary responsibility with their downstream neighbours Dalunggak for the site *Dubjirr* in Blunder Bay, at about the area where the two land claims the subject of the present inquiry conjoin. Mr Laurence has noted that that point was a crossing point on Victoria River on the walking track between Fitzmaurice River and the west, and its name resembles the sound ‘duj’ of a leaping Barramundi re-entering the water.
105. The apical ancestor for this local descent group was Numurngarri (deceased), who had three sons and two daughters. The details of the succession from that apical ancestor are set out in the revised genealogy Exhibit 6A and in the report of Mr Laurence at pp 65-67. I shall not recite them here.

### 3.1.5. Group 5: Dalunggag – Jaminjung language

106. The Jamingung-speaking Dalunggag local descent group have primary responsibility for the country at the western end of Bradshaw, and mainly in Fitzmaurice River to the north forms a boundary with the Murinpatha and Murinkura language groups on the opposite bank. On the western bank of Victoria River are the Gajirribeng-speaking Jarrajarrany and Goorbijim groups referred to above. The Dalunggag estate borders the Madbag estate upstream from about *Dubjirr*.
107. The Dreamings recorded for a couple of sites relevant to the Legune Area LC are not fully in accord with present knowledge. Mr Laurence refers to the following sites for which the Dalunggag are responsible: the Barramundi and Flying Fox sites *Ngumbunje* (Quoin Island), *Deruguman* (Driftwood Island) and *Garaguman* (Clump Island). Those Islands are in what can broadly be called the mouth of Victoria River, but are not within the area hatched on the map attached to the application. It is accepted that, in any event, the three islands are not unalienated Crown land. The hatched area is from the western side of Quoin Island and across the waters then to the headland to the west. Further upstream, clearly within the hatched area, is another Barramundi site at *Dubjirr* shared with their upstream neighbours the Madbag local descent group.

108. There are also sites within the claim area on or adjacent to Victoria River known as *Ngarrangurl* (a *Bindindi* – Finch Dreaming), and comprising a creek system in and into the river, and related sites *Gumburrundu* and *Gurringgayi*, manifestations of the Two Kangaroo Dreaming (*Yunumburrngu* and *Kunjabin*) who leaped from *Boorlinjinja* to *Dujbirr*.
109. The Dalungag local descent group has an apical ancestor Ganggina Nganaya (deceased) who had two wives, and two sons by his first wife. For the same reasons as previously, I will not set out the detailed genealogy. It is set out in exhibit A6 and described by Mr Laurence in his report at p 68.

### **3.1.6. Group 6: Gimul – Jaminjung language**

110. The country of the Gimul local descent group extends from the beds and banks of Victoria River north along the Koolendong Valley to the north of Fitzmaurice River. Within the claim area of the Gregory NP/Victoria River LC their country runs from the hill known as *Binjili* to the hill known as *Bijin* along the beds and banks of Victoria River.
111. The Dreamings in this part of their country include Barramundi (*Marna*), Rock Cod (*Dalwak*) and the Dingo, Little Bat and Flying Fox group. *Marna* travelled from *Binjili* upstream to *Galadanggad*, the junction of Lobby Creek and Victoria River, and onward to *Balmayi*, another hill adjacent to the river. On the opposite bank is the country of the Madbag local descent group. *Dalwak* started his journey downstream from *Gamalgala*, adjacent to the river before resting for good at Indian Hill on Legune Station. Dingo (*Lungut*), in pursuing Little Bat (*Jinimin*) and Flying Fox (*Warrba*) turned north from *Galadanggad* into the Koolendong Valley.
112. The apical ancestor for the Gamul local descent group is Marang (deceased), who had two wives and a number of children by his first wife. The genealogy is set out fully in Exhibit A6 and is described in the report of Mr Laurence at pp 69-71.

### **3.1.7. Group 7: Ngalinjarr – Gajirrabeng language**

113. The country of the Ngalinjarr local descent group extends from the plains north of the West Baines River, over the Pinkerton Ranges (*Ngalinjarr*) and down the slopes of Bullo River. Their entitlement to be recognised as the traditional owners of that area has been recognised by consent determinations in both the Bullo River and Auvergne Native Title claims under the Native Title Act in 2010. Relevantly, along Victoria River *Ngaliinjarr* takes in the following creeks: Bull (*Manbagula*), Boundary, Packsaddle, Peter, Stony and Fancy Creeks. Only a small portion of their country is within the claim area along Victoria River in the Gregory NP/ Victoria River LC.



114. Dreamings in the relevant country to this claim include a group of Flying Foxes (*Warrba*) who fled Old Man *Mulalibugu* from the mouth of Ord River to the west to Bull Creek, and then down Victoria River where they crossed to *Binjili*. The *Marna* Dreaming also crosses their country, and as they crossed upstream they rested at *Gulunggun* (Curiosity Peak) overlooking the river. That hill and an associated *Kunggit* tree (Rusty Bloodwood) and spring are part of the *Marna* Dreaming at this place. A small hill known as *Midbana* refers to the waving motion of the fins of a Stingray (*Pirini*).
115. The Ngalinjarr local descent group is composed of descendants of two closely related ancestors, Barney Biting Walul and Wallaby (both deceased). They are believed to have been brothers. Both married and had children. The full genealogies are contained in Exhibit A6 and are described by Mr Laurence in his report at pp 72-73.

### **3.1.8. Group 8: Gulu Gulu – Jaminjung language**

116. The Gulu Gulu local descent group derives its name from the bluff Angle Point (*Gulu Gulu*) towards the eastern extremity of the claimed area in the Gregory NP/ Victoria River LC. Their country largely runs north from Victoria River in that area, including the plains of Angalarri River to approximately King Billabong (*Gulluwarriji*) on Victoria River.
117. The sites of particular relevance to the present claim include sites for which the Gulu Gulu local descent group have primary spiritual responsibility. Within their country, the *Marna* Dreaming takes in the beds and banks of Victoria River at *Gijinbarra*, *Gamalan* (where Angalarri River runs into Victoria River) with its associated *Juju* (Water Goanna) Dreaming and travelling *Marna* Dreaming. The billabongs *Mamanyaniung* and *Nananggi* adjacent to the river are both part of the travelling *Lungut* (Dingo) Dreaming on the banks and the *Marna* Dreaming from the river. The hill *Bijin* runs down to the banks of the river, and from that point the Emu Dreaming runs north a considerable distance and creates many features of the landscape.
118. The earliest remembered ancestors of the Gulu Gulu local descent group are Deaf George (deceased) and Garngayi (deceased), who were the descendants of a Gulu Gulu father. Each brother married a Nungali woman and had children. The full genealogy is set out in Exhibit A6 and is described in the report of Mr Laurence at pp 74-75.

### 3.1.9. Group 9: Wurlayi – Ngarinyman language

119. Wurlayi is a large country estate which takes in much of the plains of the East and West Baines Rivers (Auvergne Station) and extends south into the Newcastle Range and Judbara/Gregory National Park. The Wurlayi local descent group have been recognised as traditional owners of country within Judbara/Gregory National Park, and have been recognised as traditional owners of Auvergne Station by a consent determination under the Native Title Act in 2010. For present purposes, the relevant part of their estate is the beds and banks of Victoria River extending upstream from about the location of *Gulunggun* (Curiosity Peak), where their responsibility is ‘fifty’ with the Ngalinjarr local descent group, along the river to Big Horse Creek, almost at the eastern extremity of the claim area in the Gregory NP/Victoria River LC and close to the township of Timber Creek.
120. The Goanna (*Malajagu*) Dreaming is significant in Wurlayi country, mainly confined to the south of the river except for crossing the river at Sandy Island before turning back at King Billabong. The Goanna travels through that country, and then leaves the country of the claim and travels upstream along Big Horse Creek. He created a *marntiwa* (circumcision song and ritual) that is still in use today. Along the relevant stretch of Victoria, the *Malajagu* sites include the mouth of West Baines River, *Midbarral* (Elbow Swamp), *Mulin* (Flying Fox Swamp), *Lalda* (Pelican Point), *Manarni* (Sandy Island), *Ngalibinggag* (Gregory’s Tree Historic Reserve) and the western banks and mouth of Big Horse Creek (*Yajalwirriyig*) where it flows into Victoria River.
121. In Wurlayii country, *Marna* (Barramundi) formed a number of physical features and continued to carry out secret and restricted business. After leaving *Gulunggun*, *Marna* passes by *Midbana* and then crosses to the other bank of the river to return to *Wurlayi* country at Sandy Island. There are restrictions about those activities and their significance at that place. *Jalibinggag* is a creek junction and spring associated with *Marna* upstream from Gregory’s Historic Tree site (where Gregory camped in the mid-1850s). After this, *Marna* travels down Big Horse Creek to *Barrambarra* and out of Wurlayi country.
122. The members of the Wurlayi local descent group are descendants of Long Will Yirribuk ‘Mankalngmawu’ (deceased). He had three children with his wife. The full details of the genealogy are contained in Exhibit A6. They are summarised in the report of Mr Laurence at pp 77-78.

### 3.1.10. Group 10: Magalamayi, Wunjayi, Yanturri, Wantawul – the Timber Creek Company – Nungali/Ngaliwurru language

123. Mr Laurence explains this local descent group first by noting that, in the Timber Creek Land Claim under the ALRA (1985) and then the Timber Creek Native Title Claim (2005), the traditional owners and holders of native title respectively of the stretch of Victoria River upstream of Big Horse Creek and Timber Creek Valley were found to be a ‘company’ of local descent groups whose countries fell along the river and whose relationship was the result of shared responsibilities for the *Marna* Dreaming that extends upstream beyond the present boundary of the Gregory NP/Victoria River LC. He notes also that two further groups were also found in one or other of those two decisions to have been traditional owners: the Mayalaniwung and Kuwang local descent groups, who share a Devil (*Wulgurru*) Dreaming track from Timber Creek. Those two groups are not included in the presently described local descent group as it is responsibility for the *Marna* tradition which unites the group.
124. The country of the present local descent group extends along the southern bank of Victoria River from Big Horse Creek past the Timber Creek Junction and continues upstream out of the claim area. It extends up the valley of Timber Creek and takes in the banks and hills of the river to approximately King Billabong on Bradshaw (formerly Bradshaw Station).
125. There are a number of sites and Dreamings on the northern bank of Victoria River and in that stretch of the river for which the group has primary spiritual responsibility. They are either within the river, or on or close to the riverbank and include Dreamings centred on Barramundi (*Marna*) and on Shark and Stingray. In addition, the sites for which the group has collective responsibility include *Wugardijburrurni* (McDonald Spring, a Rock Wallaby Dreaming), *Gurruwarraji* (King Billabong) and *Gulanju* Dreamings. As it travelled up the river, *Marna* carried out business (*juju*) at sites of special significance and responsibility including *Barrambarra*, where certain activities took place. Further up from the Big Horse Creek junction, its activities included tossing Freshwater Long Tom (*Diwuru*) on the bank at *Diwarra*; and the creation of the site *Mirrin Mirrin*. *Marna* encountered frogs at Stoney Crossing (*Malarra*). That site includes the rocky bars and a tidal whirlpool. *Marna* then created *Burringgi*, a reef opposite the current airstrip at Timber Creek. Further upstream, *Marna* stopped at *Jalalawudu* where a fight broke out and Shark was speared by Stingray with his tail. And further up again, at *Magalamayi* (the junction of Victoria River and Timber Creek) *Marna* left a log and whirlpool. *Marna* then travelled on the *Durrudburrurni* on the Bradshaw side of the river where Shark left his fat in the form of two long rocks forming a spring.

126. This stretch of Victoria River also holds the *Garimala/Jalmin* (Rainbow Snake) Dreaming. *Jalmin* was a large log that floated along that section of the river known as *Gunginiwung*, between *Magalamayi* and the mouth of Big Horse Creek (*Yaajalwirriyik*). It is a manifestation of *Garimala*, as *Garimala* created both Timber Creek and *Dudduburrurni* Creek, as well as the site *Nitgiwung*. It is also a section of Victoria River where the group of Dingos referred to earlier, including *Modborrongo*, travelled upstream and carried out ceremony with Goanna. At McDonalds Spring, the Dingos part company with *Modborrongo*, crossing the river at *Yajalwirriyig*, and changing their name from *Lungut* to *Wirip*. *Modborrongo* carried out ritual with *Marna* and Frogs at *Barrambarra* before travelling up the Timber Creek Valley.
127. It is necessary to identify briefly the ancestral structures of each of the groups that make up this composite group.

#### *Magalamayi local descent group*

128. The Magalamayi local descent group is descended from brothers Mangaramawuk and Tinker 'Number One' Lamparangana. The genealogy within Exhibit A6 and the brief discussion in the report of Mr Laurence at pp 80-81 explains that there are no patrifiates, and that this estate group is currently going through a process of succession. The senior claimant for this group and his sister have been found to be the traditional Aboriginal owners and Native Title Holders in both the Timber Creek Land Claim (1985) and in Timber Creek Native Title Claim (2005). There is no reason to doubt the confidence about the establishment of the process of succession, and the succession itself, to maintain the integrity of this local descent estate group.

#### *Wunjayi local descent group*

129. The Wunjayi local estate group is the next estate upstream from the Magalamayi local estate group. It is a small descent group. The country has an important *Marna* site located at the head of the junction of Line Creek and Victoria River, which is located upstream of the present claim area.
130. The apical ancestor was a man known as Tiyawatulwan (deceased). He had a son and a daughter, whose line of succession is set out in Exhibit A6 and briefly described by Mr Laurence in his report at p 82. For the same reasons as previously, I do not need to replicate that.

### *Yanturi and Wantawul local descent groups*

131. Mr Laurence says in his report that the local descent groups associated with *Yanturi* and *Wantawul* are closely connected and can be described as one group. There is no dispute with that proposition. I accept that they closely identify by reason of their patrilineal cores being related by marriage over at least three generations, so there is significant commonality in the respective genealogies. I also accept that members of both groups assert affiliations to ancestral beings that occur in both their countries: linked by the activities of the *Yalumpara* (King Brown) ancestral being and the *Marna* ancestor. They share responsibility for the areas between the sites.
132. Mr Laurence then describes the relevant genealogies at pp 83 – 84 of his report. That demonstrates the sense of his approach. I shall not repeat it. I note that the ancestor for Yanturi country was a man called Mutpuyula who had patrilineal links through his father Tiyawakatak. The detailed genealogy appears in Exhibit A6. In the case of the Wantawul family, the apical ancestors are two brothers Pulawatitj and Puljayinkara. Again, the genealogy can be seen in detail in Exhibit A6. It bears out the approach suggested, and which I adopt.

## **3.2. TRADITIONAL ABORIGINAL OWNERSHIP**

133. I have referred earlier in this report to the definition of ‘traditional Aboriginal ownership’ in section 3 of the ALRA.

### **3.2.1. Common spiritual affiliations and primary spiritual responsibility**

134. The first criterion is that there be a local descent group or groups of Aboriginals who have common spiritual affiliations to a site or sites on the land, being affiliations that place the group or groups under primary spiritual responsibility for that site or those sites and for the land. The recording of the ten local descent groups in the previous section of this report and their spiritual affiliations with many sites on their respective countries or estates is sufficient to record that that criterion is well satisfied in relation to the several claim areas in each of the Legune Area LC and the Gregory NP/Victoria LC.
135. The responsibility of the local descent groups to protect and pass on the correct knowledge regarding the many sites referred to (in all some 170, including a significant number within each of the areas of the two land claims) is clearly spiritual and was established by the creative spirits in the Dreamtime.

136. In each instance, recruitment to the local descent group is primary affiliation through a grandparent. All members of each group are responsible for maintenance of the sites and country given to them by the ancestral beings, but with the responsibility being focussed on particular persons of patrilineal (or cognatic) lines of descent, that is through their father's father (*gagung*) assisted by the matrifiliates through their mother's fathers (*jabujing*) and on other factors. Primarily, only patrifiates pass on their rights and responsibilities to their children. I have allowed for some cognatic descent to accommodate succession concerns in the groups (including the Madbag group), as that is the evidence. The responsibility to make decisions for sites and for country rests mainly with the senior male members of the groups – to ensure that the ceremonies, rituals and associated song cycles are preserved and take place. In the languages of the claim areas, the senior males are known as *dagemunkij* (Gajirrabeng), *jujungali* (Ngarinyman) and *warijbari* (Jaminjung/Ngaliwurru). In cases where the senior members of a particular group are young and do not have sufficient knowledge to run the ritual, it is not uncommon to draw on the knowledge of senior men and women from neighbouring countries to assist with the preservation and carrying on of the correct practices.
137. The material shows that there are three distinct language families of the groups within the claim areas: Jaminjung/Ngaliwurru, Ngarinyman and Gajirrabeng. The material shows that those languages have terms with some variable meanings, developed over time and common usage, but fundamentally they relate back to the dead ancestors of the estate and the connections to them. They show a close relationship between the Dreaming and the present. They show the chain of meaning back to the law (*yumi*), passed down by descent through the ancestors, the relationships between the ancestors and the present day group members, and the relationship between the groups in respect of the source of present spiritual responsibilities for sites and for country.
138. It is clear that there is a strong continuance of the practice of ritual in each of the areas of the two claims through the relevant local estate groups. They maintain a strong ritual life and accept the ongoing obligation established by their ancestors to care for country and to maintain the ceremonies and rituals. It is not necessary to expand upon the nature of the ceremonies and 'business'. The evidence shows its continuance. It shows that it is through ceremonies and business that the older members of each local estate group pass on much of the religious knowledge to the younger members of the group when appropriate. The continued practice of dietary taboos relating to particular species, the preservation and practice of kinship rights and obligations (including the avoidance of particular kin and the unavoidable obligated giving), and the recording and recognition of many species of fauna and flora in the Victoria River system all confirm that spiritual commitment. During the view taken on the first day of the hearing at Timber Creek, there was a section of the view taken up by male-only attendance and discussion of the nature of a particular sacred site involving the Barramundi

business; it was indicated that a particular ceremony was arranged to take place at a specified location in the following week. At the boat ramp at the junction with Big Horse Creek and Victoria River, again with a specified men-only limitation, certain verses were sung for part of the Dreaming associated with nearby sites. They were really incidental confirmation of the continued active ceremonial life of the claimant groups in relation to the Dreamings and sites on the claim areas.

139. The same commitment and awareness was apparent from the involvement of many members of the claim groups in the work of the Aboriginal Areas Protection Authority in sacred site clearance work, in submissions to governmental officers and Ministers, and in dealings with others in respect of proposed developments in the vicinity of the claim areas (an example given by Mr Laurence related to protection of the *Walujabi* (Black Head Python Sisters) Dreaming in the area between Keep River and Sandy Creek). The capacity of the small group of senior men who participated in the flight over the claim areas on the second day of the hearing at Timber Creek was also strongly indicative of the continued knowledge of, and care for, sites in the claim areas. The flight was largely along the claim areas involving Keep River and Victoria River. There were many sites identified by name on that view, including some not referred to in the report of Mr Laurence or in the maps.

### **3.2.2. Rights to forage**

140. The second criterion for the establishment of traditional Aboriginal ownership is the entitlement to forage as of right over the claim areas.
141. Again, the acceptance by the Northern Territory that this criterion has been shown to exist in the claim areas means that the reference to supporting material can be quite short.
142. The context, having regard to the geography and weather patterns, is obviously that access is limited by weather. In the wet season, it is clear that access to much of the areas claimed is very restricted. The principal access is during the dry season. In relation to Keep River and Sandy Creek, many members of the local descent groups reside in Kununurra. The three relevant groups Wadyngbang, Goorbijim and Jarrajarranyi fish in Keep River, mostly on the western bank, and in Sandy Creek. On Victoria River, the local traditional owners in the Timber Creek area fish at *Magalmayi* (Policemen Point), *Jalawudu* (Flat Rock), *Yajawirriyig*, (the mouth of Big Horse Creek) and the mouth of Baines River. Bradshaw restricts access to the eastern/northern side of the river and physically access is limited to the extremes of the river where it flows into the sea in the absence of road access. That affects the access particularly of the Madbag and Dalunggag estates to that area. There nevertheless exist arrangements with the Department of Defence for periodic access, and on such occasions (as exemplified

by the camp access in 2014 to the camp at *Yele* or *Little Gimul*) the activities then include hunting and fishing as well as the active teaching about significant sites, ceremonies and a public corroboree (*wajarra*). An Indigenous owned company, Bradshaw Construction Company based in Timber Creek, contracts to perform maintenance and construction work on Bradshaw, and that work is associated with protecting sites and educating the younger members of the local descent groups.

143. In my view it is clear that each of the ten local descent groups referred to above clearly satisfies the criteria for being traditional Aboriginal owners of those parts of the claim areas for which they have primary spiritual responsibility. It is also clear, by reason of the detailed description of each of the local descent groups and the country for which they are responsible, either singly or shared, means that the claimants in each of the Legune Area LC and in the Gregory NP/Victoria LC have established traditional Aboriginal ownership over the whole of the claim areas.

### **3.3. THE STRENGTH OF THE TRADITIONAL ATTACHMENT AND RELATED MATTERS**

144. Sections 50(3) and (3)(a) of the ALRA require the Commissioner, when reporting to the Minister and to the Administrator, to have regard to the strength or otherwise of the traditional attachment by the claimants to the land claimed, and 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. There are additional relevant matters to be addressed as specified in section 50(3) (b) and (c) which are addressed in the following section of this report.
145. I note that the claims do not relate to alienated Crown land so section 50(3)(d) is not engaged.
146. For the sake of completeness, I also note that the principles specified in section 50 (4)(a) and (b) do not have particular significance. That is, there are on the evidence no 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 and who presented as being in the position where, if practicable, they might need to secure occupancy of that place. Secondly, there are on the evidence no Aboriginals who are not living at a place on the traditional country of the tribe or linguistic group to which they belong and who desire to live at such a place, and who ought, if practicable, to be able to acquire secure occupancy of such a place.



