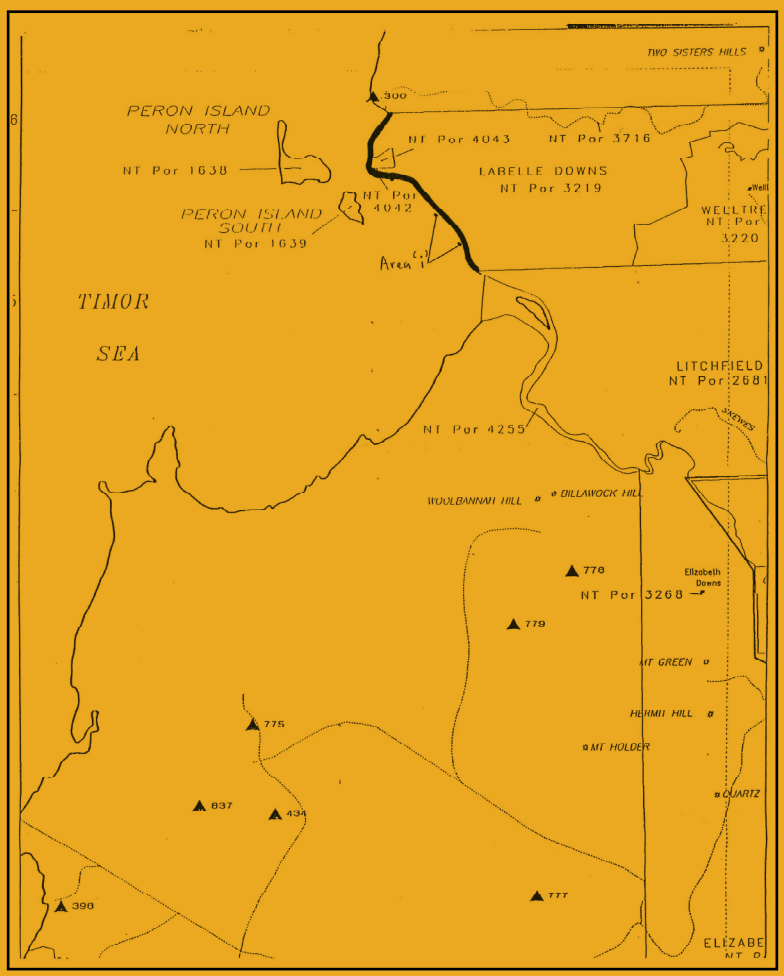
Aboriginal Land Rights (Northern Territory) Act 1976

Peron Islands Area Land Claim No. 190

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



Peron Islands Area
Land Claim No. 190

Report No. 77

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

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20 March 2023

The Hon Linda Burney MP
Minister for Indigenous Australians
PO Box 6022
House of Representatives
Parliament House
CANBERRA ACT 2600

By email: MinisterBurney@ia.pm.gov.au

Dear Minister,

RE: Peron Islands Land Claim (No. 190)

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

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

Yours faithfully,

The Hon John Mansfield AM KC
Aboriginal Land Commissioner

Australian Government

Office of the Aboriginal Land Commissioner

Telephone: (08) 7972 4111
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Level 5, Jacana House, 39-41 Woods Street, DARWIN NT 0800
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20 March 2023

The Hon Hugh Heggie PSM
Administrator of the Northern Territory
Office of the Administrator
14 The Esplanade
DARWIN NT 0800

By email: govhouse@nt.gov.au

Dear Administrator,

RE: Peron Islands Land Claim (No. 190)

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

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

Yours faithfully,

The Hon John Mansfield AM KC
Aboriginal Land Commissioner

WARNING

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

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

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1. INTRODUCTION

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 concerns an Inquiry undertaken by the Aboriginal Land Commissioner (the Commissioner) pursuant to section 50(1)(a)(i) of the ALRA into an application made by or on behalf of Aboriginals claiming to have a traditional land claim to an area of land being unalienated Crown land in the Northern Territory.