147. Usually, the evidence relevant to section 50(3) emerges in the course of the claimants' evidence in support of their claim. That is not the case here, as such evidence became unnecessary when the Northern Territory indicated that it accepted the entitlement of the claimants to be the traditional Aboriginal owners of the claimed lands (subject to the belated issues about the geographical extent of the claim as expressed, and the geographical scope of operation of the ALRA). That intimation was given by the Northern Territory before the issue in parentheses arose. There is nevertheless strong material to respond to the matter raised by section 50(3)(a).
148. Past reports of the Commissioner have adopted a number of factors to guide the exercise of the subjective judgment called for. These include the degree to which traditional spiritual affiliation to various sites is still meaningful to the Aboriginal claimants; the extent to which the Indigenous religion of the claimants is still considered to be important to them; the extent to which the claimants access the claimed lands from time to time; the emotional response of members of the local descent group or groups to their country and sites within it; the extent of the continuation of ceremonial life; the nature of the use of the claimed land; and the strength of the traditional life of the claimants generally. Gray J in his report on the Ngaliwurru/Nungali (Fitzroy Pastoral Lease) Land Claim No. 137 and on the Victoria River (Beds and Banks) Land Claim No. 140 adopted that approach.
149. I bear in mind that these two land claims are essentially over beds and banks of Keep River, Sandy Creek, Victoria River and the intertidal zones along section of the coast. They represent only a small portion of the areas over which each of the local descent groups claims to be the traditional Aboriginal owners. I have referred above to those wider areas, all of which have been recognised as being the lands of the ten local descent groups either by a report under the ALRA or be a consent determination under the Native Title Act. The wider attachment to country which has been recognised is capable of informing the strength of attachment of the ten estate groups to the particular lands which are the subject of the two present claims under consideration. Even without importing that background and material into the assessment to be made, I consider that the material directly relating to the particular areas claimed is sufficient to be satisfied that the attachment to the lands claimed is a strong one.
150. The evidence shows that the majority of the members of the ten local descent groups, including the identified claimants, continue to live in the communities and locations proximate to the areas claimed. For instance, the Jarrajarrany group (Group 3) have until recently lived at Marralum outstation near Sandy Creek, and they are endeavouring to re-establish residence there. Fishing trips to Keep River and Sandy Creek are common, thereby using the resources of the country, and on occasions those trips are used at least in part to teach younger members of the group about sacred sites and their mythology. The relationship between the Department of Defence and the traditional Aboriginal owners enables annual

camping trips to Bradshaw by the traditional owners, and the opportunity to maintain ceremony and to educate the younger members of the groups. There was evidence that those annual camps involve several local descent groups, including from time to time Madbag (Group 4), Dalunggag (Group 5) Gimul (Group 6) and Gulu Gulu (Group 8). The provision of maintenance by Bradshaw Construction Company also enables Aboriginals from the local descent groups to work on Bradshaw, and to take that opportunity to protect sacred sites and country, and to instruct younger members of the groups about ceremony and ritual.

151. The evidence also shows that the claimants continue to maintain a strong ceremonial life by regular performance of ceremonies for country within the claimed areas and within their wider country and by passing on knowledge to younger members of the groups. The report of Mr Laurence describes the performance by a senior member of one group during the Bradshaw camp in 2014, which included encouraging younger members of the groups present to participate and learn the ceremony and its significance. It appears to be a ceremony performed on other occasions. The first day of the hearing at Timber Creek also referred to a planned Barramundi ceremony. Mr Laurence, in his report, refers to a range of ceremonies and ‘business’ rituals still carried out by the ten local descent groups. It is not necessary to itemise and describe them.
152. Much of the material referred to in the preceding section of this report is indicative of a strong and continuing traditional life. There are occasions when men only may be present, and sometimes certain men only, and others when women only may be present. That was apparent during the first day of the hearing at Timber Creek. Adherence to traditional life is also demonstrated by traditional dietary restrictions in respect of certain food, by prohibitions against waste, the manner of fishing and cooking, and by the social avoidance rules referred to. It is also demonstrated by the use of language, and the maintenance and extensive use of traditional names for flora and fauna. It was demonstrated by the use of traditional names for many sites and geographic features, and the familiarity with those names and features, as demonstrated during the flight on the second day of the hearing at Timber Creek.
153. The external material, not formally in evidence but relied upon by the claimants in submissions (without objection) is that contained in reported decisions of the Federal Court, and in other land claim reports concerning the same wider areas which include the claim areas in the two claims. Much of that external material was some considerable time ago. It shows a continuity of traditional spiritual connection with the relevant country, including country adjacent to the present claim areas. Reference may be made to the judgment in *Griffiths v Northern Territory of Australia (No 3)* [2016] FCA 900, especially at [336] – [363]; the observations of Maurice J as the Commissioner in the Timber Creek Land Claim Report No. 21 (19 April 1985) at p 21; and the observations of Gray J as Commissioner in the Ngaliwurru/Nungali (Fitzroy Pastoral Lease) Land Claim;

Victoria River (Beds and Banks) Land Claim (Nos. 137 and 140) Report No. 47 (22 December 1993) especially at pp 34-36. That last mentioned report concerned the beds and banks of Victoria River immediately upstream of the Timber Creek Land Claim, and the attachment was described as 'very strong indeed'.

154. With the exception of those groups close to Timber Creek, none of the present claimant local descent groups have been granted title to their country under the ALRA (as distinct from recognition as traditional owners of alienated Crown land under the Native Title Act). There are well in excess of 300 claimants within the ten local descent groups, some larger than others. That is readily apparent from the description of the apical ancestors of each of the groups, and the tracing of the genealogy to the present day, as well as from a study of the genealogies contained in Exhibit A6. In the case of the Madbag group, this is supplemented by Exhibit A6A.
155. There are probably significantly more Aboriginal people than the claimants who are Aboriginals with traditional attachment to the areas of land claimed who, if the claims are acceded to, would benefit from the grant of the land claimed in the Legune Area LC and in the Gregory NP/Victoria River LC. That would include non-claimants who are affiliated to one or more of the claimant groups by more distant genealogical links, such as where parts of the claim areas are their mother's mother's country or their father's mother's country. It would include non-claimants who are connected to the claim areas through affiliations to other parts of Dreaming tracks that cross the claim areas. It would include non-claimants who have strong historical links to the claim areas, such as through having worked on stations that include parts of the estates that comprise the claim areas. It would include non-claimants who are married to or are children of claimants. I note that similar considerations were adopted by Gray J as Commissioner in the 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 p 45 [7.6.1].
156. The nature and extent of the advantage of the grant of the claimed lands under the ALRA accruing to an individual will vary according to the nature of the person's interest in the claimed area. The claimants and other persons referred to above will be advantaged by the grant by obtaining a high degree of control over the area for matters such as mineral exploration on the land and over other activities that may physically impact the land. In the present circumstances, that control will obviously include the control of access to the land and of those who may wish to fish within the beds and banks and waters of Keep River, Sandy Creek and Victoria River. The extent of the interests identified as relevant to detriment (discussed in the next section of this report) indicates the significance of the control which the grant of the claimed areas will accord to the traditional Aboriginal owners of the lands claimed. That control will therefore provide to the traditional owners commercial opportunities to the extent that they wish to

take them up to allow or manage activities of a commercial nature on the claimed lands for the benefit of the whole of their communities. At a spiritual level, the grant of the lands claimed will importantly give to the traditional owners an enhanced capacity to protect sacred sites and other areas of cultural significance. And finally, but also importantly, the grant of the claimed lands under the ALRA will provide to the traditional Aboriginal owners recognition of the fact that they are the successors of those who were dispossessed by European settlement, and an affirmation of the value of traditional rights and interests including in areas of particular cultural significance. It will enforce and strengthen the sense of community spirit and self-esteem, and allow for its further development. As Gray J said in the Malignin and Nyinin Claim to Mistake Creek Land Claim (No. 133) Report No. 50 (18 June 1996) at [6.2.3]:

The importance of such an acknowledgement and such a focus for modern Aboriginal communities should not be underestimated.

157. In my view, the claimants have demonstrated that they are familiar with their sites in even the most remote parts of the claim areas; they conduct ceremonies for those sites and associated Dreamings. There is really no doubt of the strength of their traditional attachment to even the more remote parts of the claim areas, as well as the more accessible areas. I have no hesitation in concluding that they have a very strong traditional attachment to the land claimed. I recommend that the claimants be granted the claimed land in accordance with sections 11 and 12 of the ALRA.
158. Of course, that is a matter for the Minister. It is my responsibility to provide the Minister my comments on the matters referred to in section 50(3)(b) and (c), and then for the Minister to consider those additional matters before making a decision in relation to this report.

## 4. DETRIMENT AND LAND USAGE

159. 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 to be 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 of the claim. This section of the report addresses those matters. It is convenient to refer to each of those matters collectively as ‘detriment’ until the context hereunder requires specific focus on the two matters dealt with under subclauses (b) and (c) of section 50(3).
160. In the submissions there was some debate about the extent to which the Commissioner, when commenting on detriment, should express any views about whether or how such detriment might be, or could be, accommodated when the Minister is exercising the function under section 11 of the ALRA of deciding whether the Minister is satisfied that the claimed land should be granted to the traditional owners through a Land Trust, and in the implementation of such a decision.
161. It is plain enough that the Commissioner, when deciding whether to recommend the grant of the claimed lands does not have to, and indeed should not, take into account issues of detriment or the effect of a grant on existing patterns of land usage in the region: *R v Toohey; Ex parte Meneling Station Pty Ltd* [1982] HCA 69; (1982) 158 CLR 327 (*Meneling Station*). Deane J in *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* [1986] HCA 40; (1986) 162 CLR 24 (*Peko-Wallsend*) explained in his reasons at [3], CLR at 69, that the obverse of that conclusion was that the Minister cannot solely rely on what the Commissioner has commented upon regarding detriment, but must consider additional relevant information provided following the Commissioner’s report.
162. It does not follow that, when commenting on detriment, the Commissioner is limited to a bland recital of asserted detriment, leaving the Minister totally uninformed about its potential significance or about how it might be accommodated when considering whether to make the recommended grant. In *Meneling Station*, Gibbs CJ at [4] in his reasons noted without adverse comment 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.

163. And at [6] the Chief Justice added:

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 up upon which the comment is made.

164. There is nothing in the concurring judgments of Murphy and Wilson JJ which adds to or disagrees with the views of Gibbs CJ. A relevant passage from the judgment of Brennan J is set out in the next paragraph of this report; it is consistent with the view of Gibbs CJ. Mason J dissented in the primary conclusion.

165. Brennan J in *Meneling Station* said in his judgment at [15]-[16], CLR 361-362:

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.

But the weighing of the considerations specified in sub-s. (3) and of all other relevant considerations in deciding whether a grant should be made is appropriately a matter for the Minister, not for a judge – particularly when the question for decision is pregnant with political controversy.

166. 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 how it might be resolved.

167. In my view, therefore, some qualitative assessment of an asserted detriment is not necessarily inappropriate. What the Minister makes of it in due course is, of course, a matter for the Minister. To that limited extent, my view may not be in entire agreement with the submission of the Northern Territory on general principles. It asserts, correctly, that it would be impermissible when deciding whether to recommend the grant of claimed land to attempt to resolve the tension between the claims of those who might suffer detriment and those of the traditional owners. The decision whether to make a recommendation for a grant of the claimed land is to be made independently of any issues of detriment. The Northern Territory nevertheless accepts that matters of detriment are to be evaluated and described with specificity, but in my view additional comments about them is permissible. That does not detract from the primary position which the authorities indicate, namely that the decision whether to make a grant if the Commissioner recommends it lies with the Minister.

168. Ultimately, the decision whether to make a grant is one for the Minister, and the Minister is obliged to consider, amongst other factors, the detriment identified and commented upon by the Commissioner in the report. The Minister is free to make of the comments on detriment what is considered appropriate. The Minister's consideration may also include factors relating to detriment which have become apparent subsequent to the Commissioner's report. However, I suspect that in the general course it is likely that a disadvantage or detriment which has arisen from actions taken or interests acquired only after the claim under the ALRA, or after the Commissioner's report, would fall into the category of a detriment of which the person complaining has chosen to incur in the face of the claim or of the report, and might be weighed by the Minister in that light.
169. The hearing on the matters of detriment and land usage proceeded on 9 and 10 August 2017, and then on 1 June 2018 (with the hearing on the issue about the location of the mouths of the rivers and their significance on 26 and 27 February 2018). Each person or entity who or which had responded to direct contact from the Commissioner or to the public notice of the inquiry was given the opportunity to adduce evidence and to make submissions. In all there were 17 witness statements presented, and a number of those persons gave oral evidence and were questioned by counsel for the claimants.
170. The Northern Territory, in its helpful submission on detriment and land usage has categorised the evidence as relating to separate topics or categories of detriment. It is a categorisation adopted by the claimants in their response to that submission. I shall therefore adopt that categorisation, and I shall address each identified topic separately.
171. The evidence included several witnesses from the Department of Primary Industries and Resources (DPIR) of the Northern Territory, and witnesses relating to each of the topics or categorisations of the Northern Territory in its primary submission. They included Ian Curnow, the Director of Fisheries of DPIR, Lorraine Corowa, Director Major Agribusiness Projects and Director Ord Development of DPIR, Victoria Jackson, Executive Director Energy within the Mines Directorate of DPIR, and Sarah Kerin, Director of the Savannah/Gulf Region, Parks and Wildlife Commission of the Northern Territory (PWCNT). The institutional evidence was given by David Ciaravolo, Executive Officer of the Amateur Fishermen's Association of the Northern Territory (AFANT), Tracey Hayes, Chief Executive Officer of the Northern Territory Cattlemen's Association Inc (NTCA), and Katherine Winchester, Chief Executive Officer of the Northern Territory Seafood Council (NTSC). I have listed them in the sequence in which their written statements were received. There were also a number of persons who gave evidence about their individual circumstances, or the circumstances of the entity which they represented. I will refer to that evidence as necessary when

considering particular categories of detriment. It is fair to observe that, in general, the evidence of all those witnesses was not directly contradicted, although some of them were questioned on their statements by counsel for the claimants to bring out different emphases or to seek their comments on ways in which their concerns might be ameliorated.

172. There is one matter which emerged as a matter of disagreement in the submissions, and which I can address conveniently at this point.
173. Part IV of the ALRA addresses ‘Mining’. Section 40 in Part IV prohibits the grant of an exploration licence (i.e. under relevant Northern Territory legislation) in respect of Aboriginal land except under section 40(a) with the consent of the relevant Land Council given under section 42(1) of the ALRA and with the consent of the Minister given under section 42(8), or alternatively unless under section 40(b) there is a Proclamation of the Governor-General declaring that the national interest requires that the licence be granted.
174. Section 48A provides for a Land Council to enter into an agreement with a person seeking an exploration licence over land that is subject to an application for a land grant made under the ALRA by Aboriginal claimants, but which has not to that point been granted. If such agreement is made, it becomes effective when and if the grant is made.
175. Part IV thus provides a procedure for the grant of an exploration licence. It is apparent that the regime so specified will govern the relationship of the person seeking or holding an exploration licence with the relevant Land Council or Land Trust. As the ALRA provides for such a procedure, it is fair to say that compliance with that procedure will not to that extent constitute a relevant detriment to be considered by the Minister. It is prescribed by the ALRA itself and so is not directly a consequence of the grant of land. However, it emerges as a common position that the renewal of an exploration licence is not encompassed within Part IV. If there is no right to extend or renew within the existing exploration licence, then Part IV will re-activate on the expiry of an exploration licence in the event of a fresh application for such a licence – and then ‘detriment’ may arise from the status of Aboriginal land provided by the ALRA itself in that respect and the structure under Part IV provides the path to resolution of any dispute. Again, there is no relevant detriment by reason of the recommendation for a grant or the grant itself because the statutory pathway re-opens.
176. That view was taken by Commissioner Toohey in the Warlpiri and Kartangaruru-Kurintji Land Claim Report No. 2 at [327]-[328] and has been adopted in other Land Claim Reports.



177. The claimants argued, by analogy, that the consequence of that conclusion is that Section 73(1)(b) of the ALRA makes any impediment to entry on traditional Aboriginal land consequent upon a grant of land under the ALRA a detriment provided for by the ALRA itself, so that any such impediment is not susceptible of being a relevant detriment for the purposes of the report of the Commissioner under section 50(3).
178. That contention is of particular significance to members of the public who are amateur fishers, and who have used the Crown land for access to fishing resources extensively and over a long time. If the claimants' argument is correct, a grant of the claimed lands would not give rise to a relevant detriment to them because the ALRA by sections 70 and 73(1)(b) provide a legislative structure to regulate such activities. The argument then runs that the Commissioner, if making a recommendation for the grant of the claimed land, cannot identify and comment upon the interests of amateur fishers as a possible detriment, and in turn the Minister when considering whether to make a grant cannot have regard to their interests as a relevant detriment.
179. I do not accept that contention. Section 70(1) and (2) of the ALRA prohibits a person from entering on Aboriginal land, except if that person has an estate or interest in that land, and any law of the Northern Territory cannot authorise an entry on that land if that would interfere with the owner of that estate or interest. It is an enforcement provision. Section 73(1)(b) then empowers the Northern Territory to make laws regulating or authorising the entry of persons on to Aboriginal land, but so that any such laws shall provide for the right of Aboriginals to enter such land in accordance with Aboriginal tradition. That is simply because it is a provision of a different character from the detailed regime established in respect of exploration licences in Part IV. It does not of itself regulate how members of the public may secure access to land granted under the ALRA. I note that the *Aboriginal Land Act 1978* (NT) does reflect the exercise of that statutory power. Commissioner Kearney in the Upper Daly Land Claim Report No. 37 at [122] seems to have proceeded on the same basis.
180. I regard the effect upon the present access arrangements of amateur fishers to access fishing resources over Crown land, if there is a grant of that land to the traditional Aboriginal owners, as potentially constituting a detriment. The traditional Aboriginal owners would be entitled to prohibit or regulate access to the fishing resources which require access by amateur fishers through or over the land granted.
181. Lastly, in these general comments, it is appropriate to note again the decision of the High Court in the Blue Mud Bay case: *Northern Territory of Australia v Arnhem Land Aboriginal Land Trust* [2008] HCA 29; 236 CLR 24. It determined that the grant of land to a land trust under the ALRA included the right to exclude others from accessing the tidal waters within the boundaries of the grant. I accept,

as the Northern Territory has submitted, that until that decision it was generally taken that the public would retain a right to freely navigate and fish in such tidal waters, but not to access or ‘drop anchor’ on the underlying beds of the sea or beds and banks of tidal rivers and streams within the Aboriginal land grant. So much was acknowledged in the Victoria River (Beds and Banks) Land Claim; Ngaliwurru/Nungali and Victoria River (Beds and Banks) Land Claims (Nos. 137 and 140) Report No. 47 (22 December 1993) at [6.10.6] by Commissioner Gray. In both the Upper Roper River Land Claims (Nos. 129, 141, 164 and 245) Report No. 68 (24 March 2004) at [60] by Commissioner Olney and the Lorella Region Land Claim and part of Maria Island Region Land Claim (Nos. 199 and 198) Report No. 63 (18 June 2002) at [90] per Commissioner Olney that position was also taken, but noting that the issue remained to be resolved.

182. It is understandable then, by reason of the extent of the land which has been granted under the ALRA, and which may be granted by the Minister in the light of the recommendation in this report, why the issue of detriment has been of such significance in the course of this inquiry. The Blue Mud Bay case has been followed by extensive and prolonged negotiations between the Northern Land Council and the Northern Territory, over what is now more than a decade. There have been certain interim arrangements made from time to time to secure long term recreational and commercial fishers’ access to tidal waters overlying existing Aboriginal land which might otherwise have been inaccessible. The respective submissions made about detriment indicate that here is no agreed position between the claimants, the Northern Territory, and the representatives of the amateur fishers through AFANT on whether the Minister might grant the lands claimed to the traditional Aboriginal owners on the one hand, or decline to do so having regard to the detriment, or might take some middle course. There is no agreed middle course.

## **4.1. FISHING AND RIVER ACCESS**

### **4.1.1. Recreational Fishing**

183. In relation to Keep River, the evidence clearly establishes that it is the most important and easily accessible saltwater fishery for recreational fishing for the residents of Kununurra: the statement of Dick Pasfield, a long time resident of Kununurra was not challenged. That includes fishing from tinnies and from the riverbanks. It is sometimes an overnight activity, and an activity with families. The available alternatives do not readily include saltwater fishing and access is farther away and more difficult. It is a matter of comment that, as a simple matter of arithmetic, the less fish taken from Keep River, assuming the same numbers of fish are taken in the general region, the more will be taken from other watercourses. Damian Thomas made similar comments. Sgt Dennien, a keen

recreational fisher, also made that point in his evidence, but he did not put that forward as the opinion of an expert after appropriate study. Nevertheless, it is a point understandably made as a generality.

184. There are alternative freshwater fishing opportunities further upriver on the Keep River and on the Ord River. Freshwater fishing is less satisfactory, mainly because of the lesser diversity of fish. The Pentecost River does offer saltwater fishing and a 'similar wilderness appeal' as the Keep River (according to Mr Pasfield) but it is more remote and difficult to access, and sections of it are closed by the El Questro Homestead, and Wyndham (another source of salt water fishing) is somewhat further away from Kununurra than the Keep River.
185. In relation to Victoria River, in its upper reaches, there is clear evidence of extensive public use because of its proximity to Victoria Highway and the township of Timber Creek. The main boat launching location is the Big Horse River Ramp. Sgt Dennion said there were up to 30 to 40 vehicles there on busy weekends and more in peak periods, including the two annual fishing competitions. Mr Downes said that there were a number of people who 'own' moorings on the bed of the river. Not surprisingly, recreational fishing provides an important source of income for the town of Timber Creek, including the Timber Creek Hotel. As I noted above, Ms Fiona McDonald of the Timber Creek Hotel attended the initial hearing at Timber Creek with her husband Mr Callum McDonald and she made that point.
186. That evidence was generally confirmed by Ms Kerin, Mr Ciaravolo, and Mr Curnow as governmental or institutional representatives. At the level of specific reference to the claim areas, they confirmed the direct evidence I have referred to.
187. It is on that material, and not contested by the claimants, that the consequence of a grant of the claimed areas would entitle the claimants to preclude the current recreational fishing in the claim areas. The general public would have no right to go to the claim areas or to fish on the waters they presently use for fishing. It is also apparent that the opportunities for fishing in the region are somewhat limited, so that the effective cessation of recreational fishing in the claim areas would significantly impair the opportunities for the public to fish in the general region, and their enjoyment of fishing in the general region.
188. I am not persuaded that loss of access to the claim areas for recreational fishing would divert the fishing effort to other places in the general region with the consequence of a meaningful dilution of the fishing stock in those other areas. There is simply not enough evidence of a cogent nature to be able to sustain that proposition. The issue of the overall maintenance of fish stocks and 'cumulative detriment' is addressed later in this section of the report.

189. The evidence extended to the question of how any detriment to recreational fishers might be eliminated or reduced in the event of a grant of the claimed lands. Primarily and conceptually, such detriment could be alleviated by a fishing permit system. That topic had been anticipated by Mr Ciaravolo of AFANT. Although reluctant to accede to the proposition that such a system would very substantially alleviate any real detriment, he really based his concerns on two issues: cost and convenience, or as the Northern Territory put in its Final Submission – a fee and a bureaucratic process. Its suggestion was an open area declaration under section 11 of the *Aboriginal Land Act 1978* (NT). Effectively, that would simply absorb much of the benefit of a grant of the claimed lands.
190. The claimants proposed in submissions a permit system, at a relatively nominal fee, including a system similar to the Dhimurru Aboriginal Corporation (at Nhulunbuy) entry permit system for access to the Dhimurru Indigenous Protected Area. It was put to several witnesses, including Mr Ciaravolo, that the permit system would be electronically automated, so that the permit could be downloaded immediately, and would be available for differing periods at the option of the person proposing to fish in the particular area, and perhaps for those committed enough for an annual fee. The Northern Land Council is in the process of developing such a permit system. That would accommodate what the Northern Territory referred to as persons fishing without much planning, as well as those who plan their fishing activities.
191. The Northern Territory also referred to the difficulty presented where there is no internet access. That concern largely is contradicted by the evidence about where the majority of fishers come from to fish in Keep River or Victoria River. There was no cogent evidence about the extent to which an electronic permit system would really impede recreational fishing, other than the fee to be imposed. Electronic access to premises, and similar systems, are commonplace including their usage by governments and corporations. There was no question as to the genuineness of the claimants, or more widely of the Northern Land Council on behalf of those Aboriginal communities who wish to participate, about the intention to establish such a permit system. Within the Northern Territory, apart from the negotiations for a Territory wide resolution of the issue of access to tidal waters following the Blue Mud Bay decision, there have been seven separate long term agreements for access to waters overlying Aboriginal land. Mr Curnow acknowledged this, although at the same time expressing concern about the time taken and the complexity of the negotiations for those agreements. I accept his evidence about delay and complexity, but it does not really assist in assessing the prospects of, or the common sense of, the permit system contemplated by the Northern Land Council for the claimants and other Aboriginal groups to facilitate recreational fishing. That is simply because it did not expose what the negotiations to date have been, or the negotiating positions of the parties (and I accept it should not have done so). For example (not evidence based), it might be that the Northern Territory has insisted on Open Area declarations for no recompense. An alternative extreme position could also be speculated on the part of the Northern Land Council.

192. The claimants have said that any access to the beds and banks of the two rivers under a permit system would be subject to the right to exclude certain access to areas of particular spiritual significance. That is entirely understandable. A couple of matters were mentioned on that topic during the view at the junction of Big Horse Creek and Victoria River. I note the expressed concern of the Northern Territory that the claimants might, using that exception, effectively preclude access to areas more extensive than presently excluded under the *Northern Territory Aboriginal Sacred Sites Act 1989* (NT) and indeed to all of the claimed areas. I am not sure that it is appropriate to go beyond noting that concern. It is not consistent with the expression of counsel for the claimants, stated in their presence, at the first hearing day at Timber Creek, that broadly speaking the claimants did not intend to impede recreational fishing in the claimed areas. The Minister might take the view that the concern is not warranted, both because it is not in the commercial interests of the claimants to adopt that position and because it is not in accord with the views publicly expressed on their behalf.
193. AFANT through Mr Ciaravolo also said that the mere requirement to obtain a permit would itself constitute a detriment, relevant to the Minister's consideration under section 11. If it is accepted to be a detriment, the Minister may consider that it is not of such significance as to warrant the exercise of the discretion to decline to make a grant of the claimed lands as recommended.
194. If the Minister is disposed to grant the lands claimed (as I recommend), the fact of the detriment to amateur fishers by potentially being deprived of the opportunity to access the claim areas for fishing is readily accommodated by being satisfied that there is in place an easily accessible and sensible permit system for securing such access. That is what the Northern Land Council is seeking to establish. The fees so earned will remain with the respective traditional Aboriginal owners, and be available through the Land Trusts for their benefit. The fees will be specified in the proposed permit system, so that the Minister can be satisfied as to their appropriateness. And the Minister can, if it is determined to be appropriate, suggest or insist on terms of the permit system which ensure the fees charged are not unreasonably increased. If there is no such permit system then in place, the Minister may consider whether to make the grant of the claimed lands before it is in place or to defer the making of the grants until it is in place.

#### 4.1.2. River Tours

195. Victoria River Tours operates private river cruises from the pontoon in Big Horse Creek. The business is a source of income for its owners, and in the event of the owners wishing to sell the business, the continued opportunity to access the claimed areas in Victoria River is important. The present arrangement involves payment of a fee to the Parks and Wildlife Commission of the Northern Territory (PWCNT) as the manager of the Judbarra/Gregory National Park, and to Winan Aboriginal Land Trust as the traditional Aboriginal owners of the park, for the right to operate from the pontoon in Big Horse Creek and the use of the boat ramp/access jetty in that creek. That park would abut the land the subject of the claims at its further reaches as the boat ramp is located at the junction of Big Horse Creek and the Victoria River. Ms Kerin of the PWCNT gave evidence concerning these matters. As well, there are two statements of interest of Mr Fogarty. In his statement of 17 January 2017, he indicated that he was then trying to sell the business.
196. Obviously, the grant of the claimed lands in Victoria River will impede the use of Victoria River for the continued operation of the business. That will constitute a detriment to the owner of the business, and to some degree to the present contractors who permit use of the boat ramp and Big Horse Creek (in the event that the owner of the business chose to cease operating), and to a lesser extent members of the public who might otherwise take one of the cruises on Victoria River.
197. The short answer that the claimants offer in respect of that detriment is that, if the business is presently viable, then Mr Fogarty can also negotiate an access agreement with the traditional Aboriginal owners, or more accurately the relevant Land Trust, for access to Victoria River to the extent it is currently used by the business. Or he may presently negotiate such an agreement with the Northern Land Council as the relevant Land Council as contemplated by section 11A of the ALRA. Such agreements are commonplace. There is no reason to believe that the claimants would act unreasonably in standing in the way of the grant of access to use Victoria River for cruising in the river. The Northern Territory submission raised the prospect that such an agreement might be at a cost which forced the business to stop operating. Mr Fogarty has provided some detail of the pre-tax profit of the business. It is not inconsiderable as it is in excess of \$100 000 per year: see exhibit R9. It is impossible to accept that the access cost negotiated with the claimants would significantly affect the profitability of the business, particularly as the current annual fee paid to PWCNT is said to be only 1% of its gross receipts.
198. It is difficult to escape the apparent irony that the Northern Territory through PWCNT is accepting fees from Victoria River Tours (shared with the Winan Aboriginal Land Trust) for access to Victoria River through the Big Horse Creek Boat Ramp, but expressed concern that the grant of the claimed lands (as now recommended) would mean that this business ‘would not be able to operate’,

and so cause detriment to itself and the Winan Aboriginal Land Trust by the loss of fees they are recovering by the exercise of the rights to control access to the boat ramp, as well as the business of Victoria River Tours.

199. The Minister may find that, if Mr Fogarty has not entered into such an agreement with the Northern Land Council under section 11A by the time the Minister comes to consider whether to make a grant of the claimed lands, it is appropriate to make the grant leaving Mr Fogarty to negotiate access rights with the relevant Land Trust on behalf of the traditional Aboriginal owners.
200. I note that Mr Fogarty purchased the business in 2011, of course well after the Gregory NP/Victoria River LC was made and after the Blue Mud Bay decision. It is not apparent on the material before me as to whether he was aware at the time of the purchase of either of those matters, although that is a topic referred to by the Northern Land Council on behalf of the claimants.
201. It is correct to say, as the Northern Territory did, that the immediate effect of a grant of the claimed land would be to entitle the traditional owners to exclude others from entering and using it. But such a consequence would not immediately follow this report; the Minister will have to consider it and decide whether to make a grant of the claimed lands. There are administrative processes which must precede such a grant. Apart from the recreational fishers, whose detriment the Minister may wish to minimise by a permit system, those who may be affected by such a grant would have the opportunity to negotiate with the Northern Land Council and later the relevant Land Trust to secure access to the granted areas. That would include businesses such as Victoria River Cruises, and those who want to have access to the tidal waters of the Victoria River in the vicinity of Timber Creek for mooring their vessels near the Big Horse Creek Boat Ramp.
202. The businesses in Timber Creek which are dependent in part upon the recreational fishing activities in the vicinity of the claim area would also be protected in the event that the Minister took steps to be satisfied that a suitable fishing permit process was available and in place by the time of any grant of the claimed lands.

#### **4.1.3. Commercial Fishing**

203. The status of commercial fishing within the claim areas or their vicinity was extensively addressed in the evidence, principally by Mr Curnow and by Ms Winchester of the NTSC. The NTSC represents commercial fishing licence holders in the Northern Territory.
204. Commercial barramundi and king threadfin fishing occurs in the region, and to a lesser extent mud crab fishing, including in the tidal waters of the Keep River and the Victoria River. The barramundi fishery is a major commercial industry in the

Northern Territory. The holders of barramundi fishing licences are also entitled to catch king threadfin.

205. There is evidence about the significance of the claimed areas to the 14 persons or entities holding barramundi fishing licences in relation to the claimed areas.
206. Mr Curnow's data shows that only between 1 and 3 of the licensees each year access the areas for fishing, and that for the 11 years of data provided (between 2006 and 2016) there had been no commercial fishing for barramundi in the claim areas at all in 2010, 2011, 2013, 2014 and 2015. Over that 11-year period the total catch amounted to some 113,000 kg of barramundi and some 63,000 kg of king threadfin, which included about 17,000 kg of barramundi and some 15,000 kg of king threadfin in the two years 2012 and 2016. When there has been fishing in the Victoria River claim area, it has a holding line near the Big Horse Creek Boat Ramp where commercial operators may anchor, process fish and unload their catch, and may launch smaller vessels into the open areas of the fishery. I did not discern from the material what proportion of the whole Northern Territory catch that represented in the years that fishing actually took place in the claim areas.
207. Ms Winchester said that, in the years that fishing took place in the claim areas, the particular commercial fishers derived a substantial portion of their yearly income from such fishing. She said that her members wanted as wide a range of waterways to be available to them as possible so that they can respond to seasonal variations, and that position was held in relation to Victoria River and Sandy Creek, flowing into the Keep river, including because some waterways have been removed from barramundi fishing over the last decade. The extent of that was not explored in any detail. Mr Curnow explained the years of when there was no fishing in the claim as the consequence of decisions by licensees to focus their fishing in other areas – decisions made in the light of environmental factors such as weather and fish availability, and market factors such as the price of fish. The last matter could not be a factor influenced by the particular location.
208. No licensed commercial barramundi fisher gave notice of wishing to participate in the inquiry or gave evidence.
209. The position with respect to commercial mud crab fishing is also somewhat general. Commercial mud crab fishing can be undertaken, under license, in all Northern Territory waters other than Darwin Harbour and creeks of Shoal Bay and Leaders Creek. The licence is issued annually, and in recent years there has been a stable 49 licences. For the same period of 11 years, that is from 2006 to 2016, mud crab fishing has been undertaken in the claim areas only in 2006, 2007 and 2016. There has been no use of those licences for the other 8 years within the claim areas. The total catch in those 3 years is a little over 9,000 kg. Mr Curnow said that the absence of mud crab fishing in the years 2008 to 2015 was probably because the licensed fishers focussed their operations in other areas.



210. Ms Winchester's evidence did not really advance that picture. No licensed mud crab fisher gave notice of an intention to participate in the inquiry or gave evidence.
211. The Northern Territory submitted that the effect of a grant of the claim areas would be that the commercial fishing activities could not continue. The consequence would also be that the flexibility of commercial operators to respond to environmental and market conditions would be reduced. And, it said, the closure of those fishing areas may also place greater pressure on fish stocks in other watercourses.
212. In my view, there is minimal detriment to the commercial fishing of barramundi, threadfin salmon and mud crabs shown, even if the effect of the grant of the claim areas were to close the waterways for such fishing, simply because there is little to conclude that the closure of the particular waterways would make any real difference to the operations of commercial fishers. The commercial fishers use the claim areas only spasmodically by choice; only 2 of the years in the decade commencing in 2010 to 2016 for barramundi fishing and in 1 of the years of that period for mud crab fishing. The catch in the years when fishing has taken place is not shown to be of particular significance. There is no evidence that the licensed fishers who did fish in the claim areas in those years might not have been able to take similar quantities of fish and mud crabs from other available waterways.
213. In addition, it is not appropriate to assume that, in the event of a grant of the claim areas, commercial fishing in the claim areas for barramundi and king threadfin, and for mud crabs, would not take place. The traditional owners could agree to permit licensed commercial fishers to undertake such activities under section 11A of the ALRA, with commercial benefit to each of them. Alternatively, the traditional owners themselves could apply for the relevant licenses and undertake such activities.
214. I note the submission of the Northern Territory that, if a grant of the claim areas is made, the traditional owners could then apply under section 12 of the *Aboriginal Land Act 1978* (NT) for a two-kilometre sea closure. It observes that that would significantly extend the impact of the current claim on commercial and recreational fishing. That is a purely speculative matter. In my view it does not enhance the asserted detriment to either commercial or recreational fishing. Any such application is made to the Administrator of the Northern Territory. The Administrator would no doubt take the advice of the Northern Territory Government before deciding whether to accede to such an application.
215. Finally, under this heading, the Northern Territory points to the question of whether, if the claims were to be granted, the traditional owners would allow general or specific access to all of the claim areas, and the administrative effort and cost in negotiating access. It says that such circumstances 'undermine(s) the certainty of access that the public and industry otherwise enjoy': Submission of 3 March 2017 at [52].

216. I do not regard such administrative processes as constituting a relevant detriment. It is inherent in the nature of grants of land under the ALRA that the traditional owners (as with any landowners) would be entitled to regulate access on to their land. To say that having to deal with the traditional landowners if access to their land is sought undermines the access the public and industry previously had to former Crown lands is simply to state the effect of a grant. In addition, public and industry access to unalienated Crown land is not necessarily unrestricted; it is capable of control by the relevant instrument of government.
217. However, as is clear, such matters are ultimately a matter for the Minister.

## **4.2. MAJOR PROJECTS**

### **4.2.1. Project Sea Dragon**

218. Project Sea Dragon Pty Ltd (Seafarms) is a wholly owned subsidiary of Seafarms Group Limited, a publicly listed Australian agri-food company. It is Australia's largest producer of farmed prawns.
219. Project Sea Dragon is an integrated land-based prawn aquaculture project being undertaken through Seafarms. It is planned to produce high-quality year-round reliable volumes of black tiger prawns for export and local markets on an industrial scale. It involves facilities proposed to be located across the north-west of Australia. They include a Core Breeding Centre in the Darwin area, a Bloodstock Maturation Centre also to be located in the Darwin region, a Commercial Hatchery also in the Darwin region, a Grow-out Facility to be located on Legune Station, a Processing Plant to be located in the Kununurra region, a Quarantine Centre to be located in the Exmouth region and an Export facility to be located in Wyndham. It is obviously a very substantial enterprise.
220. Seafarms participated in the inquiry, including the giving of evidence by Executive Director Christopher Mitchell both by written statement and orally. That is because Project Sea Dragon may be impacted by the grant of the claim area in the Legune Area LC. Its project may be impacted in relation to the intertidal zone adjacent to Legune Station, the beds and banks of Sandy Creek and Keep River, and the beds and banks of Victoria River. It had no interest in the claim area of the Gregory National Park/Victoria River Land Claim.
221. Stage 1 of Project Sea Dragon at the time of the hearing in relation to Legune Station was still under planning development. It included three farms with a total of 1080 hectares of produce ponds, 324 hectares of internal farm recycling ponds, an intake structure and pump station at Forsyth Creek suitable for operating seawater intake pumps (which would cross the intertidal zone adjacent to Legune Station), and intake settlement basin, a main feeder channel for the delivery of

seawater (which may also cross the intertidal zone), a freshwater feed channel to each farm, a main discharge canal (which may also cross the intertidal zone), an environmental protection zone and construction wetlands, an upgrade of the road to Legune Station, a central village at Legune Station, a power station with related storage infrastructure, and storage for fuel and the like, and diesel supply and storage for light and heavy vehicles.

222. Longer term, Project Sea Dragon will involve some 10 000 hectares of produce ponds and some 3000 hectares of internal farm recycling ponds and related infrastructure. It is accepted that there will be a need for further or greater access across intertidal zones for water intake, water discharge, boat access and monitoring purposes.
223. Project Sea Dragon has been awarded Major Project status by the Commonwealth, Northern Territory and Western Australian Governments. The estimated development cost is US\$ 1.5 billion.
224. It is not necessary to record the present contractual arrangements between Seafarms and Legune Land Pty Ltd, the proprietor of Legune Station, or the extensive studies and investigations which are planned. It has lodged with the appropriate Commonwealth and Northern Territory authorities. It has applied to the Aboriginal Areas Protection Authority for an Authority Certificate pursuant to the *Northern Territory Aboriginal Sacred Sites Act 1989* (NT). It has proposed to the Northern Land Council the terms of an Indigenous land Use Agreement (ILUA). It has applied for a non-pastoral use permit under the *Pastoral Land Act 1992* (NT) over the relevant portions of the Legune Station pastoral lease.
225. The detriment to Seafarms if there is a grant of the claim areas in the Legune Area LC is not in issue. Seafarms and its employees would be unable to access the intertidal zone for the purposes outlined above. In effect the Sea Dragon Project could not proceed. It would be necessary for the traditional owners to agree with Seafarms as to reasonable terms of access under section 11A of the ALRA, or the Project would not proceed. That would impact not just upon Seafarms, but also upon the contractors and employees who would be engaged in its development and operations, and the communities where there would be the loss of the associated development.
226. Mr Mitchell expressed confidence in his oral evidence that, in due course, Seafarms would be able to reach agreement with the traditional owners on those matters. Seafarms could reasonably be expected to have that view, as it has commenced preparations for Project Sea Dragon in the knowledge of the claim and its potential implications for the Project if the claim is granted. The steps already taken to meet environmental and cultural concerns also reflect that. That view also reflects the recognition that the traditional owners of the claimed land would act rationally in relation to agreeing to the access requirements of Project Sea Dragon on appropriate terms.

227. I accept the submission of the Northern Territory to note in this report the importance of Project Sea Dragon to the economies of the Northern Territory and to the community at Kununurra.
228. In its written submission, the Northern Land Council indicated that on 30 August 2017, the Native Title holders met and approved the terms of the proposed ILUA. Its recitals, I am informed in that submission, include that the Northern Land Council as the relevant body has undertaken consultations in compliance with section 11A of the ALRA for the purpose of providing Seafarms with the required access to the claim areas for Project Sea Dragon to evolve and proceed. It is intended that such an agreement will be entered into before any grant of the land claimed, and that the Northern Land Council will then direct the relevant Land Trust to grant the agreed tenure to Seafarms., as a requirement under section 11A(5) of the ALRA.
229. In short, there is a clear and very significant detriment to Seafarms, and consequential detriment to others, if the land claimed is granted.
230. In the circumstances, and having regard to the submissions of the Northern Land Council on behalf of the traditional owners, the Minister may wish to be satisfied that the required access to the land for the purposes of Project Sea Dragon has been the subject of an appropriate agreement, and has been secured, before making the recommended grant.

#### **4.2.2. Ord Stage 3**

231. Ord Stage 3 is the final stage of the Ord Irrigation Scheme. As Ms Corowa explained, it has major project status in the Northern Territory. If and when it proceeds, it will involve significant development expenditure, job creation (including for the traditional owners) and upgrading of significant road infrastructure. There is at present no immediate commencement date for Ord Stage 3. Ms Corowa says that there are other major projects which have higher priority, in particular in the Katherine region.
232. When and if it proceeds, the grant of the claimed land will impose a significant detriment to the Northern Territory and to the developer. The Northern Territory will not be entitled to compulsorily acquire any part of the claimed (and granted) land.
233. Ord Stage 3 would involve the developer having access to the Keep River and Sandy Creek for environmental monitoring requirements which are likely to be imposed by both the Commonwealth and Northern Territory environmental approvals. Second, as with Project Sea Dragon, it is likely that there will be a need for drainage channels running across the intertidal zone and over parts of the beds and banks of the Keep River to remove excess water from the farmland.