2. That claim is called the Peron Islands Area Land Claim (Peron LC), being the claim numbered 190 in the register of applications held by the Office of the Aboriginal Land Commissioner. The Peron LC was made on 27 May 1997.

3. As appears in more detail below, despite the title given to the Peron LC adopted from the initial application, it is in fact a claim to a strip of mainland coastal land adjacent to the Peron Islands.

4. It is useful to briefly recall the nature and purpose of the inquiry.

5. 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.

6. There are two particular features of the Peron LC which it is helpful to note at an early point in this Report. They will enhance the understanding of the issues and recommendation contained in the report.

7. First, unlike many claims under the ALRA, the identity of the traditional Aboriginal owners of the claimed land was vigorously contested between several Aboriginal groups or clans or families. The requirement in section 50(1)(a)(i) is to determine whether the claimants or any other Aboriginals are the traditional Aboriginal owners of the claimed land. There have not been many claims, until recently, where there has

been a substantive issue requiring detailed consideration of a number of competing claimant interests. The *Kenbi (Cox Peninsula) Land Claim (No. 37) Report No. 59* (12 December 2000) *(Kenbi LC Report)*, provides an illustration of how complex and difficult the resolution of such competing claims may become. As there occurred, the competing claimants in this Inquiry have been separately represented and they have produced evidence from a number of anthropologists as well as their own evidence.

8. Second, the notification of the Inquiry into the Peron LC did not apparently put all the potential claimant groups or clans or families on notice of the Inquiry. It was only during the course of the Inquiry, and in one instance only belatedly during the Inquiry, that certain of the competing interests emerged. The provision of a proper opportunity for those Aboriginal persons to take a proper part in the hearing was challenging. At the same time, it was necessary to ensure that other claimants who had provided their supporting evidence were also given a proper opportunity to respond to the new material. To accommodate those interests required some serial review of evidence and the prolonging of the processes of the Inquiry. All the claimants and the Northern Territory, and to an extent those asserting detriment and who chose to make submissions on the issue of traditional Aboriginal ownership, should be recognised for their cooperative attitude, their industry and their tolerance.

9. In this Report, I have set out the relevant details of each of the claims made on behalf of the separate groups of claimants in this Inquiry. There were several such groups; a circumstance which I have endeavoured to explain in depth. I have also described the process and procedure of the Inquiry and the evidence produced in support of each claim to traditional Aboriginal ownership of the claimed lands. I have made detailed findings which led to my recommendations on that aspect.

10. The matters to be addressed by section 50(3)(a) of the ALRA were somewhat contentious, in that the Northern Territory made submissions of a different character to those of the claimant groups. I address these submissions below.

11. I have also referred to the evidence adduced by a range of interested persons, groups and entities who claimed that they might suffer detriment if the claim were acceded to. I have reported on that potential detriment in accordance with section 50(3)(b), and on the matter referred to in section 50(3)(c). There were several parties who gave evidence in relation to these sections: in response, some claimants provided evidence of ways by which asserted detriment might be addressed.

12. It is not the function of the Commissioner to make recommendations to the Minister on how the Minister should exercise the discretion under section 11 of the ALRA whether to make a grant of the claimed land where the Commissioner has recommended a grant of the claimed land (as I have done in this Report). However, I have addressed each submission on detriment in a manner which I believe will be of assistance to the Minister in exercising that discretion, having regard to the categories of interests specified in section 50(3) of the ALRA.

13. I note that one of the claimant groups asserted that they would suffer detriment if, in the event that I did not find that particular group to be the traditional Aboriginal owners, other claimant groups were found to be traditional owners to their exclusion and the Minister acceded to the claim: see section 50(3)(b) of the ALRA. This was not an extensive submission. I have explained and commented upon it.

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

15. Subject to those comments, this Report, as required, contains my findings and recommendations in respect of the Peron LC.