234. There have been no approaches to the Northern Land Council on behalf of the claimants for any access agreement under section 11A of the ALRA, although that would be an appropriate and available course of action. That perhaps reflects that Ord Stage 3 is not on the medium-term horizon.
235. Whilst recognising the potential detriment if Ord Stage 3 proceeds, the detriment is remote in terms of time. It may never proceed. The Minister may consider that, in the circumstances, it would not be appropriate to decline to make the recommended grant, or to defer it indefinitely, in the face of that state of affairs. The Minister may also take the view that, following a grant of the claimed land, the relevant Land Trust should be entrusted to, and would, act in the best interests of the traditional owners, including by entering into such access agreements as are appropriate and on appropriate terms.
236. In that context, it is also appropriate to note the position of the Western Australian Government, through the State Solicitor's Office on behalf of the Department of Primary Industries and Regional Development.
237. It participated in the inquiry to the extent of registering its interest in the Legune Area LC. It did so to ensure continued access to the beds and banks and waters of the lower Keep River in order to meet its obligations to comply with the conditions attaching to the environmental approval under the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) for the Goomig (Weaber Plain) Development Project in the north-east Kimberley region of Western Australia. That Project was part of the Ord River Irrigation Expansion Project Stage 2.
238. Its material in support of its concern is detailed. The Commonwealth approval required the implementation of an Aquatic Fauna Management Plan and a Stormwater Management Plan, both of which have been in operation since 2013. The Aquatic Fauna Management Plan has required access to the Keep River and its estuary at 6 sites on a more or less monthly basis for water sampling and monitoring, and also intensive aquatic fauna monitoring (including river sediment testing and water sampling) over a period of about 2 weeks each year. The judgment has been made by the Commonwealth that such access is necessary for environmental reasons. The claimants have not contested that.
239. The grant of the claimed land in the Legune Area LC would, or could, prevent the Department of Primary Industries and Regional Development of Western Australia from complying with those conditions, and access to the Keep River for the monitoring activities referred to could be disallowed by the traditional owners. That would involve potentially damaging environmental losses. It would involve the breach of the approvals and so a contravention of section 142(1) of the *Environment Protection and Biodiversity Conservation Act 1999* (Cth).

240. Both the claimants through the Northern Land Council and the Department of Primary Industries and Regional Development of Western Australia are confident that an agreement under section 11A of the ALRA to secure the necessary access to comply with the environmental conditions referred to can be reached. In the light of the Northern Land Council providing that intimation, the Department did not play any further active part in the inquiry.
241. The Minister may wish to be satisfied that an appropriate agreement has been entered into securing the necessary access to the Keep River waters and estuary before deciding whether to make the recommended grant.

### **4.3. PASTORAL ACCESS**

242. The evidence concerning this activity was given by Ms Hayes of the NTCA. The statement of Brian McLean, Chairman of Legune Land Pty Ltd the registered owner of the pastoral lease over Legune Station and also the licensee of Spirit Hills Station from the Northern Territory Land Corporation, was adopted by Cameron Rasheed, Manager of Legune Station and he gave oral evidence. Troy Setter, Chief Executive Officer of Consolidated Pastoral Company Pty Ltd, whose wholly owned subsidiary Baines River Cattle Company Pty Ltd is the owner of the pastoral lease over Auvergne Station also adopted his written statement and gave oral evidence.
243. Legune Station and Auvergne Station are two of the three stations whose pastoral leases abut the claim areas. The other, Bullo River Station, did not participate in the inquiry. However, for reasons which appear below, its position ultimately may well be the same as that which applies to Legune Station and Auvergne Station. The Northern Territory has pointed out that Bullo River Station holds a Non-Pastoral Use Permit for tourism activities on its pastoral lease, and accesses Victoria River and its banks for horse riding and quad biking. The permit was issued under section 85A of the *Pastoral Land Act 1992* (NT) on 25 November 2014, many years after the current land claims and at a time when it is fair to say that the owner of the pastoral lease would have been aware of them.
244. There is no dispute that the cattle operations on all three stations, with some local variations (which are described in the evidence), use the claim areas to take water for domestic purposes, for drinking water for grazing stock and a little for domestic gardening, and for cattle access generally.
245. There is no dispute also that the inability to continue to have that access, which would follow from a grant of the claimed areas as the traditional owners would control access to the beds and banks of the waterways and their tidal flow areas, would constitute a significant detriment to them.

246. The questions put to both Mr Rasheed and Mr Setter included what was in effect a proposal to accommodate that detriment. It was that each of the stations, following a grant of the claimed lands, would be given by the relevant Land Trust a licence to continue to conduct the same pastoral lease activities as those currently carried out. The licence would be a no fee (or a peppercorn rental), and would be fully assignable on transfer of the pastoral lease without needing the consent of the Land Trust and would be for the term of the relevant pastoral lease. The pastoral lessee would thereby provide to the pastoral lessee all rights currently exercised under the *Water Act 1992* (NT) and the Pastoral Land Act, including the waiver of notice of muster under the *Livestock Act 2008* (NT). Both of them were somewhat cautious about that proposal, understandably as they had not had to address it beforehand. However, in essence, they could find little fault with it. In final submissions, there was no proposition put that such a licence would not accommodate the detriment referred to.
247. In those circumstances, it is apparent that the Minister, if satisfied that such a licence would be granted or has been granted, 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.
248. The actual non-pastoral activities presently carried out on Victoria River by Bullo River Station would also no longer be able to be carried out in the event of a grant of the claimed areas without the agreement of the traditional owners. That would be a detriment. But it is a detriment which would follow from the adoption of those activities in the face of the claims, and so can fairly be said to be a matter of which the operator had notice. The Minister, in that circumstance or in any event, may consider that the potential for the Land Trust to authorise the continuing of such activities under an agreement would, with appropriate payment to the traditional owners, be a proper outcome.
249. Both Ms Hayes and Mr Rasheed (through the adoption of Mr McLean's statement) also referred to potential future plans for pastoral lessees generally and for Legune Station specifically to undertake non-pastoral activities for profit by accessing and using the claimed areas adjacent to pastoral leases. Because section 50(3)(b) of the ALRA refers to detriment which 'might result' from the grant of the claimed areas, it is necessary to refer to that prospect also.
250. At present such activities are speculative. They may never be realised, as the pastoral lessee may never seek to undertake such activities. They are not a present entitlement under the terms of the pastoral leases. To undertake such activities, permission is necessary under the Pastoral Land Act.

251. In those circumstances, the Minister might consider that the potential detriment is one which the pastoral lessees should bear in any event, and should not impede the grant of the claimed lands. If that were not the case, it would amount to saying that there should be no grant because a pastoral lessee with no present right to undertake such activities might at some time in the future want to do so, subject to the approval of the Northern Territory. The pastoral lease holders in any event would have the opportunity to seek the agreement of the traditional owners through the relevant Land Trust to conduct such activities on the claimed lands on appropriate terms.

#### **4.4. PARKS AND WILDLIFE**

252. In the overall picture this is a minor matter.

253. The relevant evidence was given by Ms Kerin of PWCNT. She is the Director of the Savannah/Gulf Region of PWCNT since January 2016, which relevantly includes the Keep River National Park and the Spirit Hills Management Area and certain other locations on behalf of other Northern Territory instrumentalities.

254. As noted above, the Victoria River/Gregory National Park Land Claim borders the Judburra/Gregory National Park, owned by the Winan Aboriginal Land Trust and leased to PWCNT under the ALRA to manage that park. That has included the construction and operation of the Big Horse Creek entrance to Victoria River and the Big Horse Creek boat ramp. Ms Kerin's evidence about vehicular use of that area and the agreement with NL & MA Fogarty to operate Victoria River Cruises from that location has already been considered in a separate context.

255. The immediately relevant concern is that, although PWCNT has no current or proposed assets in the claim areas, the granting of the land claims may set 'a precedent' by isolating 'the intertidal zone from its related marine, coastal and island ecosystems': Statement of 24 February 2017 at [14] and Exhibit NT 8. In her oral evidence, she was unable to present any pre-existing document recording such concerns and said she was comfortable to withdraw that assertion. It was apparently, she said, in a document presented to her for adoption.

256. She did say that the claim areas would be impracticable to manage in isolation from the surrounding ecosystems, so 'jurisdiction' over the whole complex of ecosystems would be necessary. The PWCNT officers may enter Aboriginal land for such purposes in any event. So her concern was reduced to the claim that access by independent researchers engaged by PWCNT would be restricted if the claims were granted, except by permission of the traditional owners. However, she accepted that independent researchers had not accessed the claim areas for that purpose, and that there were no present plans for that to occur.

257. It is difficult to see that there is any meaningful detriment as postulated.



258. In addition, as Ms Kerin accepted, the Judburra/Gregory National Park is jointly managed by PWCNT and the Winan Aboriginal Land Trust. There is no reason to think that, if necessary, such joint management could not extend to the relevant Land Trust or Land Trusts in respect of the extensive area of beds and banks of the Victoria River which would share a common boundary with that land held by the Winan Aboriginal Land Trust.

#### **4.5. MINERAL AND PETROLEUM TITLES**

259. I have referred to the relevant provisions of the ALRA in the introductory discussion to this section of the report.

260. The primary information in the Northern Territory submission is said to come from the statement of Alan Holland, Director Mineral Titles within the Mines Division of DPIR. That statement was not relied upon at the hearing. The Northern Territory through counsel said that his statement dealt with mineral titles which, on examination, did not extend into the claim areas. The precise detail which it is said in the submission probably does not matter too much. The point is that there is no evidence of any existing mining interests (as defined in section 3 of the ALRA) over the claim areas.

261. Based on the evidence of Ms Jackson, it is accepted that there were at the time of the evidence two petroleum exploration permits and one petroleum retention licence overlapping the claim areas, held respectively by Territory Oil and Gas Pty Ltd and Beach Petroleum (NT) Pty Ltd jointly, by Paltar Petroleum Ltd, and by Onshore Energy Pty Ltd. Beach Energy Ltd wrote to the Commissioner to indicate that it is not likely to conduct any exploration in the claim areas under EP 126, and accepted that it had no concerns about detriment if the claims were granted.

262. The existing rights of those holders are protected by sections 66 and 70(2) of the ALRA.

263. However, the Northern Territory submitted that they may suffer detriment upon the expiration of their holdings. None of the holders participated in the inquiry, either by written submission or oral evidence. It might readily be inferred that they did not think that the detriment anticipated by the Northern Territory on their behalf was significant. It may well be simply because the two exploration licences expired in late 2017 in any event.

264. Once those rights expire, then any new application for such an interest must be made in accordance with Part IV of the ALRA. It appears to be intended that the holder of a mining interest who has a contractual right to a renewal might also have to be exposed to the processes under Part IV. It is not necessary to explore that question fully, as there were on the evidence no relevant mining rights in

force. Compare the Elsey Land Claim (No. 132) at [6.11.3] Report No. 52 (1997) per Gray J as Aboriginal Land Commissioner, and the Carpentaria Downs/Balbirini Land Claim (No. 160) Report No. 55 (27 January 1999) at [6.11.2] again per Gray J.

265. As to exploration rights of the character of those which did exist, and are referred to above, the definition of 'mining interest' in section 3(1) expressly says that for the purposes of Part IV the definition of mining interest excludes exploration licences and exploration retention licences. Each of those licences are each separately defined in section 3(1).
266. The result, in my view, is that rights under the existing licences referred to were preserved until they expired. Once they expired, and a grant of the claimed land is made, Part IV regulates the circumstances in which an exploration licence may be issued. In particular, as noted above, section 40 prescribes one criterion for its grant as being the consent of the relevant Land Council.
267. In the case of mining interests, section 45 in Part IV creates a similar scheme for the grant of a mining interest, including the requirement for the consent of the relevant Land Council. As there are no existing mining interests identified in the material, there is also no issue about detriment as if such interests existed and it was sought to renew them.
268. Accordingly, I do not consider that there is any relevant detriment. In the event of a grant of the claimed areas, Part IV of the ALRA will then govern the outcome of any application for an exploration licence or for a mining interest.

#### **4.6. EXISTING AND PROPOSED PATTERNS OF LAND USE**

269. 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, distinct from detriment, by section 50(3)(c) of the ALRA. There was no real focus on the concept of land usage, as it is used there. With the exception of pastoral land usage – where that usage might be significantly impaired or altered if holders of pastoral leases cannot access the beds and banks of the watercourses in the claim areas – it was not said that the claim areas would be put to different existing usage than if the land claims were not acceded to. The traditional owners could, and probably would, carry out much the same activities as those currently using those areas. The intensity of usage might be different.
270. The potential change in land usage prompted by Project Sea Dragon, and if it comes to pass Ord Stage 3, would be significant, but the grant of the claimed areas would not be the cause of that. And, as the consideration of detriment in relation to those two matters shows, the grant of the claim areas would only inhibit those

projects to the extent that access arrangements for monitoring and for water usage and storage and disposal is a relevant detriment, but it is not of real concern to the developers as they are confident of securing those access rights. The grant of the claimed areas will not itself alter proposed patterns of land usage.

271. The submissions on behalf of the Northern Territory were brief.
272. First, in relation to existing patterns of land use, it simply referred to its previous submissions on detriment. As they have been addressed in turn, I need not refer to this aspect further.
273. As to proposed or prospective patterns of land use there were two matters referred to:
  274. First, it was pointed out that the public use of the unalienated Crown lands claimed in these two applications, namely boating and recreational fishing, is likely to increase over time, particularly if other 'beds and banks' claims under the ALRA lead to greater restriction of other options for those activities. The usage for fishing and boating by the traditional owners would continue, so any change is one of degree rather than of character.
  275. In any event, I consider that that aspect has been recognised when addressing the detriment to recreational fishers above. It does not represent a changed pattern of land usage in the region. Indeed, if the proposal on behalf of the traditional owners were implemented – the permit system referred to – there would be little or no change in the extent of that usage.
276. The second comment was that, in the event of the grant of the claimed lands, the proposed future for aquacultural and agricultural use by Project Sea Dragon and by Ord Stage 3 would be impractical unless access for the purposes of those two projects were permitted over those lands. That issue of access to areas adjacent to the granted lands in the event of the grant of the claimed areas was addressed in considering detriment. It is appropriate to note that it may also require comment under section 50(3)(b). The comment is that each of the developers is likely, in due course, to be able to negotiate an access agreement with the two developers upon appropriate terms. The grant of the claimed areas therefore would be unlikely to impede those developments and that proposed land usage adjacent to the claim areas.
277. That is the completion of the topics in the final submission of the Northern Territory. There are two further matters which must be discussed. The first relates to the Bradshaw Field Training Area (Bradshaw). The second relates to what was called in the submission as 'cumulative detriment'. It is a matter upon which the Northern Territory and the claimants made extensive submissions.

#### **4.7. DEPARTMENT OF DEFENCE – BRADSHAW**

278. Bradshaw is a training area used by the Australian Defence Force to conduct training operations. It is the subject of a Defence Purposes Lease dated 15 April 2004 granted to the Commonwealth by the Northern Territory with a lengthy term. It is relevantly bordered by the Victoria River to its south and west, and to its north by the Fitzmaurice River. For present purposes, it is the south-western boundary along the Victoria River which is relevant, up to the point where the Victoria River runs into the Joseph Bonaparte Gulf. The only permanent authorised entry point is by a dedicated Bradshaw Bridge over the Victoria River about 10 km west of Timber Creek. Bradshaw also has its electricity supplies by overhead lines from Timber Creek. The normal activities of Bradshaw include access to the Victoria River (called in the submission the proximate riverine land and waters) for routine watercraft activities, land access to the homestead during the wet season for bushfire management and for its training activities.
279. Bradshaw has entered into an Indigenous Land Use Agreement (ILUA) dated 16 July 2003 with the traditional owners of the Bradshaw area and the Northern Land Council. It is not necessary to go into the terms of that ILUA. In addition, the area of the Bradshaw Bridge was excluded from the Legune Area LC by agreement with the traditional owners, again on terms which it is not necessary to explore.
280. It is accepted by the claimants that the grant of that claim would cause detriment to the use of Bradshaw and the adjacent rivers unless there were a prior agreement in place under section 11A of the ALRA between the Commonwealth and the Northern Land Council on behalf of the traditional owners for a term matching that of the Bradshaw lease.
281. On the basis of the submissions of the Commonwealth and adopted in the submissions of the Northern Land Council on behalf of the traditional owners, and in the light of the evidence, I have a high degree of confidence that, prior to any grant of the claimed areas relevant to Bradshaw, there will be negotiated agreement under section 11A of the ALRA which will both appropriately recognise the interests of the traditional owners and will secure the continuance of the operations on Bradshaw or the same duration as the ILUA.
282. Consequently, any detriment to Bradshaw will have been ameliorated before the Minister comes to consider whether to adopt the recommendations of this report and to make a grant of the claimed area.

#### 4.8. CUMULATIVE DETRIMENT

283. The Northern Territory made the submission that this Report should include a comment about ‘cumulative detriment’. It says that because the immediate effect of a grant of the claimed areas would be that access to the claimed areas for recreational and commercial fishers would not be permissible without the consent of the traditional owners, consequently there is likely to be a corresponding increase in fishing in other areas. Then it would follow that the fish stocks in the other accessible areas may become depleted, and those areas may become overcrowded with a negative effect on the recreational fishing experience.
284. Commissioner Olney has remarked upon that potential effect upon recreational fishing in particular, so that detriment ought to be measured ‘on a Territory scale’ rather than a purely local basis. See, for example, in the Lower Roper River Land Claim (No. 70) Report No. 65 (7 March 2003) at [112] and the McArthur River Region Land Claim (No. 184) Report No. 62 (15 March 2002) at [169]. The context of those remarks is that the Blue Mud Bay case, concerning the geographical extent of grants of land under the ALRA, was then on foot, having been commenced in 1997, and at least at first instance had been the subject of a decision: *Arnhemland Aboriginal Land Trust v Director of Fisheries (Northern Territory)* [2000] FCA 165. So it is not surprising that Commissioner Olney also commented that ultimately legislation might have to provide the solution to that perceived problem.
285. The topic was the subject of evidence through Mr Curnow. As a matter of common sense, the proposition which he put forward is understandable.
286. Mr Curnow has held his position since 2008, the year in which the High Court delivered the Blue Mud Bay decision. He has been directly involved in the dealings with the Northern Land Council over its consequences since then.
287. His statement of 21 June 2018 shows that both the Northern Territory and the Northern Land Council on behalf of traditional owners have conducted their discussions positively and in good faith. An overall mutually satisfactory Territory wide resolution has not been reached. Nevertheless, access for recreational fishers to seven areas of relevant Aboriginal land for a lengthy period has been procured. The recent press releases in November and December 2019 (MFI NT 20 and MFI NT 21) are relevant to the present state of affairs. There was a dispute about whether they should be admitted into evidence; I consider that they are relevant, and that their late production does not cause significant prejudice to any interested party. They will accordingly become Exhibits NT 20 and NT 21.
288. Mr Curnow’s statement also deals with cumulative detriment with the starting point that the primary objective of fisheries legislation is to ensure catches are sustainable, and are shared between various users of the resource. For that

purpose, knowledge of the status of fishery areas Territory-wide is obviously desirable. He did not claim that the relevant knowledge could not be procured, in the event of the claimed areas being granted to the traditional owners.

289. It is, however, said that displaced fishing activities by reason of reduced or removed fishing activities in one area may result in relocation or redistribution of fishing activities to another area or areas, and can impact on the marine environment, on affected fishers, and on other marine activities. He acknowledges that an objective analysis about the direct and cumulative impacts of changes to fishing access is difficult. That analysis would depend on the relative importance of the lost fishing grounds to those activities, and the distance to alternative grounds; he also refers to several other factors. He further says that the more specialised the operations impacted, the harder it is to displace those operations to other areas.
290. Those comments may be accepted. At [58] of that statement, there are six matters summarised where restrictions on current access and use in any one fishing area may cause a range of detriments. They overlap, or intersect, in some respects.
291. I have concluded that the closure of the fisheries in the claim areas (if that occurs and there is no permit system) will reduce the amenity and enjoyment of recreational fishers who presently use them. It is not apparent that that would also adversely affect 'commercial harvest and recreational values' more generally. It will displace some recreational fishing to other areas in the region, and may to some degree (which it is not possible to assess) cause some greater demand for fishing in other areas. Those who choose to fish elsewhere may then affect the profitability and amenity of other tourist operations elsewhere – by increased demand in those other locations – but in the case of recreational fishers their amenity may be reduced by the possibility of an increased density of fishers in other areas.
292. There is not sufficient objective analysis, or indeed any real factual foundation for such an analysis, to accept that to the extent that fishing activities are displaced to other areas, other recreational fishers will be disadvantaged in any material way.
293. The remaining two matters also overlap. It is said that the closing of a fishery 'potentially affects the sustainability and the management of the fishery in other areas' where access is maintained. And, it is also said, the greater number of the closed areas, the greater the effect on the remaining available areas for fishing.
294. Again, there is not sufficient objective analysis, or any factual findings for such analysis, to accept that that potential is a realistic one in relation to the grant of the claimed areas. Indeed, it has not been attempted. If there were any attempt to demonstrate that, it would need to take account of the available fisheries, including those secured by the seven agreements discussed above.

295. I did not find in Mr Curnow's evidence the 'tipping point' of tolerance, or a basis for concluding when or where the balancing of 'the Territory scale' should result in a conclusion that the detriment of precluding recreational fishing in one location by granting the relevant area to its traditional owners should outweigh the benefits of making the grant. More specifically, there is no basis for such a conclusion in relation to the potential closure of the fishing areas if the claim areas were granted to the traditional owners.
296. Whilst Mr Curnow's views are readily understood as a matter of overall common sense, they also present another issue for the Minister to address, even if there were evidence to support the claim of cumulative detriment. If that concept were applied logically, it may dictate that no one area of unalienated Crown land should be granted to the traditional owners, to the extent that included fishing areas for recreational fishers, because it would entitle the traditional owners to close that fishing area. To use the word used in the submissions, any such closure would potentially affect the sustainability and the management of the fishery in other areas. If that were right, it would appear to subvert the intention of the ALRA, and simply give priority to the interests of recreational fishers to access unalienated Crown lands of that character over those of the traditional owners.
297. It may also be observed that it is not apparent that the capacity of the Northern Territory to manage fishery areas would be diminished by the grant of the claimed areas. It will still monitor fishing stock and permit or control fishery use in that regard.
298. The evidence did not show, by reference to earlier decisions of the Minister to grant land to its traditional owners under the ALRA, that there had been a material shift of particular groups of recreational fishers from the particular relevant watercourses to any other specific watercourse or, importantly, the extent to which such a shift took place. There may be other reasons, unrelated to land grants under the ALRA, which explain a concentration of fishing in certain areas. The Northern Land Council in its submissions referred to the Northern Territory, as a matter of policy choice, having closed certain fisheries; examples proffered included seasonal closure under the Daly River Fish Management Zone, and in relation to commercial fishing a number of closed areas.
299. Accordingly, although I do not have to reach a formal conclusion on the issue, I do not wish to be taken as acceding to the comments of Commissioner Olney about the need, potentially, to consider a 'Territory scale' detriment.

300. Apart from the comments already made, a further reason for that hesitation is that it would not be an obvious intention of the ALRA that, progressively as grants of land are made to the traditional owners under the ALRA, the Minister's decision whether to make a grant should or might become progressively less likely on the basis of prior grants. It would obviously be unfair to the present claimants, and other subsequent claimants, if the Minister's discretion was to be exercised by reference to the number or terms of earlier grants. That would imply a legislative intention of saying that, notwithstanding the recommendation of the Commissioner, the Minister might decide not to make a grant of certain land when a certain number of grants of unalienated Crown land with particular characteristics have been made. There is no provision of the ALRA which would appear to justify a 'first come, first served' criterion in deciding whether to make a grant of the claimed land in particular claims. But that would be the effect of the 'tipping point' contention, if it were applied to the present claims so as to decline to grant them by reason of cumulative detriment.
301. Another reason is that the terms of section 50(3)(b) and (c) suggest a local focus. In subclause (c) the relevant pattern of land usage is regional, not Territory wide. Although subclause (b) is not so expressed, it would be surprising if the reference to 'persons or communities' was intended to have Territory-wide scope as opposed to regional scope. There is no apparent reason why a Territory-wide scope for identifying detriment should have been chosen; and if it were, why different wording was not used to make that plain. The concept of regional patterns of land usage seems to have a wider geographical scope than 'persons or communities' affected by the potential grant.
302. Ultimately, of course, the decision on such matters is for the Minister.
303. In the present circumstances, it may well be unnecessary for the Minister to have to consider such matters. I have found that there would be a significant detriment to recreational fishers, largely but not exclusively fishers from within the region, if the lands claimed were granted to the traditional owners through a Land Trust or Land Trusts. I have also noted that the Northern Land Council proposes a Territory wide permit system to apply to recreational fishers with certain characteristics. And I have observed that the Minister, when considering that detriment, might take the view that the establishment of such a permit system would alleviate the detriment to the extent that the lands claimed should be granted in any event (and of course, subject to the Minister's consideration of other detriment and patterns of land usage).

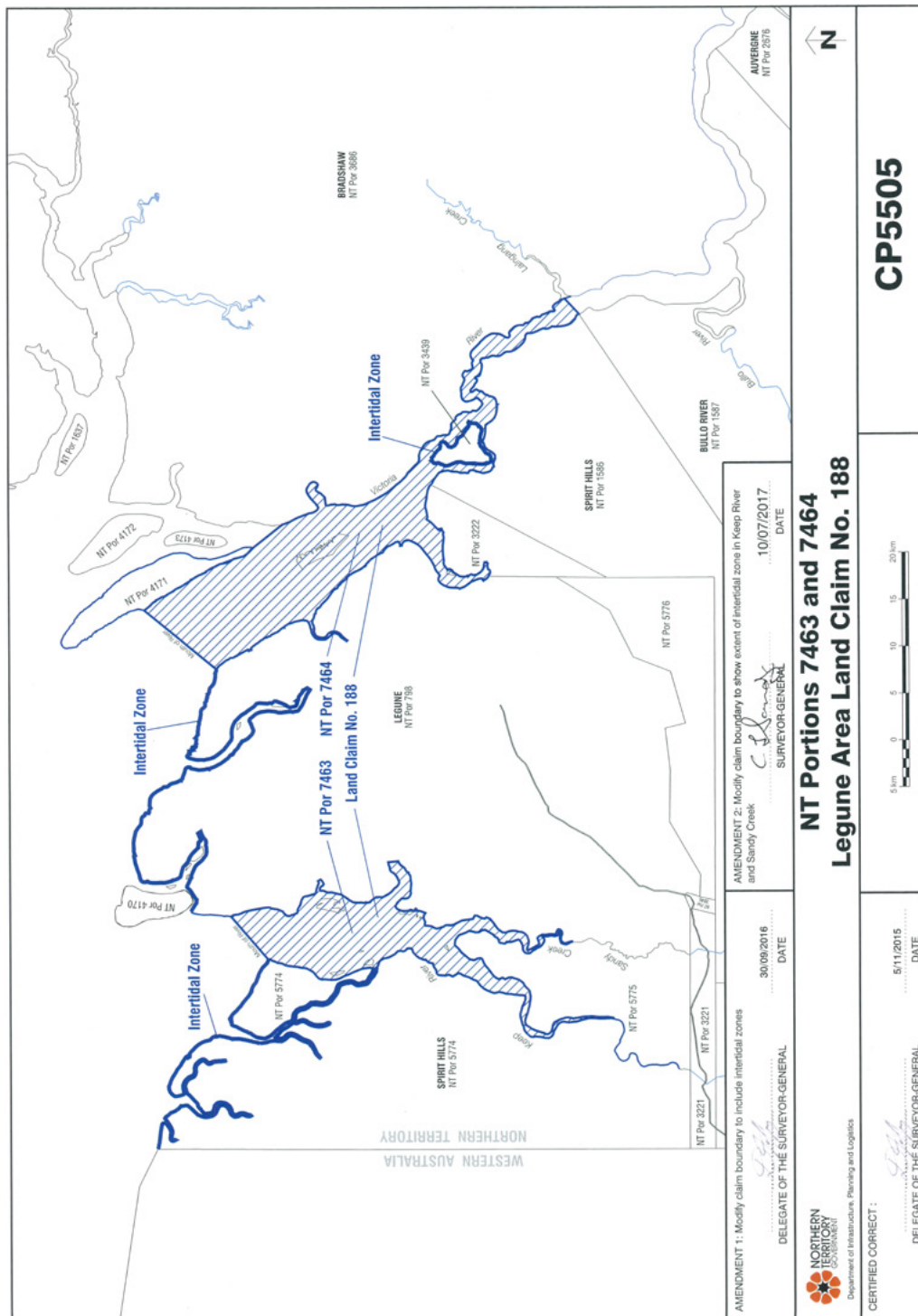


## 5. CONCLUSION

304. In accordance with my functions under section 50 of the ALRA, I have ascertained that, applications having been made by the Northern Land Council on behalf of Aboriginals claiming to have a traditional land claim to an area of land, being unalienated Crown land, those Aboriginals are the traditional Aboriginal owners of that land.
305. The evidence clearly shows that each of claim groups constitute a local descent group within the meaning of the ALRA. That is, each of these groups has common spiritual affiliations to sites on the land, being affiliations that place that group under a primary spiritual responsibility for the relevant sites and land. Each of the groups are also entitled by Aboriginal tradition to forage as of right over that land.
306. As I have detailed above, there are ten such groups stemming from three distinct language families: Gajirrabeng, Jaminjung (including the related Nungali-Ngaliwurru), and Ngarinyman. Each group maintains a strong spiritual life through, for example, continuing practice of rituals and observance of traditional procedures. Knowledge of associated Dreamings is evident and is passed from generation to generation as a matter of priority. While access to the claim area is restricted by weather and other matters, each group exercises rights to forage in respect of their relevant areas when possible.
307. For these reasons, I recommend that the whole of the land claimed in both the Legune Area LC and the Gregory NP/Victoria River LC, described at [36] and [41] respectively in 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. The evidence shows that these people are the traditional Aboriginal owners of that land.
308. A list of the presently identified persons for whom the land may be held is contained in Exhibits A6 and A6(A): it is not necessary to repeat it. Obviously, it will not be a fixed list, however this is a matter for the Northern Land Council.
309. 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 the Legune Area LC and the Gregory NP/Victoria River LC being acceded to. On the evidence, that attachment is demonstrably substantial: it would be wrong to conclude otherwise. There are also a significant number of others who would be advantaged by a grant of land.

310. I have also commented upon submissions relating to sections 50(3)(b) and 50(3)(c), that is, matters of detriment and effects on patterns of land usage. In accordance with established principles, it is for the Minister to consider those matters in deciding whether to make a grant of land trust as a result of this report.
311. For the sake of completeness, I again note that there is no need for me to comment upon sections 50(3)(d) and 50(4) in respect of either of these claims.

# ANNEXURE A: Exhibit NT1 CP5505



Source: Northern Territory Government

# ANNEXURE B: PROCEDURAL MATTERS

## 1. Legal representatives

### Party represented

### Names of representatives

For the claimants:

Mr P Willis SC, Mr D Avery  
(Northern Land Council)

For the Northern Territory:

Mr T Pauling QC, Mr P Walsh, Mr T Anderson,  
and Mr L Peattie, and Ms K Gatis (Solicitor for the  
Northern Territory)

For Commonwealth of Australia, Department  
of Defence:

Mr R Levy, Ms C He, Ms S Davis, Ms E Gallagher,  
Ms D Boyce, Mr G Kennedy and Mr A Gerrard  
(Australian Government Solicitor)

For the Western Australia Department of State  
Development / Department of Primary Industries  
and Regional Development:

Mr A Rorrison (State Solicitor’s Office)

For Consolidated Pastoral Company Pty Ltd:

Ms E Farnell (Ward Keller)

For Legune Land Pty Ltd:

Mr N Johansen (Cozens Johansen Lawyers)

For Amateur Fishermen’s Association NT:

Mr B Torgan (Ward Keller)

For Timber Creek Hotel:

Mr M Salerno (Salerno Law)

For Victoria River Cruises:

Mr D Walters (Dylan Walters Lawyer)

## 2. Anthropologists

### Party represented

### Names of anthropologists

For the claimants:

Mr John Laurence (Northern Land Council)

For the Northern Territory:

Professor Basil Sansom

### 3. List of Witnesses

<b>Type of evidence</b>	<b>Names of witnesses</b>	
Traditional Aboriginal Ownership (at Timber Creek):	Jerry Jones Chris Griffiths Cleon Griffiths Roy Roberts Chris Jinjair Luke Jinjair Ray Clyden Maurice Simon Larry Johns	Alan Griffiths Kim Griffiths Laurie Roberts Kelly Jinjair Paul Jinjair Smiler Lakut Reggie Smiler Scotty Raymond Other traditional owners
Detriment:	Ms Valerie Smith (Department of Tourism and Culture) Mr Ian Curnow (NT Fisheries, Department of Primary Industry and Resources) Ms Victoria Jackson (Department of Primary Industry and Resources) Ms Tania Moloney (Department of Environment and Natural Resources) Ms Katherine Winchester (NT Seafood Council) Mr David Ciaravolo (Amateur Fishermen’s Association NT) Mr Troy Setter (Consolidated Pastoral Company Pty Ltd) Ms Fiona McDonald (Timber Creek Hotel) Ms Loraine Corowa (Department of Primary Industry and Resources) Sergeant John Dennien Ms Sarah Kerin (Parks and Wildlife Commission) Mr Chris Mitchell (Seafarms Pty Ltd) Mr Cameron Rasheed (adopted the statement of Mr Brian McClean, Legune Station) Mr Kane Bowden (Northern Land Council) Mr Terry Downs (Recreational fisher)	
Jurisdictional evidence (mouth of the river issue):	Professor Stuart Kaye Mr Mark Alcock (Geoscience Australia) Mr Robert Sarib (Acting Surveyor-General of the NT) Mr Simon Watkinson (Northern Land Council)	

## 4. Exhibits

<b>Exhibit reference</b>	<b>Tendering Party</b>
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
CW	Tendered on behalf of the Commonwealth Department of Defence

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

<b>Exhibit No.</b>	<b>Restricted</b>	<b>Title of exhibit</b>
A1		Report on Status of Title
A2	R	Anthropological Report by John Laurence
A3	R	Sacred Site Map for Claim 188
A4	R	Sacred Site Map for Claim 167
A5	R	Site Register for Claims 188 and 167
A6	R	Genealogies for Claims 188 and 167
A7	R	Claimants Personal Particulars
A2 - A	R	Response to a letter from the Solicitor for the Northern Territory
A2 - B	R	Madbag Group – Exercise of Primary Spiritual Responsibility
A6 - A	R	Madbag Group – Amended Genealogy
A8		Summary of Site Visit to Big Horse Creek and Bradshaw Bridge, conducted on 17 October 2016 and flight over the land claim area on 18 October 2016
A9		National Recreational Fishing Survey: The Northern Territory, by A.P.M. Coleman, dated February 2004
A10		Dhimurru Aboriginal Corporation General Permit Application Form and Central Land Council Transit Permit Application Form
A11		Judbarra / Gregory National Park and Gregory's Tree Historical Reserve Joint Management Plan, dated June 2011
A12		Survey of Recreational Fishing in the Northern Territory 2009–2010
A13		Letter from the NLC to the Aboriginal Land Commissioner dated 10 March 2017 with enclosures
A14		Map - AUS 725 (Amended)
A15		Kaye Figure 10 Adjusted
A16		Kaye Figure 11 Adjusted
A17		Map of Australia – Straight baselines and some bay-closing lines

<b>Exhibit No.</b>	<b>Restricted</b>	<b>Title of exhibit</b>
A18		Map of Fitzmaurice River Landward Extent
A19		Alcock Figure 1 Adjusted
A20		Alcock Figure 4 Adjusted
A21		Alcock Figure 9 Adjusted
A22		Resume of Simon Watkinson
A23		AUS 725 Tidal Map (large size)
A24		AUS 316 Tidal Map
A25		International Hydrographic Organisation Regulations for International Charts and Chart Specifications, September 2013
MFI A26		Witness statement of David Avery dated 22 September 2017 with annexures
A27		Intertidal Extents Model Product Description dated 1 June 2016
A28		Remote Sensing of Environment dated 2017
A29		Map entitled "Sea Country Access Arrangements in the Northern Land Council Region"
A30		NLC Information Sheet "Fishing Access to Tidal Waters on Aboriginal Land" dated 16 November 2017
A31		Public Notice published in the Northern Territory News of 17 December 2017 entitled 'Access to Tidal Waters on Aboriginal Land in the NLC Region'
A32		Six redacted settlement deeds with accompanying licence agreements between the Northern Territory, the NLC and the Daly River/Port Keats Aboriginal Land Trust – Anson Bay area; Daly River/Port Keats Aboriginal Land Trust – Port Keats area; Malak Malak Aboriginal Land Trust; Narwinbi, Wurralibi and Wurralibi (No. 2) Aboriginal Land Trusts; Arnhem Land Aboriginal Land Trust – Nhulunbuy area; Arnhem Land Aboriginal Land Trust – Murganella area
A33		Recreational Fishing Development Plan 2012 to 2022 of the Northern Territory Government published in November 2012
A34		Map entitled "New Commercial Barramundi Fishery Closure Lines" published by the Northern Territory in 2013
A35		Document entitled "'Million Dollar Fish' Industry Fact Sheet published by Tourism Northern Territory 2017
A36		Northern Territory Seafood Council document "NT Barramundi Fishery" presented at a meeting in Maningrida in February 2018.
A37		Statement of Kane Bowden dated 20 May 2018
NT1		CP5505 being NT Portions 7463 and 7464, in relation to claim 188 dated 5.11.2015

<b>Exhibit No.</b>	<b>Restricted</b>	<b>Title of exhibit</b>
NT2		CP5506 being NT Portion 7465 in relation to claim 167 dated 5 November 2015
NT3		CP5594 Depicting Boundaries of Adjoining Parcels to Land Claims 167 and 188, dated 3 May 2017
NT3A		Three Plans marked S.2001/176, S. 2005/193A and S.2005/193B
NT4		Three documents being Record of Administrative Interests and Information concerning NT Portions 7463, 7464, 7465
NT5		Statement of Lorraine Corrowa with attachments dated 24 February 2017
NT6		Kimberley Agricultural Investment Pty Ltd Building the Ord Document
NT7		Statement of Sergeant Jonathan Dennien, dated 7 September 2016
NT8		Statement of Sarah Kerin, dated 24 February 2017
NT9		Statement of Victoria Jackson, dated 24 February 2017
NT10		Statement of Ian Arthur Curnow, dated 24 February 2017
NT11		Statement of Ian Arthur Curnow, dated 4 August 2017
NT12		Statement of Ian Arthur Curnow, dated 9 August 2017
NT13		Statement of Dick Pasfield, dated 9 February 2017
NT14		Statement of Damian Thomas dated 9 February 2017
NT15		Statement of Ms Katherine Winchester dated 24 February 2017
NT16		Statement of Stuart Kaye and annexures dated 2 November 2017
NT17		Statement of Robert Sarib dated 8 September 2017
NT18		Statement Robert Ian Sarib dated 8 November 2017 excluding paragraphs 28-44
NT19		Statement of Ian Curnow dated 26 October 2017 and its annexures
NT20		Media Release Entitled Blue Mud Bay Waiver Extension dated 15 November 2018
NT21		Media Release Entitled Intertidal Zone Permit Waiver Extended for Six Months dated 4 December 2018
R1		Plan of Auvergne Station produced by Mr Setter dated 15 April 2017
R2		Statement of Troy Robert Setter dated 28 February 2017
R3		Statement of David Angelo Ciaravolo dated 6 March 2017
R4		Outline of detriment issues by the Amateur Fishermen's Association of NT Inc. of 23 paragraphs excluding paragraph 7 submitted with letter dated 21 November 2016



<b>Exhibit No.</b>	<b>Restricted</b>	<b>Title of exhibit</b>
R5		Statement / Letter – Mr Chris Mitchell, dated 13 October 2016 together with attachments
R6		Map entitled “Project Sea Dragon Feasibility Study Masterplan and Overall Plans and Layout Plan”
R7		Statement of Brian McClean, dated 23 February 2017 adopted as adopted by Cameron Rasheed
R8		Statement of Tracey Hayes dated 27 February 2017
R9		Notice of Detriment from Neville Fogarty dated 7 November 2016
R10		Notice of Interest from Neville Fogarty dated 2 August 2016
R11		Email from Dylan Waters dated 31 August 2016 enclosing some photographs.
R12		Submission of the Department of Defence dated 23 November 2016
R13		Submission of the Department of Defence dated 6 March 2017
R14		Submissions of State Solicitor’s Office on behalf of Western Australian Department of State Development dated 14 November 2016
R15		Paragraphs 1 – 4 and 15 of the statement of David Ciaravolo in relation to the Fitzmaurice River Region Land Claim No. 189 dated 11 September 2017
R16		Statement of Katherine Winchester dated 20 June 2018
CW1		Statement of Mark Alcock together with annexures dated 18 January 2018
CW2		Map – Low tide overview Figure 12
CW3		Map – Low tide overview Figure 13
CW4		Map – Low tide overview Figure 14

# ANNEXURE C: LIST OF CLAIMANTS

## Garijirrabeng-Jarrajarany Estate

### Names of claimants

Pamela Simon  
Pauline  
Peter Charlie Mulligan  
May Simon Nyumanig  
Maurice Simon Thalawuk  
Maureen Hall Mandiyab  
Mary Simon  
Wendy Simon Niye/Gumboi  
Maureen Hall  
Johnny Clyden  
Ray Clyden  
Maxine Clyden  
Desmond Clyden  
Marcellino Jijikimin  
Bernadette Simon Kunyirri  
Marcus Simon Marrde  
Maurice (Dooley) Simoon Wunmirr  
Davis Simon Doitjibirr  
Desiree Simon Gundatj  
Janelle Nanamurr  
Sophia Simon Nanagin  
Malcolm Simon Doitbirr  
Veronica Simon Garriningi  
Bevan Simon Balgarri Barrkum  
Anthanathious Yinmeli  
Joeline  
Theodore Wunumul  
Larissa Nuri Nuri  
Narissa Korunga  
Mirriam Mapa  
Conceota Damalu  
Thamisina Thumedabirr  
Marissa Kunanggurr  
Lazarus Nathinga  
Tarika Nimbuk  
Benedict Thuthawa  
Johnny Junior  
Jessie Wurrmi  
Leonidas  
Lilly  
Sheba Wilson  
Raylene

### Names of claimants

Kirsten  
Cheyenne  
Ciara  
Memphis  
Dolores  
Simone  
Qanisha  
Chrishana  
Toby  
Dreylin Munirr  
Garth Muntagan  
Anjelia Munguwa  
Hamish Gujiyin  
Simon Doomoo  
Grace Nyitbarriya  
Ahkeela Wuntunga  
Hartina  
Christine  
Myhtia  
Andrea  
Ashley Lingyirrin  
Trayson Carlton-Simon Malakunda  
Kerrissa Carlton Kuwuyen  
Quincy-Lee  
McKailer  
Patricia  
Abraham Dalowuk  
Agnus Yambul  
Joseph  
Montannah  
Elizabeth Simon Kulkut  
Cornelius Milan  
Gordon Muwin  
Vincent