2. THE CLAIM AREA, HISTORICAL BACKGROUND AND THE INQUIRY

2.1. THE CLAIM AREA

16. I start by first identifying the general area surrounding the Peron LC, and the claim area itself. It is a coastal strip of land between the high water mark and the low water mark. It does not include any land above the tidal high water mark. It runs for a considerable distance along the coast. It is convenient, although obviously not precisely accurate, to treat the claim area as running north/south along the coast.

17. The claim area is located in a part of the Northern Territory known as the 'Top End', south-west of Darwin in the Anson Bay region. It is bordered on its northern extremity by land granted to the traditional Aboriginal owners pursuant to Schedule 1 of the ALRA, with the Delissaville/Wagait/Larrakia Aboriginal Land Trust area (Wagait ALT), and on its southern extremity by land granted to the Daly River/Port Keats Aboriginal Land Trust area (Daly River ALT) about where the northern bank of the Daly River flows into the sea. Both those grants were made and scheduled under the ALRA at its commencement. They each extend inland a significant distance.

18. The High Court of Australia in the *Blue Mud Bay case* (*Northern Territory of Australia v Arnhem Land Aboriginal Land Trust* (2008) 236 CLR 24; [2008] HCA 29) confirmed that such grants extended to the low water mark of the granted land. Each of those grants of land therefore extends to the low water mark, so the relevant coastal strip the subject of the Peron LC abuts the tidal waters of those two grants.

19. Traditional ownership of the Wagait ALT has historically been the subject of some dispute. This was asserted, on more than one occasion, to be relevant to this Inquiry. I describe this history below.

20. It is also useful to describe the tenure history of the land adjacent to the claim area and roughly along its eastern boundary, that is the land above the high water mark along the length of the claim area. To the immediate east of the claim area of the Peron LC, that is eastwards of the high water mark, is the Labelle Downs Pastoral Lease (Northern Territory Portion (NTP) 3219), and then further to the east Welltree Pastoral Lease, and Litchfield Pastoral Lease, and then Litchfield National Park. One must drive through the Park (either via Berry Springs or Batchelor) and Labelle Downs to access the claim area. Access is otherwise only possible by air or sea. At a point about 6 kms from the northern end of the claim area, and where the coastal line bends eastwards to some degree as it extends south and east towards the mouth of the Daly River the area of Labelle Downs is broken by NTPs 4042, 4043 and 6362. It is the area known as Channel Point. That small portion of land interrupts the direct contact of Labelle Downs to the high water mark along the claim area, but it extends both above and below, or north and south of, the Channel Point area.

21. NTP 4043 is the subject of Crown Lease in Perpetuity No 1067 to Frazer Earl Henry, Edmund John Bailey, and Excess Pty Ltd as trustee for four separate trusts: the DM Walker Testamentary Trust, the DE Walker Testamentary Trust, the LP Walker Testamentary Trust, the CJ Walker Testamentary Trust and the CA Walker Testamentary Trust. They hold the lease as tenants in common.

22. NTP 4042 is immediately to the south of NTP 4043. It is held under Crown Lease in Perpetuity No 1066 by Fitzroy Pty Ltd (Fitzroy). It is shown on Survey Plan S91/216 that NTP 4042 extends across the intertidal zone, and so may break the continuous coastal line of the claim for a short distance.

23. NTP 6362 (formerly part of NTP 4042) is Crown land, compulsorily acquired on 2 November 2004 and subsequently declared as Channel Point Coastal Reserve under section 12(1)(a) of the *Territory Parks and Wildlife Conservation Act*. It also extends across the intertidal zone.

24. There is an issue about whether the high water mark of the claim area in the vicinity of the Channel Point area abuts the boundary area of NTP 4043, or whether there is a narrow strip of unalienated Crown land of some 20 metres or so between its western boundary and the high water mark.

25. The matters referred to in the preceding paragraphs have some significance to the matters of detriment. They do not affect the consideration of traditional Aboriginal ownership of the claim area.