## **Gajirrabeng-Wandanybang Estate**

### **Names of claimants**

Vernon Gerrard  
Noreen Morton  
Mervyn Gerrard  
Mark Aldus  
Doreen Gerrard  
Carol Hapke  
Helen Gerrard  
Evonne Gerrard  
Gary Gerrard  
Colleen Gerrard  
Alfie Jnr Gerrard  
Warren Gerrard  
Terrence Gerrard  
Marcia Gerrard  
Harold Gerrard  
Ruth Gerrard  
Dianne Gerrard  
Ralph Gerrard  
Richard Gerrard  
Merle Carter  
Owen Birch  
Donna Birch  
Rhonda Birch  
Ann Birch  
Victor Carlton  
Danny Morton  
Joyce Morton  
Verna Morton  
Jennifer Wilson  
Robert Wilson  
Richard Jnr Wilson  
Leslie Wilson  
Michael Wilson  
Steven Wilson  
Ivan Wilson  
Harold Wilson  
Florence Bin Omar  
Elizabeth Chandri  
Leonie Smith  
Rosemary Smith  
Damien Smith  
Julie Johnston  
Roseanne Smith  
Edna Hester  
Jeremiah Hester  
Arthur Hester  
Many Ah Wan  
Christine Kelly  
Josie Kelly

### **Names of claimants**

Annette Jelly  
Maxine Carlton  
Thomas Carlton  
Francis Gerrard  
Gareth Wunanggu  
Lucy Wunanggu  
Louise Bray  
Rebecca Bray  
Tamara Bray  
Fiona Reid  
Ruben Reid  
Gordon "Andy" Reid  
Robert McLean  
Dierdre McLean  
Melissa McLean  
Kirstie McLean  
Alisha McLean  
Gary (Jnr) Gerrard  
Nikita Gerrard  
Kayleen Gerrard  
Anthony Webster  
Vernon Gerrard  
Vanessa Gerrard  
Terry-Lee Gerrard  
Alfie Jnr (3) Gerrard  
Christopher "Stumpy" Gerrard  
Crystal Gerrard  
Dhene Gerrard  
Julian Gerrard  
Corina Gerrard  
Terrence (Jnr) Gerrard  
Shelley Gerrard  
Danielle Gerrard  
Mervyn Roberts  
Karen Roberts  
Joshua Roberts  
Megan Riley  
Jeremiah Gerrard  
Emily Gerrard  
Douglas Gerrard  
Diane Gerrard  
Ralph (Jnr) Gerrard  
Rosie Gerrard  
Winston Gerrard  
Andrew Clark  
Steven Clark  
Sonia Clark  
Dy Gerrard  
Lawrence (Jnr) Carter

**Names of claimants**

Kathy Carter  
Tania Carter  
Lyndon Carter  
Leslie Birch  
Anna Birch  
Hank Birch  
Collette Birch  
Bentley Birch  
Jason Bridge  
Ronal Bridge  
Raymond Bridge  
Chantel Birch  
Shari Birch  
Joseph Bin Swarmi  
Christopher Bin Swarmi  
Iren Rose Bin Swarmi  
Adam Hannigan  
Ben Hannigan  
Carissa Birch  
Neville Topless  
Courtney Topless  
Blake Topless  
Shanley Topless  
Jamie Birch  
Jenna Birch  
Helen Carlton  
Erica Carlton  
Lauretta Carlton  
Marlene Carlton  
Shannon Carlton  
Joyce Carlton  
Dennis Morton  
Donald Morton  
Bradley Tigen  
Clive (Jnr) Tomlinson  
Wayne Winton  
Mary Lou Winton  
Ricki Morton  
Codie Morton  
Sandy Morton  
Danielle Frank  
Richard Wilson  
Thomas Wilson  
Jordan Bin Omar  
Rambo Bin Omar  
Resanthia Bin Omar  
Amelia Bin Omar  
Herman bin Omar  
Tina Wilson  
Scott Wilson  
Sharona Wilson  
Jennifer Wilson

**Names of claimants**

Shirley Wilson  
Leslie "Harry" Wilson  
Ivan Wilson  
Michael Wilson  
Jordan Wilson  
Meegan Wilson  
Pepita Wilson  
Michael (Jnr) Wilson  
Terrence Wilson  
Lawrence Wilson  
Robert Wilson  
Tyzel Wilson  
Zammielee Wilson  
Teziko Wilson  
Keera Wilson  
Infant female Wilson  
Ivan (jnr) Wilson  
Kaleesha Wilson  
Kiana Wilson  
Amanda Wilson  
Bodine Wilson  
Clay Wilson  
Ashley Bin Omar  
Nigel Bin Omar  
Like Bin Omar  
Marcus Bin Omar  
Daniel Bin Omar  
Rebecca Chandri  
William Chandri  
Edward Smith  
Nikita Smith  
Rachael Smith  
Neveron Smith  
Bernice Smith  
Kathleen Smith  
Margaret Smith  
Walter Smith  
Bernadette Hester  
Keesha Hester  
Natalia Innvalong  
Debra Hester  
Donald Hester  
Tracey Alec  
Kirsten Jessell  
Walter Ah Wan  
Mengel Brendon

## **Jaminjung-Dalunggag Estate**

### **Names of claimants**

Isa Pretlove Winggal/Jargutjing  
Amy Johnson  
Sarah Bitting Yetbarriya  
Nacy Bitting Wanjaying  
Bobby Bugindja  
Monica Bernard  
Daisy Pretlove Winggal  
Madeleine Brockman  
Jonah Johnson  
Ernest Daylight  
Rosemary  
Helena Anne Bernard  
Sebastian Nganbag/Jinjair  
Lucia Thoorbiliny/Jinjair  
Christopher Ngaminiyin/Jinjair  
Roy Nguthul/Jinjair  
Roseanne Ngarjinthug  
Christina Jenhmele  
Sylvia Gidehnu  
Geraldine Brandy  
Noeline Benning  
Cheryl Cox  
Helena Cox  
Gilbert Cox  
Paul Cox  
Eric Cox  
Edmond Cox  
Thalia  
Divina  
Ashley Bernard-Dixon  
Kyle Bernard-Dixon

### **Names of claimants**

Tyisha  
Zarima  
Linden  
Joeline  
Rosita  
Sally  
William  
Jordan  
Jessica  
Robert  
Brett  
Alisha  
Izalia  
Tashaya  
Emily  
Kitanah  
Ezraya  
Ezra  
Lorry  
Tyrone  
Heze  
Shante  
D'Andre  
Camilo  
Eric  
Geraldine (Tayah)  
Gilbert  
Kassaria  
Edmond Jnr  
Ava

## **Jaminjung-Gulu Gulu Estate**

### **Names of claimants**

Finnigan Quilty  
Omar Baker Joe Kanini  
Terry Brown  
Patsy Brown  
Lizzie Brown  
Polly Brown  
Sandra Brown  
Ross Brown

### **Names of claimants**

Josie Jones  
Rosemary  
Maxie  
Sarah  
Richard  
Kieth Campbell  
Jane Raymond

## **Jaminjung-Kimul Estate**

### **Names of claimants**

Nancy Bitting Wanjaying  
Sarah Bitting Yetbarriya  
Bobby Bugindja  
Tommy Dodd Bungun Narraguname  
Kathleen Dodd Mayiwa  
Basil Dodd  
May Dodd Gubungga  
Lisa Campbell  
Charlie James  
Rodger James  
Sammy Freddy  
Isabelle James  
Lynette James  
Eileen Huddleston  
Shirley Long  
Amy Long  
Corlene Long  
Myrtle Long  
David Long  
Leslie Long  
Donald McDonald  
Jamie McDonald  
Margaret McDonald  
Betty McDonald  
Rita McDonald  
Shirley McDonald  
Scotty Raymond  
Nancy Raymond  
Joy Raymond  
Pauline Raymond  
Antony Raymond  
Gordon Raymond  
Kevin Raymond  
Susan Raymond  
Raylene Raymond  
Joy Raymond  
Warren Raymond

### **Names of claimants**

David Allyson  
Theresa Raymond Walinya  
Maxy Allyson  
Kenn y Allyson  
May Rosas  
Ernest Daylight  
Rosemary  
Cathy Berry  
Patrick Carlton  
Annistacia Carlton  
Terrance Carlton  
Clifford Carlton  
Suzanne Carlton  
Linton Carlton  
Leslie Dodd  
Celestine Dodd  
Suzanne Dodd  
Janice Dodd  
Deborah Dodd  
Gladys Dodd  
Mary Mackillop  
Loretta  
Bernadette  
Leslie John  
Johnathan Dodd  
Linton Raymond Marang

# Jaminjung-Madbag Estate

## Names of claimants

Tracey Mininja  
Mary Minija  
Isa Pretlove Winggal  
Warren Raymond  
Raylene Raymond  
Joyce Raymond  
Susan Raymond  
Richard Raymond  
Rodney Raymond  
Kalpa  
Karen Wandarray  
Harry Gudpurr Murunba  
Jerrem Maykat  
Samuel  
Esther  
Kevin  
Cicilia  
Lynette  
Andrea  
Jamie  
Monica Bernard Butbiyun  
Daisy Pretlove  
Madeleine Brockman  
Thomas Carlton Bilambi  
Maxine Carlton Tjirimaiyi  
Steven Presley  
David Presley  
Michael Presley  
Kenny Presley  
Jabba Presley  
Helena Anne Bernard Yamarung  
Sebastian Jinjair Nganbag  
Lucia Jinjair Thoorbiliny  
Christopher Jinjair Ngamiyin  
Roy Jinjair Nguthul  
Roseanne Ngarrjinthug  
Christina Jenhmele  
Sylvia Gidehnu  
Geraldine Brandy  
Neoline Benning  
Cheryl Cox  
Helena Cox  
Gilbert Cox  
Paul Cox  
Eric Cox  
Edmond Cox

## Names of claimants

Thalia  
Dividna  
Rhys Mugugunna  
Tyrone (Leeroy)  
Jelika Yutmariya  
Alex  
Ashley Bernard Dixon  
Kyle Bernard Dixon  
Tashaya  
Zarima  
Linden  
Joeline  
Rosita  
Sally  
William  
Jordan  
Robert  
Brett  
Alisha  
Izalia  
Tashaya  
Emily  
Kitanah  
Ezraya  
Ezra  
Lorry  
Tyrone (Leeroy)  
Heze  
Shante  
D'Andre  
Camilo  
Eric  
Geraldine (Tayah)  
Gilbert  
Kassria  
Edmond Jnr  
Gilbert  
Tennille  
Erol  
Edmond  
Shannon  
Kyre  
Ava

## **Ngarinyman-Wurlayi Estate**

### **Names of claimants**

Stan Long  
Raymond Long  
Doreen Long  
Elaine Long  
Ethel Long  
Francis Long  
Leslie Long  
Joanne  
Debroah  
Frances  
John Long  
Dennis Long  
Brian Long  
Dominc Long  
Laurie Roberts Martpikarri  
Nacny Roberts  
Josie Roberts  
Roy Roberts  
Kevin Woditj  
Pauline Woditj  
Jennifer Woditj  
Simone Woditj  
Jasmine Woditj  
Bronwyn Woditj  
Jimmy Jnr Long  
Ian Long  
Kareena Long  
Shadrach Long  
Meshach Long

### **Names of claimants**

Abednego Long  
Rachel Long  
Misharna Long  
Stan Long  
Ulana Long  
Clarissa Long  
Donita Long  
Trina Long  
Lionel Long  
Bradley Long  
Andy Long  
Miranda Long  
Jeremiah Long  
Robbie Long  
Brenda Long  
Sherina Long  
Damien Long  
Natasha Long  
Samuel Long  
Marcus Long  
Jadene Long  
Regina Long  
Moses Long  
Mary Long  
Kaylene Long  
Zaccaharaiah Long  
Jah Bundari  
Melinda Victor  
Katie Long



## **Nungali-Ngaliwurru-Magalamayi Estate**

### **Names of claimants**

Harold Griffiths Pilwi  
Celina Griffis  
Kenny Griffiths Kutjungmawuk  
Dora Griffiths Jirrkurri  
Jan Griffiths Gunjaka  
Christopher Griffiths Bugaga  
Kenneth George  
Lee George  
Domino Lansen  
Kevin Jr Lansen  
Natalie Brumby  
Kanitia  
Saberro Griffiths  
Ziattel Griffiths  
Aaron Griffiths Warjaka  
Kim Jalmin  
Kenny Jr Ward Wartart  
Ailin

### **Names of claimants**

Sonia Griffiths  
Shirese Griffiths  
Adam Griffiths Pitutuk  
Peter Jnr Griffiths Pujuk  
Allison Griffiths Walamawuk  
Kanethia Griffiths Pankaman  
Erinaous Griffiths Tjibi  
Cleont Hunter Mawutkiyak  
Delanye Hunter Ngugunyuk  
Larissa Hunter Mangkaman  
Kirsten Hunter Lamparangana  
Nathaniel Hunter Wilkajung  
Keeveena Hunter Wilingari  
Cathy Ward Dululuman  
Sydney Langayarri  
Chris Jnr  
Graham

## **Nungali-Ngaliwurru-Wantawul Estate**

### **Names of claimants**

Larry Johns Numgkawali Jargala  
Loraine Johns Bugati  
Leslie Johns  
Lynette Johns Jantijkari  
Maxine Johns  
Victor Johns  
Debbie Watts  
Annie Watts  
Shaun Watts  
Helen Watts  
Toni Watts  
Roay Harrington Niyawatpuru Wayiman  
Dorris Paddy Jigura  
Clara Paddy Ganyuk  
Jenny Paddy Pankaman  
Waly Paddy Yaylalamawuk  
Camilla Paddy Wulpinga  
Johnny Lurda Karanakpan  
David Lurda Jangalitj  
Joy Lurda Ngarakan  
Tim Konkerman  
Kassandra Morgan  
Krystal Morgan Minyunmit  
Christopher Morgan Kirrdirra  
Jacob Johns Ngulyu  
Kevin Johns

### **Names of claimants**

Keshia Isaac Ajak  
Devina Isaac Ajak  
Jasmin Isaac Ajak  
Jayden Isaac  
Jarrod Issac  
Anton William  
Acab William  
Roxanne Young  
Liam Young  
Myer Young  
Neil William  
Brittany William Gilmu  
Chad William Pilwini  
Lydia Wiolliam Yanmaok  
Shnelle Yanunmun  
Beatrice Jackie  
Justin Jackie  
Elizabeth Hackie  
Renalda Douglas  
Jed Douglas  
Samara Jackie  
Aaron Williams  
Glendel Nuggins  
Ron Campbell/Harrington Jarijkula  
Kerri Anne Campbell  
Roseanne Harrington Malalawala

**Names of claimants**

Leslie Jnr Johns  
 Matthew Johns  
 Peggy Johns  
 Narthier/Victor Daniel  
 Cecilia Johns  
 Michael Kaine Taylor  
 Callum Wade Taylor  
 Lauryn Betty Taylor  
 Dom  
 Ash  
 Nae  
 Philip  
 Kale  
 Jasmin Tate  
 Beccy Watts/Challenger  
 David Kemp  
 Bianca Watts  
 Bradley Watts  
 Ashley Watts  
 Graham Watts  
 Tiana Cooper  
 Debra Pepperil  
 Rina Kamaluk  
 Irene Ogilvy  
 Kalita McKeen Dunbar  
 Scarlett McKeen Tjanngarri  
 Sienna McKeen Gudarl  
 Kelsey Morgan  
 Shonice Morgan Warijingali  
 Nathaniel Morgan Randal Morgan  
 Kenneth Morgan Minbiya  
 Amber Morgan  
 Rohanna Morgan  
 Angela Morgan  
 Justine Johns  
 Darius Johns Miwut  
 Bonita Wurawura  
 Kimberly Duywardulan  
 Polly Anne William Narntawuk  
 Anthony William Yanbiari  
 Irene William Kimanjuk  
 David William Paranpuru  
 Alec Jackie Julunpul  
 Jeanie Jackie Wiyulu  
 Rita Jackie Lundu  
 Lorna Jackie Mayulu  
 Raymond Starlight Kulngayari  
 Renee March  
 Matthew March  
 Jenna March  
 Mary

**Names of claimants**

Timothy Harrington Yigaratpi  
 Veronica Harrington Linmurin  
 Valerie Harrington Majagan  
 Martina Harrington Lungan  
 Peter Harrington Winbilin  
 Paul Harrington Gawaratj  
 Renita Harrington Magunuk  
 Terry Hector Winpatigari Pitiari  
 Christella Yrirwula Kudipidi  
 Daniel Roberts Palinpalin  
 Joseph Roberts/Paddy Lalgurr  
 Mathalene Roberts Yanga/Marrarun  
 Magdalene Roberts Arbunguru  
 Dennis Lewis Niyawakari  
 Steven Lewis Kitilpa  
 Claude Lewis Yanpiyari  
 Annette Lewis Minyinit  
 Lewis Darryl Puljayinkari  
 Renelle Lewis Palganmawuk  
 Paddy Corey Ngangitjpuru  
 Paddy Jonah Pamitaola  
 Ross Paddy Ngalyu/Pinmayari  
 Shannon Paddy Jigapa/Garngu  
 Henry Paddy Tulmajki  
 Tina Ginigna  
 Gabriel Paddy Manapiti  
 Wayne Paddy Wijigari  
 Nathan Paddy Jutpara  
 Jayleen Anzac  
 Andrew Paddy Yaykatuk  
 Yvonne Paddy  
 Jonathan  
 James Dickson  
 Bernadette Nalja  
 Doneeta Jamauk  
 Kleon Wilfred  
 Terina Tibirin  
 Duncan Barrow  
 Donna  
 Sophia Lurda Child  
 Geraldine Lurda Child  
 Kelly Lurda Child  
 John Lurda Child  
 Richard Lurda Child  
 Derrick Snowy  
 Donna Snowy  
 Leon Jones Jamtitjkari

## **Nungali-Ngaliwurru-Wunjayi Estate**

### **Names of claimants**

Samuel Darby Manjayari  
Maureen Darby Nyamalu  
Darryl Darby Munjinkayi/Piliritj  
Sharon Darby Waringmawuk Tjirgarnarli  
Georgie Jones Talmuka  
Diana Darby  
Gwenta Darby  
Troy Darby  
Douglas Darby  
Bernadette Darby

### **Names of claimants**

Cheryldeen Campbell Yangarr  
Misana Campbell Injingali  
Douglas Dibalgari  
Tarinda Wirbangali  
Ruby  
Kira Darby  
Darrance Tingam  
Jodie Wayanmawak  
Toby

## **Nungali-Ngaliwurru-Yanturi Estate**

### **Names of claimants**

Eric Lewis Minpiya  
Patsy Smiler Kangyanga  
Eileen Smiler Kirnaya  
Duncan Smiler Payrow/Mirin  
Jerry Smiler Pijiwa  
Josephine Jones Tatpung  
Ralph Lewis Mutpuyula  
Clinton Lewis Njandang  
Delwyn Lewis Mawarli  
Mabel Daly Pilimangu/Miyamiya  
Colin Boxer Wayparanga  
Kim Harry Mapawun  
Julie Harry/Witijpuru Warijngali  
Margaret Lewis Yipiri/Putjululn  
Betty Smiler Yipit  
Philip McDonald Kataranyin  
Sammy McDonald Majukupy  
Rita McDonald Markuju  
Shirley McDonald Warmalun/Kunpirrinin  
Richard Bloomer  
Sandra Ngalkaritj  
Henry Lewis Julmatjki  
David  
Frankie Lewis Jnr Wumpulayt  
May Lewis Munmariya  
Kenneth Lewis Mapalankat  
Matthias Smiler Yanturi  
Rihanna Smiler Talmarang  
Dallas Smiler Nguntantal Kutantal  
Bruce Smiler Jinpuru  
Sheila Smiler Tarranga  
Lester Sandy  
Deborah Sandy

### **Names of claimants**

Irene Mambiuk  
Therese Parari  
Leroy Young  
Toya Young  
Nataiyis Wirlwalal  
Angela Jugurra  
Zebediah  
Elsie Anne  
Cody  
Todman Young Lanagayari  
Alina Young  
Baydel  
Monrel  
Harold  
Caroline Jones Jarwarilngarli  
Eileen Daly Liripin/Linja  
Patsy Daly Lawatpan/Junturrnali  
Rina Daly Yumputkari  
Julie Daly Palpayi  
Cedric Daly Panankura  
Darryl Daly Jarnpakari  
Richard Bloomer Kalnayeri  
Priscilla Rodney Majaju  
Nathaniel Slim Jatpirr  
Agnes Witijpuru Munmariya  
Dennis Lewis Niyawalkari  
Steven Lewis Kitilpa  
Claude Lewis Yanpiyari  
Annette Lewis Minyinit  
Darryl Lewis Puljayinkari  
Rennelle Lewis Palganmawuk  
Junior Smiler Wilipili  
Michael Smiler Yanyanung

**Names of claimants**

Julianne Sandy  
 Nancy  
 Barry  
 Georige Yukan  
 Henry Humbert Nangnayari  
 Denise Humbert Warrungnali  
 Trevor Smiler Winparikari/Tuwarki  
 Luke Smiler  
 Stephen Jones Yawunula/Janangu  
 Susan Jones Manyili/Marjagan  
 Christopher Jones Kimiliri/Kutiyari  
 Jerry Jones Jnr Yampara/Naja  
 Deborah Jones Wayitpingali  
 Lorraine Jones Pujatji Purrungurungali  
 Daniel Jones Mungkawali/Yiwarangana  
 Jonathan Jones Yijantan  
 Desmond Jones Jiminyi  
 Duane Hector Jones Kujolu  
 Carris Tones Talmuka  
 Shatrina Jones Brirnali  
 Marcia Jones Marringnali  
 Natasha Jones Wulima  
 Desley Jones  
 Donovan Jones Juluwal  
 Daniel Jones Wanditj  
 Christella Hector  
 Bronwyn  
 Chris Jnr Jones Yarunhyangbau  
 Savannah Jones Walamawuk  
 Wilton Jones Pimirl  
 Clifford Jones Windarl  
 Megan Jones Garaguman  
 Gabrielle  
 Leon Jones Jamtitjkari  
 Devin Jones Purinjit  
 Tarikka Jones Yirala/Turukuman  
 Susan Jones Yijunmalan  
 Kelvin Anzac Jones Wilbiyarri  
 Haidee Bautbarriya  
 Nickehsa Jones Pujira  
 Louanna Jones Nabidan  
 Cheyanne Wulamuj  
 Myra Jimbul Jimbul  
 Blair Manjarri/Tijawuk  
 Kurt Hector Yimankunyang  
 Russel Jnr Jones Winbillin  
 Hayden Jones Jabalauk  
 Ryan Jones Kumeyi  
 Keenan Jones Wajaga

**Names of claimants**

Reggie Smiler Wirnpilin/Wariuk  
 Matthew Smiler Talmuka  
 Diane Smiler Kulatiki  
 Francis Smiler Yiwarangana  
 Joanne McDonald Katilmun  
 Simon McDonald  
 Judy McDonald  
 Antina Paddy Gingina  
 Jaylene McDonald Marmunun  
 Rebecca Humbert Nungunyu  
 Timothy Humbert Tulumawuk/Dulungmauk  
 Leroy Humbert Wanmarugari  
 Cassandra Humbert Tulumawuk  
 Brendan Humbert Bangaman Malmayari  
 Dilena Humbert Ganyuk  
 Alicia Humbert Kuying  
 Tammy Humbert Jigura  
 Dyland Yalgu  
 Rikishia Lanianga  
 Elred Jones Manjiari  
 Trevor Jones Kalanji  
 Divina Jones Nyanbak  
 Shaun Tjimilin  
 Marcella Barndi  
 Stevena Moyanat  
 Joshua  
 Aquinas Jones Marnyi  
 Florence Jones Kirnirr  
 Cedric Jones Narpikawuk  
 Topsy  
 Tealisha Bulbayi  
 Queenisha Gudnarri/Wiligarri  
 Antonio Yungayarti  
 Quenith  
 Montianna Gungyimi  
 Catermole Yambunyi  
 Josiah Bulgi  
 McAlister Nunggurru  
 Alena Malina  
 Miranda Tadiyarri  
 Aquannett Nayitbayi  
 Wade  
 Alex  
 Joel Kulbitala  
 Latifa  
 Nathaniel Winkilman

## **Gajirrabeng-Gurrbijim Estate**

### **Names of claimants**

Maggie John Warrugut  
Pauline  
Peter Charlie Mulligan  
Joan Kudidjin  
Victor Carlton Yalmi  
Shirley  
Teddy Carlton Yambany/Winmirr/Ludpirr  
Barbara  
Herbert Anthony Yukmirr  
Sadie Anthony  
Kinervan Anthony  
Theresa Anthony  
Joseph Carlton  
Gail Carlton  
Elizabeth Carlton  
Joyce Carlton  
Kevin Thompson  
Jennifer Thompson  
Mary Ann Thompson  
Rupert Sadler  
Jimmy Paddy  
Johnny  
Nancy  
Daniella  
Daniel  
Timika  
William  
Talesha  
Rossie  
Shana  
Dinade  
Penelope Paddy  
Maryanne Paddy  
Joelene Riley Dalkbi

### **Names of claimants**

Charles Junior  
Joseph Riley Kutpirr  
Nikaya  
Malochai  
Quayrene  
Cyprus  
Santalia  
Rikita  
Milo  
Bevanesha  
Lindsay  
George  
Sarafina  
Laddie  
Pat  
Nadene  
Jordan  
Chelsea  
Crysthanina  
Kieran  
Charlise  
Whitney  
Katrina  
Milton  
Dorisina  
Javison  
Denise  
Sophilia  
Matthew Jnr  
Markquem  
Aliaquia  
Pavlich  
Kathesha

## **Gajirrabeng-Ngalingjarr Estate**

### **Names of claimants**

Margaret Biting  
Sarah Biting  
Patrick Biting Janggabugi  
Lindsay Biting  
George Biting  
Sarafina Biting  
Laddie Biting  
Patricia Biting  
Saeli Biting  
Michael Biting  
Rosie Saddler  
Mandy Little  
Trevor Little  
Charamaine Little  
Marietta Little  
Anna-Marie Little  
Victor Leering  
Douglas Tate  
Vivienne Bradshaw  
Janice Leering

### **Names of claimants**

Adrian Leering  
Johnno Leering  
Vincent Leering  
Lynette Leering  
Alice Leering  
Veronia Leering  
Lawrence Leering  
Michelle Leering  
Miriam Chungala  
Johnny Chungala  
Brian Leering  
Waylon Leering  
Brian Leering  
Pearl Leering  
Andrew Leering  
Laela Leering  
Jessica May  
Victoria May  
Andrea Barney  
Benjamin Barney

## **ANNEXURE D: REASONS FOR RULING – GREGORY NATIONAL PARK / VICTORIA RIVER LAND CLAIM (NO. 167), LEGUNE AREA LAND CLAIM (NO. 188), FITZMAURICE RIVER REGION LAND CLAIM (NO. 189)**

1. This ruling relates to the second of two issues concerning the geographical extent of the claims in each of the Legune Area Land Claim (No. 188) and the Gregory National Park/Victoria River Land Claim (No. 167), which were heard together, and the Fitzmaurice River Region Land Claim (No. 189). For convenience, I will call the two claims heard together the Legune LC and the other the Fitzmaurice LC. The particular issue relates to the geographical extent of the ‘beds and banks’ parts of the claimed areas.
2. It is an Annexure to the reports in relation to each of those land claims.
3. I have referred in each report to the first issue which arose in the course of each Inquiry about the geographical extent of the each of the land claims. In each instance, the Commonwealth and the Northern Territory argued that the claim as expressed was limited in its geographical extent by the use of the expression ‘mouth of the river’ or a like wording in each of the land claim applications. The geographical extent of the claim, by the use of such words, relevantly was said to be restricted to waters in the rivers landward of the ‘mouths’ of the three rivers, that is the Victoria River and the Keep River within the Legune LC and the Fitzmaurice River in the Fitzmaurice LC, as identified in the evidence called by the Northern Territory, and relied on by the Commonwealth. That line for each river was said to exclude inlets and estuaries. In each case it was at a line across the relevant watercourse some distance inland of the line drawn by the claimants in the marked area in the map as part of their original claims. In the case of the Fitzmaurice LC, that was a considerable distance inland from the area of that land claim as indicated by the rough map depicting its area. As indicated in the body of this report, I have rejected that contention in each instance.
4. That evidence as to where to locate the mouth of a river was given by Professor Stuart Kaye, a barrister and Director, Australian National Centre for Ocean Resources and Security, Innovation Campus, University of Wollongong. He said he was engaged to advise as to the legal principles arising from case law as to how to determine the location of a river mouth. He also was asked to apply those principles to identifying the location of the mouth of the Fitzmaurice River. In a proceeding in an Australian Court, that material would probably not have been admissible, although it may have been accepted as a submission. Nothing turns on that. For the purposes of this Inquiry, his written statement and his oral evidence was received. It provided an interesting and informative analysis of relevant judicial decisions, and how they might be applied to identifying the mouth of the river.

5. The Commonwealth called evidence from Mark Alcock, Director of the Maritime Jurisdiction Advice Section of Geoscience Australia. He has a Bachelor of Applied Science (Geology) and has a Graduate Diploma in Legal Studies (Environmental Law). He described his role as to determine at common law the location of the three rivers: the Fitzmaurice River, the Victoria River and the Keep River on the basis of the legal principles established by Professor Kaye. That is obviously, more accurately, to determine at common law the location of the mouth of the three rivers, as that is what he set out to do, and what Professor Kaye had addressed. He explained that Geoscience Australia and its antecedents have had the responsibility of determining the location of the territorial sea baseline and other geographic features relevant to offshore boundaries or boundaries over which the Australian Government has an interest.
6. The Northern Territory also called Robert Sarib, then Acting Surveyor-General of the Northern Territory. He is a licensed surveyor. His role is to provide advice to the Northern Territory Government relating to land survey boundaries and administration. He was asked by the Northern Territory to provide a statement in relation to the mouth of the Fitzmaurice River. His process included identification of, and reference to the earliest survey journals.
7. I note that Gary Willis, Hydrographer in the Water Resources Division of the Department of Environment and Natural Resources of the Northern Territory also gave evidence by a written statement. He identified a gauging station on the Fitzmaurice River at a site chosen to be just above the tidal reach of the sea upriver. It is also just upstream of the point where Alligator Creek flows into the northern side of the river. His evidence did not touch of the location of the mouth of the river.
8. As noted in the report, in respect of the first issue (identifying the area claimed in the initial application), it was then argued that the use of the words ‘mouth of the river’ in the initial application in each instance must have meant what those witnesses said was its mouth, rather than what was evident from the entirety of the application itself, including the rough map attached to and part of the original application. Put another way, that argument was: you have used the term ‘mouth of the river; we have said what is meant by ‘mouth’ of the river; therefore your claim is confined by our definition of that term and our identification of its location, rather than what you might have actually meant to convey by that term. I have rejected that contention.
9. The second issue was that each of the land claims, to the extent that they covered river waters seaward of the lines said to represent the mouths of the three rivers as identified by the three witness’ evidence (excluding Mr Willis), could not succeed because each of the claims was not to that extent made over unalienated Crown land in the Northern Territory. In short, it was said, such waters in the three rivers were beyond the jurisdiction of the Aboriginal Land Commissioner (the Commissioner)



to recommend a grant of that part of the claim areas because the waters in each of those three watercourses – using a neutral term – downstream from the defined and identified ‘mouth’ of each river was not over unalienated Crown land, and was not Crown Land, as those terms are defined in section 3 of the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) (ALRA). Relevantly, section 50(1)(a)(i) of the ALRA requires an application to have been made by Aboriginals claiming to have a traditional land claim to an area of land being unalienated Crown land, and the inquiry and report of the Commissioner to the Minister must be in relation to that land.

10. I reject the proposition put forward by the Commonwealth and the Northern Territory. The conclusion I have reached is that the land claimed (subject to the proper construction of the particular claims) in each of the land claims is not confined within the limits proposed as the ‘mouths’ of the three rivers by the evidence relied on by the Commonwealth and of the Northern Territory.
11. These are the reasons for that decision.
12. The instrument establishing the Northern Territory as part of South Australia set the western boundary of the Northern Territory as so much of the Colony formerly part of New South Wales as lies:

between the 129<sup>th</sup> and 138<sup>th</sup> degrees of east longitude together with the bays and gulfs therein, and all and every the Islands adjacent to any part of the mainland ...

See Letters Patent dated 6 July 1863, issued pursuant to section 2 of the *Australian Colonies Act 1861* (Imp), received by the Governor of South Australia on 9 September 1863. Relevantly, in the relevant geographical area being the south eastern area of the Joseph Bonaparte Gulf where the three rivers flow into that Gulf, the boundary of the Northern Territory is as described. There is nothing in either the *Northern Territory Surrender Act 1907* (SA) or the *Northern Territory Acceptance Act 1910* (Cth) (NT Acceptance Act) to change that position. In sections 5 and 4 of the respective Acts, the same description is used as in the Letters Patent.

13. It has been decided in the High Court decision in *Risk v Northern Territory of Australia* [2002] HCA 23; (2002) 210 CLR 392 (Risk HC) that, despite that description, the term ‘land in the Northern Territory’ used in the definition of Crown Land in section 3 of the ALRA does not extend below the low water mark of the coast. Land seaward of the low water mark is not ‘land in the Northern Territory’ and so cannot be unalienated Crown land available to be claimed under that ALRA.
14. The decision in Risk HC was said by the Commonwealth and by the Northern Territory to be a decision which effectively concludes the current issue in their favour. It is said that Risk HC must be taken as prohibiting claims ‘to seabed in estuaries, inlets or arms of the sea regardless of whether or not the seabed is

within a bay or gulf or can be said to be “landward of the low water mark of the coast” [a passage from the submission of the claimants] i.e. the estuary mouth’: see [62] of the written submission of the Commonwealth of 29 May 2018.

15. Of course, I must apply the decision of the High Court if it has that effect. It is therefore necessary to consider it carefully.
16. The High Court unanimously dismissed an appeal from the Full Court of the Federal Court of Australia. The plurality judgement (Gleeson CJ, Gaudron, Kirby and Hayne JJ) at [1] identified the central question in the appeal as being whether the seabed of bays or gulfs within the limits of the Northern Territory can be the subject of claim under the ALRA. Their Honours answered that question in the negative. Separate concurring judgements were delivered by McHugh, Gummow and Callinan JJ.
17. The issue in that case arose from the description of the claimed land as being ‘[a]ll 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’ where the Adelaide River runs into the sea and seawards of the low water mark of the seacoast of the mainland and a line across the points between the eastern and western banks of the Adelaide River where those banks meet the low water mark of ‘the seacoast of the mainland’: see the plurality judgment at [2]. On the northern side of the Adelaide River there had already been a grant of Aboriginal land under the ALRA to the traditional owners to that point, that is to the point where the northern bank of the Adelaide River met the seacoast. Paragraph [1] of the plurality judgment says that ‘The seabed of bays and gulfs within the limits of the Northern Territory cannot be the subject of a claim under the Land Rights Act’.
18. The description of the issue by the plurality indicates that the issue the Court addressed was to waters seaward of the low water mark, both along the coast and seawards of a line adjoining the headlands where the Adelaide River flowed into the sea.
19. To determine the significance of the decision in Risk HC to the current issue, it is noteworthy that the plurality at [8] observed of the land grants made under section 10 of the ALRA and scheduled under Schedule 1 to the ALRA:

Most of the areas in Sched 1 are on the mainland; some, however, relate to islands – the Arnhem Land Islands, Bathurst Island and Melville Island. Some of the mainland areas abut the coast and include rivers that enter the sea at the coast. There are therefore some parts of those areas that would be inundated permanently.
20. That general observation also indicates that the focus of the Court in Risk HC was not upon the issue which presently arises, but more generally upon the availability of lands seaward of the low water mark from the coastline to be the subject of a grant under the ALRA. It is consistent with that understanding that the High Court

did not need to query the fact that the ALRA in Schedule 1 uses the description of a straight line across ‘rivers, streams and estuaries’ that intersect the coast to define the area of a number of land grants made under section 10 as follows:

... a straight line joining the seaward extremity of each of the opposite banks of each of all intersecting rivers, streams and estuaries [intersecting the coast] so that the aforesaid boundary line shall follow that part [at] low water mark of each of the aforesaid intersecting, rivers, streams and estuaries.

21. Counsel for the claimants in each of the Legune LC and the Fitzmaurice LC pointed out that such a description appears in the boundaries of the grants known as the Arnhem Land (Islands) land grant, the Arnhem Land (Mainland) land grant, the Bathurst Island land grant, the Daly River land grant, the Melville Island land grant, and the Wagait land grant.
22. It is also indicative of the issue being addressed by the High Court that at [19] it focussed also on section 73(1)(d) of the ALRA providing for the Northern Territory to make laws ‘regulating or prohibiting the entry of persons into, or controlling fishing or other activities in, waters of the sea, including waters of the territorial sea of Australia, adjoining, and within 2 kilometres of Aboriginal land’.
23. The plurality at [20] remarked that the two features of the ALRA noted are the only explicit reference in the ALRA to ‘the sea or waters of the sea’.
24. As has arisen here, the Court then turned to the question of what constitutes ‘land in the Northern Territory’. In the case of Risk HC, at the Inquiry stage the Commissioner had not specifically addressed that issue, as the focus turned to whether the bed of any bays or gulfs of the mainland and of adjacent islands is ‘land in the Northern Territory’. Their Honours addressed the more general issue first.
25. It is not necessary to refer in detail to the sequential analysis of the plurality at [22]. Their Honours noted the terms of the NT Acceptance Act by which the Commonwealth assumed responsibility for the Territory from South Australia. From the definition of the Northern Territory in that enactment, the comment was made that the geographical limits of the Northern Territory ordinarily end at the low water mark: at [24], but so that within those limits there will be areas that are permanently inundated, and on the other hand there is no seabed within the Northern Territory, only the inter-tidal zone on the coast. Those observations were made in part because the NT Acceptance Act had defined the Northern Territory by specified latitude and longitudes, and had said that within that area it included ‘the bays and gulfs therein’.

26. The plurality said at [25] that there are at least three reasons why the ALRA referring to ‘land in the Northern Territory’ did not mean or include the seabed of bays or gulfs. First, there were textual indications in the ALRA itself. Second, that the nature of the interest which is granted to a Land Trust under the ALRA made such a meaning unlikely. And third, that the relevant extrinsic material and the legislative history behind the ALRA supported that conclusion. Those three matters were then addressed in detail.
27. In my view, the following section of the plurality judgment discussing those reasons does not indicate that the present issue was specifically a matter of decision, or indeed consideration. It is not necessary to refer sequentially to those reasons in detail. The reference to the extrinsic material included the Aboriginal Land Rights Commission Reports and the Aboriginal Land (Northern Territory) Bill 1975. They both referred to the prospect of Aboriginal land extending to two kilometres seaward of the low tide line of coastal waters. As is apparent, that was not provided for in the ALRA. That is, the fact that despite those references, the ALRA did not so provide was an indication that the ALRA gave a more confined meaning to the term ‘land in the Northern Territory’ than had been expressed in the NT Acceptance Act.
28. There is in the judgment of McHugh J a similar focus on the distinction between ‘land’ as ‘that solid portion of the earth’s surface above the low water mark of the sea surrounding the Northern Territory’, and the seabed: see at [60] and at [67]. And at [61], his Honour preserved that distinction between land on the one hand and waters of the sea and the seabed below the low water mark on the other.
29. Gummow J reached a similar conclusion. His Honour added at [94]:

It should be added that nothing decided by this litigation denies the efficacy of grants under the Act in respect of areas including rivers and estuaries. The determination by the Commissioner was not directed to such matters.
30. Callinan J also in a separate judgment reached the same conclusion. His Honour noted that the territorial limits of the Northern Territory extend to include bays and gulfs, by reason of the Letters Patent dated 6 July 1863 issued pursuant to section 2 of the *Australian Colonies Act 1861* (Imp), but that definition of the Northern Territory was not absorbed by the ALRA, which had a more confined concept of ‘land in the Northern Territory’. That more confined concept did not extend to ‘the claiming and granting of title to seawaters or the seabed beneath them’: see at [128].
31. Consequently, I do not accept the primary contention of the Commonwealth and of the Northern Territory that the decision in *Risk HC* necessarily determines that the ‘land in the Northern Territory’ available for claim does not include the waters of the three rivers landward of the coastal low tide line. In particular, I reject the proposition that the waters and beds and banks of the three rivers where they

are seaward of the point where the ‘mouth’ of each river has been fixed (by the evidence adduced by the Northern Territory referred to above) is excluded from ‘land in the Northern Territory’ as that term is used in the ALRA. The extent of the proposed exclusion includes waters in the three rivers which ultimately run into the sea and which are landward of the coastal low water line and the line drawn across headlands, including the exclusion of estuarine waters.

32. As the High Court in *Risk* HC said, the critical question is the meaning of the term ‘land in the Northern Territory’ in the ALRA. It does not include the bays and gulfs which might otherwise have been included, as the bays and gulfs within the latitude and longitude limits of the Northern Territory at the time of the original establishment of the Northern Territory and at the time of the NT Acceptance Act were by the relevant instruments included in the Northern Territory.
33. It is useful to recall the decision of the High Court in *New South Wales v Commonwealth* [1975] HCA 58; (1975) 135 CLR 337 (Seas and Submerged Lands case). It decided that the boundaries of the former colonies of Australia ended at the low water mark and that the colonies had no sovereign or proprietary interest in the territorial sea of Australia or in the seabed underlying the territorial sea seaward of the low water mark. The low water mark is the mean low water mark, excluding the highest and lowest monthly tides, and is not fixed by reference to the Lowest Astronomical Tide: see *Yarmirr v Northern Territory* (1998) 82 FCR 533.
34. In the well-known Blue Mud Bay case: *Northern Territory v Arnhem Land Aboriginal Land Trust* [2008] HCA 29; (2008) 236 CLR 24, the High Court decided that a fishing licence issued by the Northern Territory did not authorise the holder of the licence to fish in waters above or landward of the low water mark where there had been a grant of land to the Yolngu People under the ALRA (of course, through a Land Trust) which extended to the low watermark.
35. So the starting point for considering the proposition of the Commonwealth and of the Northern Territory is that ‘land’ under the ALRA includes or may include tidally affected areas, or the inter-tidal zone – the area of land between the high water mark and the low water mark along the coast line.
36. It is appropriate to recall that, in the reports in relation to the Legune LC and the Fitzmaurice LC, I have rejected the argument of the Commonwealth and of the Northern Territory that the use of the words ‘mouth of the river’ in the applications themselves either necessarily or actually confined the area claimed to that in the three rivers landward of the ‘mouth’ of each of the rivers as fixed by the expert evidence called by the Commonwealth and the Northern Territory. I have found, to the contrary, that the areas claimed included sections of the three rivers to the point where, in common parlance, they flowed into the Joseph Bonaparte Gulf.