26. North and South Peron Islands are located offshore from the claim area, more or less immediately to the west and towards its northern section. Those islands are (perhaps misleadingly) not included as part of the Peron LC. Instead, they comprise part of the Wagait ALT grant.

27. The area the subject of this Report comprises only the intertidal zone extending south from the southern-most point of the Wagait ALT to the northern bank of the Daly River where the Labelle Downs lease runs to the coast along its southern line. It includes the intertidal zone adjacent to the NTP 4042 and Channel Point Coastal Reserve (NTP 6362). The claim area is thus situated, generally speaking, between the mouths of the Finniss River in the north and the Daly River in the south. The mouth of the Reynolds River is also located in between those two rivers.

28. The application made on 27 May 1997 includes a map entitled ‘Map A’. Map A depicts the claim area the subject of this Report: it is annexed to this Report as Annexure A. The area was described in the originating application as follows:

    (i) Intertidal Zone adjacent to Northern Territory Portions 3219, 4042 and 4043

    All that land in the Northern Territory of Australia between the high water mark and the low water mark adjacent to Northern Territory Potion 3219, otherwise known as Labelle Downs Station, and adjacent to Northern Territory Portions 4042 and 4043.

    …

29. The originating application also includes a ‘Map B’, depicting the following area said to be claimed:

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

    All that land in the Northern Territory of Australia which is adjacent to, and seawards of the low water mark of the seacoast of the mainland from, in the west, the point the western boundary of Daly River/Port Keats Aboriginal Land, just north of Chindi, marked on Map B by the letter ‘X’, and to, in the east, where the northern-most point of the western boundary of Delissaville/Wagait/Larrakia Aboriginal Land (marked on Map B by the letter ‘Y’);

including, without limitation:-

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

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

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

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

…

30. For reasons explained below, that area referred to in the immediately preceding paragraph is not the subject of this Report.

31. I also note that the Peron LC area is situated in general proximity to several other historical land claim areas which have been reported on by past Commissioners. These land claims are said to have some bearing on the issues in this Inquiry, and as such I return to them below.

2.2. HISTORICAL BACKGROUND TO THE PERON LC

32. The history of the Peron LC area bears significantly on the claimants' evidence and submissions on the issue of traditional Aboriginal ownership. Because of the competing claimant groups or clans or families, I consider it necessary to set it out in some detail.

33. The previous ethnographic and anthropological research concerning the claim area and surrounds spans the course of approximately one century. It is summarised in the expert reports, particularly the Anthropology Report of Mr Kim Barber dated June 2019 (Exhibit AM6) (Barber Report), the Anthropologists' Report of Carol Christopherson, Samantha Ebsworth, Jeff Stead and Robert Graham dated October 2017 (Exhibit A2) (Graham Report), and the Provisional Anthropological Report of Professor Basil Sansom dated 18 February 2020 (Exhibit NT10) (Sansom Provisional Report). For the sake of completeness, I note that Mr Gareth Lewis provided his Anthropologists Report for the Kiyuk People in the Peron Islands Land Claim No 190 in July 2019 (Exhibit AK5) (Lewis Report). Mr Graham subsequently provided his Supplementary Report on the Peron Islands Land Area Land Claim No 190 on 6 August 2021 (Exhibit A12) (Graham Supplementary Report). Professor Sansom also provided his Supplementary Anthropological Report on 26 August 2021 (Exhibit NT11) (Sansom Supplementary Report) and Mr Lewis provided his Supplementary Anthropologists Report for the Kiyuk People in August 2021 (Exhibit AK9) (Lewis Supplementary Report). Dr Stephen Bennetts provided his Preliminary Anthropological Report also in August 2021 (Exhibit AC7) (Bennetts Preliminary Report.) Given the number of claimant parties to this Inquiry and the voluminous amount of material provided in support of their cases, I do not propose to describe in detail each piece of research.