37. As I have concluded in the Legune LC that there are traditional Aboriginal owners over the claimed area, including the beds and banks of the Keep River and of the Victoria River, the factual criteria for traditional Aboriginal ownership of those parts of the two rivers has been made out. Why then should there be an intention that no recommendation could be made, and no grant made, over those parts of the rivers and their banks, including their estuarine waters? As I noted, the Northern Territory until after the close of final submissions also accepted that there are traditional owners of the claimed areas, including the areas of the Victoria River and the Keep River which it now says are beyond the reach of the ALRA. In the case of the Fitzmaurice LC, I have also concluded that there are traditional owners of at least part of the areas of the Fitzmaurice River which it is said are beyond the reach of the ALRA. The fact that the relationship of Aboriginal traditional ownership exists is itself a good reason why the ALRA should not be so construed as to exclude it from the reach of the ALRA itself.
38. But, it was contended, the mouths of the three rivers were as fixed by that evidence so that the 'land in the Northern Territory' in the ALRA excluded those sections of the three rivers seaward of their defined 'mouth' in each instance. They were described as arms of the sea, or as estuaries, or as inlets of the sea so that they were excluded from the expression 'land in the Northern Territory' in the ALRA. As was accepted in the course of submissions, the consequence is that the areas of water extending inland some considerable distance from the Joseph Bonaparte Gulf, and being the tidal sections or much of the tidal sections of the Victoria River, the Keep River and the Fitzmaurice River, are either not part of the Northern Territory at any time from the original instrument establishing the Northern Territory, or are areas of the Northern Territory excluded from the expression 'land in the Northern Territory' in the ALRA. That would be equally true of other parts of the Northern Territory where extensive river systems flow into the sea.
39. Neither of those propositions can be discerned from, or supported by, the decision in Risk HC.
40. In short, in my view, the meaning of the term 'land in the Northern Territory' used in the definition of 'Crown land', in the context of the ALRA as a whole is not limited by the imposition of a definition of 'river mouth' or 'mouth of a river' by that evidence, and does not necessarily exclude waters, including estuarine waters, landward of the low water mark along the coast where the waters of a river flow into the sea. It then becomes a matter of evidence in each case as to whether estuarine waters and waters adjacent to tidal and mangrove flats within the low water mark of the coastline and across facing headlands or other physical features delineating the coastline are shown to be part of the land in the Northern Territory which has traditional Aboriginal owners. Obviously, the character of the estuarine and like waters, including whether they are always underwater at low tide and the character of the water flow in the vicinity will be relevant to whether the necessary ownership is established.

41. The ALRA in its terms and in the light of its background is clearly beneficial legislation. It is intended that, where there is unalienated Crown land in the Northern Territory, that land may be granted to the traditional Aboriginal owners. Part II provides for the establishment of Land Trusts to hold land for the traditional Aboriginals and to have ongoing responsibility for it. Its focus is the definition of ‘traditional Aboriginal owners’ in relation to land in section 3 of the ALRA as meaning:
- a local descent group of Aboriginals who:
    - (a) (a) have common spiritual affiliations to a site on the land, being affiliations that place the group under a primary spiritual responsibility for that site and for the land; and
    - (b) (b) are entitled by Aboriginal tradition to forage as of right over that land.
42. The effect of the ALRA was that, upon the establishment of the appropriate Land Trusts, very significant areas of Crown land in the Northern Territory were granted to Land Trusts by their scheduling under Schedule 1 to the ALRA pursuant to section 10 of the ALRA. Section 4 of the ALRA requires the Land Trusts to hold the land for the traditional Aboriginal owners. Many of those initial grants took effect upon the commencement of the ALRA. A number of those grants set out in Part 1 of Schedule 1 to the ALRA included the waters of rivers, streams and estuaries. I shall refer to those grants later in these reasons in more detail. That is referred to in Risk HC.
43. In addition, in respect of areas other than those originally scheduled, there was provision for claims to be made to the Commissioner under s 50 of the ALRA, and for the Commissioner after conducting an inquiry to report to the Minister whether there are traditional Aboriginal owners of the claimed areas. The focus of such claims is upon there being traditional Aboriginal owners of the claimed area of land in the Northern Territory, and relevantly that the claimed land be unalienated Crown land. The Minister may then make a decision under section 11 of the ALRA to recommend the Governor-General grant that area of land to a relevant Land Trust on behalf of the traditional Aboriginal owners. In making that decision, the Minister is obliged to have regard to the detriment which may be experienced by third party interests in the event of a grant. The topic of detriment is a matter upon which the Commissioner is obliged to report when making a recommendation to the Minister, by reason of section 50(3)(b) of the ALRA. The decision is then implemented, if it is to make a grant of the land to the traditional owners, by the Governor-General executing and delivering a deed of grant of an estate in fee simple to the relevant Land Trust.
44. These claims arise under the procedure provided by section 50 of the ALRA.

45. There is nothing in the ALRA itself which might indicate that any narrow view of the expression ‘land in the Northern Territory’ in the definition of ‘Crown Land’ in section 3 of the ALRA should be taken. It would be surprising if areas of land which customarily have been regarded as land in the Northern Territory and in relation to which there are shown to have been traditional Aboriginal owners should not be eligible for possible grant under the ALRA because of some more confined concept of ‘land in the Northern Territory’. The use of the word ‘customarily’ is not derived from the ALRA itself, and is not a term of art. It is intended to convey that which is according to common usage. The reasoning in Risk HC is based on factors that relate to waters seaward of the low water mark along the coast.
46. The point is well illustrated by the fact that neither the Northern Territory nor the Commonwealth initially resisted the proposition that the claimed area in the Legune LC was available for claim. The Northern Territory specifically accepted that that was the case. That position therefore included that those two land claims extended roughly to the line across the outermost land features at the openings of the Keep River and the Victoria River respectively as they flow into the Joseph Bonaparte Gulf. The more restrictive position was taken only after the completion of the evidence in the Inquiry in the Legune LC, and as a result of the point being taken in the Fitzmaurice LC, which was heard after the Legune LC. Up to that point in time, as is recorded in the report on the Legune LC, the Northern Territory had accepted that there were traditional Aboriginal owners of the whole of the claimed areas, including over the tidal waters of the Keep River and the Victoria River inland of the low water mark across the opposing headlands as nominated by the Northern Land Council.
47. I note that, in 1978, section 3A(1) of the ALRA was inserted to provide:
- ... the application of this Act in relation to Crown land extends to Crown land that is vested in the Northern Territory.
48. I do not consider that that subsection throws any particular light on resolution of the current issue. It might suggest that there is ‘land in the Northern Territory’ that is Crown land that is not vested in the Northern Territory, but in the Commonwealth. If that is correct, then it might follow that the waters of the three rivers that are seawards of the ‘mouth’ of each of the rivers (as identified in the submissions of the Commonwealth and of the Northern Territory) but are within the inlets or estuaries of those three rivers are land in the Northern Territory but remain vested in the Commonwealth and remain available for grant. That was not a position put by any party. I do not need to refer to that provision further in these reasons for ruling. It was enacted roughly about the same time as the *Northern Territory (Self-Government) Act 1978* (Cth).
49. It is necessary to say something about the evidence of the witnesses on the topic.



50. Professor Stuart Kaye is an academic lawyer who obviously has a special knowledge of maritime law. It is a little difficult to draw the line between what he said by way of evidence legitimately within his area of expertise, and what he said (no doubt in an informed way) about the jurisdictional boundaries of the Northern Territory and/or the proper construction of the ALRA. On those latter two aspects, what he said strictly speaking should be regarded as a matter of submission. Indeed, although his evidence extended over a range of international jurisdictions, ultimately he said that his research established principles for determining the location of a river mouth, and then for applying those principles to the physical geography of the Fitzmaurice River principally and also of the Victoria River and of the Keep River. He then left the task of identifying the ‘mouth’ of each of the three rivers, by reference to those principles, to others.
51. The location of the three river mouths having regard to their physical geography was more precisely done by Mark Alcock of Geoscience Australia and Robert Sarib, an experienced surveyor. Each of them in essence made their analysis and formed their opinions by reference to the principles identified by Professor Kaye. I have no reason to doubt their qualifications or the genuineness of the analysis they carried out.
52. Fundamentally, however, I do not think their evidence, as a matter of proper legal principle, informs the correct construction of the ALRA or the proper understanding of the 1863 Letters Patent establishing the Northern Territory, or the proper construction of the NT Acceptance Act.
53. First, and obviously, none of the three relevant witnesses recognised that the issue is one of statutory construction. It has been assumed, both in the instructions recorded and in their responses, that ‘land in the Northern Territory’ is defined as land upstream from the mouth of the three rivers. It is not. Indeed, as noted Mr Alcock sought to apply Professor Kaye’s legal principles about the location of the mouths of the rivers ‘at common law’.
54. Hence, Professor Kaye referred to Australian statutes in which the term ‘mouth of the river’ appears, principally section 7 of the *Seas and Submerged Land (Territorial Sea Baseline) Proclamation 2016* (Cth), which provides the effective coastline from which Australia’s territorial sea is measured. Although generally the term refers to the straight line drawn across two points on the low water lines of the banks of the river, there are exceptions. He treats the primary rules as applicable to show the significance of the mouth of the river. But he acknowledges that the territorial sea baseline on the eastern side of the Joseph Bonaparte Gulf is not determined that way, apparently due to the coastline having large indentations and being fringed with islands. Then despite that, he asserts that is ‘not relevant to determining the mouth of the Fitzmaurice River’. It may not be, but it may well be a signal about the practical way to determine the land in the Northern Territory to which the ALRA applies. The estuarine waters within the

territorial sea, bounded as they are by the relevant geographical features (noted below), should be available for claim if there are Aboriginal persons who can establish the specified criteria for traditional ownership of those waters.

55. Professor Kaye then refers under the heading ‘Australian Common Law’ to a series of cases. I do not think that analysis is helpful, as it does not involve consideration of the relevant provisions of the ALRA or of the Letters Patent establishing the Northern Territory as part of South Australia, and of the subsequent legislation when it was transferred to the Commonwealth. Perhaps that is most obvious by his reference to *Simlesa v Perry* [2003] NTSC 85. I can only think that its reference indicates an advocatory role to support a premise. In that case, the appellants’ convictions for commercial net fishing in a river were set aside, but in particular circumstances. They were fishing in an area known as Perekary Creek on Bathurst Island. It was unlawful to fish for barramundi in that way in a river, as defined in Clause 4 of the *Barramundi Fishery Management Plan* made under the *Fisheries Act 1988* (NT). The finding was that the fishing took place in an armlet of the sea running inland in a narrow channel where seawater flows in and out according to the tide rather than in the tidal estuary of a river. It had not been shown that at that point there was ‘a body of water, whether fresh or brackish that seasonally or consistently flows into the sea ...’. That was the relevant part of the definition of ‘river’ in the Plan. It may be noted that the judge compared that situation with a tidal estuary of a river.
56. There was an appeal from that decision: *Perry v Simlesa* [2004] NTCA 2. The appeal was allowed and the convictions restored (Mildren J, with Thomas and Bailey JJ agreeing). While the decision of Angel J was reversed, the reasoning is neutral in relation to the construction of the ALRA. The express legislative provisions are of course different and more specific. His Honour regarded the words ‘tidal arm’ in the definition of ‘river’ as meaning a tidal arm of the sea rather than an arm of the river subject to tidal waters, and so extending the definition of river: at [13].
57. I also do not consider that the analysis of overseas common law jurisdictions by Professor Kaye is of any real assistance for the same reasons. Indeed, there is an apparent element of practical judgment in the outcome of some of the cases referred to. That may be seen, for example, in *Post Office v Estuary Radio Ltd* [1968] 2 QB 740, the prosecution of a ‘pirate’ radio station in the Thames Estuary. The practical answer was that the prosecution could succeed because the Thames estuary was within the territorial sea baseline. The extent of the Clyde estuary was considered in *Western Ferries (Clyde) Ltd v The Commissioner for Her Majesty’s Revenue and Customs* [2011] UKFTT 243 (TC). There was a definition of ‘transitional waters’ in the relevant Directive. Professor Kaye drew from that case a recognition that estuarine waters are distinct from river waters. It is clear that any such distinction was a consequence of the issues in the case and consideration of the relevant Directive.

58. It can be seen that there was derived from that case, and other cases, an asserted distinction between riverine waters and estuarine waters, and the proposition that estuaries are seen as inlets of the sea while rivers 'are associated with the land'. Then the step is taken of saying that what is regarded as an inlet of the sea will not be within a river and will be seaward of the mouth of the river.
59. I am not of the view that that analysis is directly relevant to the construction of the expression 'land in the Northern Territory' in the ALRA. I do not consider that that is a correct starting point for the constructional exercise.
60. The position of the mouth of the Fitzmaurice River was then located by Professor Kaye as upstream of Clump Island, and discounting Clump Island as one of the headlands of the Fitzmaurice River. It is not clear from his earlier analysis why that is a critical step as he appears to have already determined that the waters to the east of the line from the northern tip of Clump Island and slightly east of north to the mangrove area adjacent to the Whale Flat area better fitted the description of an estuary. His reasoning is that the waters in the vicinity of Clump Island are relatively deep and have the geographical name of Keyling Inlet – indicative, he says, of being an arm of the sea. The use of the name of that stretch of water extending some distance upstream (it is not clear on the evidence where the extent of Keyling Inlet upstream reaches – on the map prepared by Mr Alcock which is included as Appendix I to this Annexure the words Keyling Inlet extend roughly along the upper boundary of Clump Island). Professor Kaye also says that it is significant that Clump Island is separated from the mainland by 'relatively deep water and that it is named Gunn Channel [the extended stretch of water which, as discussed in the report is coloured in the map prepared by Mr Laurence, but is not apparently included in the original application]'. The point where he then locates the mouth of the river is some 2 ½ kilometres upstream from the northern tip of Clump Island. The significance of the names used as an aid to the construction of the term 'land in the Northern Territory' was not earlier discussed by him or referred to in any of the cases. He makes no reference to the territorial sea baseline in his reference to the physical features or names on which he drew his conclusion.
61. Mr Alcock also clearly started, and finished, by identifying what he said was the mouth of the Fitzmaurice River. In reaching his conclusion on that point, he recognised the need to consider the particular circumstances of each river, and the unique geography of the Australian continent. He notes a distinction between estuaries and rivers, based on what he says is an authoritative text; the *1997 National Land and Water Resources Audit*. It distinguished seven categories of wetland ecosystems, including riverine area (rivers and streams) and estuarine areas (including deltas, tidal marshes and mangrove swamps).

62. His assessment of the Fitzmaurice River is best understood by reference to the Overview map which is Figure 1 attached to his written statement, and is Appendix I to this Annexure. The tidal reach up the Fitzmaurice River is a bit less than 100 km and the same applies to the Keep River. The tidal reach up the Victoria River is some 250 km. On that map, point D is the location of the gauging station referred to by Mr Willis. Between points C and D, Mr Alcott says that the river has ‘normal characteristics so its mouth must be seaward of point C’. He then assesses the river between points D and B. He notes the widening of the ‘estuary and that the banks show evidence of the significance of tidal flows, so that ‘the estuary is dominated by the sea’. His reasoning at this point is confusing or erroneous: he refers to the analysis by Professor Kaye of the Perekary Creek in *Simlesa v Perry* (above) to conclude that this section of the river/estuary has the characteristics of a creek for the seven months of the dry season when freshwater flows are negligible. I have sought to explain why that decision depended on the terms of the relevant Direction and the particular circumstances. The approach of Mr Alcock really does not relate to the construction of the term ‘land in the Northern Territory’ in the ALRA. Nevertheless, he then concludes that the mouth of the river is at point B rather than point D because of the constriction of the Eastern Branch of the Macadam Range at that point from the north, and the character of the river behind it (to the east), and that adopting point D would be inconsistent with Australia’s practice in identifying river mouths for the purposes of Article 9 of the *United Nations Convention on the Law of the Sea* (UNCLOS). Again, the focus is not a constructional one. His conclusion also in fact disregards the fact that, as he notes, Australia has declared a straight baseline closing the Southern Joseph Bonaparte Gulf that is some distance seaward of the estuary; he has chosen to adopt a different baseline to support his conclusion.
63. I note also that Mr Alcock is somewhat critical of the conclusion of Mr Sarib, although he reaches the same point for the mouth of the river, as he does not adequately identify all of the relevant factors. Mr Sarib’s evidence is discussed below.
64. Perhaps in a more expansive way, Mr Alcock also comments at [58] that ‘Modern Australian boundaries are now much more likely to follow function and policy imperatives with different treatment of the same geographic area for different sectors’. For instance, an estuary may be treated as part of a river for one purpose, but part of the sea for another. In my view that is the task which none of the three principal witnesses on the location of the ‘mouth of the river’ undertook: the meaning of the words ‘land in the Northern Territory’ in the ALRA.

65. Mr Sarib started his consideration of the location of the mouth of the Fitzmaurice River in a different way, by a historical investigation of how the Fitzmaurice River was discovered and named. I have referred to that in the introduction to the report concerning the Fitzmaurice LC. Apart from his reference to the primary material (Stokes' journal of the 1839 exploration) to locate what he decided was the mouth of the river, he also referred to the Northern Territory Barramundi Fishing Management Plan for the definitions of 'river' and 'mouth of a river', the UNCLOS, and the tidal glossary of the Australian Hydrographic Service, Department of Defence. There are other recent record systems to which he also refers.
66. The task of identifying the extent of the land in the Northern Territory in the vicinity of where the Fitzmaurice River (and the Victoria River and the Keep River) flow into the sea is informed first by the Letters Patent referred to. The Northern Territory then comprised the south eastern corner of the Joseph Bonaparte Gulf including its bays and gulfs. The decision in Risk HC decided that 'land in the Northern Territory' in the ALRA was more restricted, to the low water line along the coast. There are clear and sensible reasons for that conclusion, including having regards to the suggestion in the Woodward report that waters beyond the low water line might be included in areas which might be the subject of a grant under the ALRA. The geography in the vicinity of the area claimed (as hatched in Annexures 1 and 2 to the Fitzmaurice LC report) is clearly inside both the territorial sea base line in the south eastern corner of the Gulf, and adjacent to areas which are clearly within the scope of the 'land in the Northern Territory' – that includes Quoin Island, Clump Island and Driftwood Island (but for their alienation), the north western section of the Bradshaw Training Area, which extends to and is across the narrow but deep channel adjacent to Clump Island, and the south western section of the Daly River/Port Keats Aboriginal Land Trust area, which includes the Western Section of the Macadam range and the flatter areas along the coast including Whale Flat and the mangrove areas. Both the northern corner of the Bradshaw Training Area and the southern corner of the Land Trust land have boundaries which abut the water flow to the Gulf inside the territorial sea base line and the rough line of the coast in that section of the Gulf. Given the beneficial purpose of the ALRA, it is appropriate in the absence of any contra-indication in the ALRA, to treat the waters with the areas in issue, as claimed, as available for claim. It is not necessary to determine the full extent of the 'land in the Northern Territory' save for the purposes of the Legune LC and the Fitzmaurice LC.
67. It is of course necessary to consider the evidence to decide whether the claimants have shown that they are the traditional owners of all the areas claimed, including the waters downstream from what the evidence referred to identifies and the mouths of the three rivers.

68. I note that evidence contrary to the evidence of Messrs Alcock and Sarib was given by Simon Watkinson, Senior Geographic Information Systems Officer of the Northern Land Council. I do not need to decide whether his critique of that evidence is valid. It was given on the assumption that the correct starting point for the Inquiry in each of the Legune LC and the Fitzmaurice LC about the location of the mouths of the three rivers, as described by Professor Kaye and then as interpreted by Mr Alcock and Mr Sarib, sets the boundary of ‘land in the Northern Territory’ in the ALRA, rather than focusing on the words of the ALRA as considered by Risk HC. The focus on some contemporary geographical concept for identifying the mouths of rivers is reflected in the submission by the Commonwealth that Mr Watkinson failed to ‘apply modern practice’ to identifying the mouths of the three rivers: written submission of 29 May 2018 at [26].
69. Their view is not explicit in any part of any relevant legislative background to either of those Acts, or to the making of the Letters Patent. Indeed, in the case of the Letters Patent, there was no federation of the Australian Colonies. That description was carried through in the transfer of the Northern Territory. The expression ‘land in the Northern Territory’ at least as used in the ALRA does not invite the subtleties of distinguishing between rivers and estuaries, and rivers and inlets of the sea: those distinctions are not expressed when they would involve a complex and serrated coastline of the Northern Territory for the purposes of the ALRA. Nor does such a construction accommodate the possibility of a claim extending into Crown land that is not vested in the Northern Territory, as apparently contemplated by section 3A(1) of the ALRA introduced about the time of independence granted to the Northern Territory, because such land would necessarily be excluded from any potential claim.
70. The distinction between waters in rivers on the one hand and waters in estuaries on the other, drawn by the Northern Territory and the Commonwealth, may not accommodate the particular evidence of traditional ownership in these land claims. It has no foundation in the ALRA or the relevant constructional aids. Indeed, as noted above, Gummow J at [94] in Risk HC specifically allowed for there being circumstances, if supported by evidence, where the grant under the ALRA could be in respect of areas including rivers and estuaries.
71. I do not think it is correct (as the Commonwealth submits) that Gummow J there drew a ‘constructional distinction between the claims process ... and the scheduling of Aboriginal reserves which may be bound by closing lines across estuaries’ in its written submission at [59]. In effect, as [66] of that submission contends, that submission involves an extension of the geographical reference to ‘bays and gulfs’ as used in the Letters Patent and in the NT Acceptance Act and by the High Court in Risk HC to a ‘bay, gulf, inlet, estuary or watercourse’. That extension effectively puts any river and its beds and banks to the extent of the tidal inflow in rivers at the mean low tide as being excluded from the description of ‘land in the Northern Territory’ under the ALRA. In my view the proper

distinction is not between claims over the seabed, which it may be accepted are not contemplated (for present purposes), and claims the landward side of the low water line upstream in rivers and streams, including estuaries. The sharp line which the Commonwealth says is drawn between rivers and their waters and beds and banks above their 'mouths' (as the Commonwealth defines them) and by way of contrast the waters in rivers and their beds and banks below that line and in estuaries is not drawn in the reasons of the High Court in *Risk HC*.

72. The submission of the Northern Territory was along similar lines to that of the Commonwealth. That includes the proposition that the 'land in the Northern Territory' in the ALRA is confined so as to exclude the rivers and the beds and banks of rivers which flow into the sea, beyond the 'mouths' of all those rivers as it now defines them. It starts by the assertion that the claims 'entirely depend' on the terms 'river' and 'estuary' being interchangeable in the ALRA: at [1]. But those words are not in the definition of Crown land in the ALRA. The analysis of the Reports of the Aboriginal Land Rights Commission focuses on a 'buffer zone' being 2 kilometres seaward from the coastline as broadly understood.
73. Accordingly, in the reports concerning both the Legune LC and the Fitzmaurice LC it has been necessary to consider in detail the evidence upon which traditional Aboriginal ownership is claimed up to the points specified in the respective applications.



# Appendix I to Annexure D