34. Much of that material does, however, paint a useful picture of the general history of the Peron LC area, particularly the first three reports referred to above.

2.2.1. 1869 to 1950: Colonisation and 'vacated' land

35. It is not disputed that the Peron LC area and, more generally, the wider region surrounding the claim area has seen significant historical disruption as a result of colonisation.

36. The Barber Report is particularly illuminative in this regard. Mr Barber recounts the description by Toohey J in the *Finniss River Land Claim (No. 39) Report No. 9* (22 May 1981) (*Finniss LC Report*) of the impacts of colonisation in the area to the immediate north and east of the claim area in this Inquiry. In Barber Report, the region was noted as one of the most densely populated parts of the Northern Territory in the 19th century. There were a range of events which attracted significant numbers of non-Aboriginal people to the general area, including Goyder's surveying in 1869, the establishment of the townships of Palmerston, Southport, Virginia and Daly River, and the construction of the Overland Telegraph Line between Adelaide and Port Darwin: Barber Report [23]–[28].

37. The late 19th century saw an increase in the uptake of pastoral leases in the Daly River region, and the discovery of gold in the Finniss River area. The effect of this was, according to Mr Barber, 'significant and rapid': [31]. Gold in particular brought a 'dramatic influx of Chinese miners' to the area, with their numbers reaching an estimated 6000 by 1888: Barber Report [32].

38. Mr Barber again cites the *Finniss LC Report* in assessing the impact of these developments on the local Aboriginal population, which included 'the sexual exploitation of Aboriginal women, the supply of opium and alcohol to Aboriginals, and the dislocation of Aboriginals from the areas with which they had close association': [34]. Violent conflict with pastoralists also occurred which, in tandem with introduced diseases, resulted in substantial decreases to the numbers of local Aboriginal persons.

39. Similar events unfolded in the Daly River region to the east and south of the Peron LC area. Conflict between Aboriginal and non-Aboriginal people led to punitive expeditions and other insidious events.

40. Put simply, the consequence of these events was that the local Aboriginal population were dispersed from their traditional lands. Some were forced away from the area entirely, moving to railway towns and in other directions to Batchelor, Pine Creek, Katherine, Adelaide River and Rum Jungle. Others were drawn to more local townships and settlements, for example, at Daly River. Yet such movements, whether confined or more widespread, had the same effect: as Mr Barber notes at [40], 'less Aboriginal people remained in the bush'.

41. In 1911 the Commonwealth assumed control of the Northern Territory. From this point onwards part-Aboriginal children were removed from their families by the government as part of what is now generally referred to as the 'Stolen Generations'.

The ongoing detrimental effects of this policy are well-recognised, and are the subject of discussion in many other contexts; it is not necessary for me to set them out here.

42. The early anthropological reference materials dates from 1916, in which TJ Beckett recounts a visit to the area on behalf of the Office of the Administrator of the Northern Territory and describes interactions with Aboriginal people at Point Blaze, Channel Point and Anson Bay, among other locations (including 'Perrin Island'). Other early anthropological pieces include those of WEH Stanner (1933), who examined social organisation and land tenure in the Daly River region. The work of AP Elkin (1950) concerning what were previously termed the 'Wogait/Wagaitj' tribes of this area is also included.

43. There was some difference in view in this Inquiry between Professor Basil Sansom, anthropologist for the Northern Territory, and Mr Robert Graham, anthropologist for the Bwudjut group of claimants represented by the Northern Land Council, as to when, if ever, the region in which the Peron LC is located was 'vacated' of Aboriginal residents. Each anthropologist's interpretation and analysis of the works of Stanner and Elkin of 1933 and 1950 respectively were the subject of some critique: see, e.g., Sansom Supplementary Report [12]–[25].

44. Stanner (1933) documents vacation of the general area to the north of the Daly River (which includes the Peron LC area) in that piece. Later, Elkin confirms that the land of the 'Wogait/Wagaidj' (then understood to include the Peron LC area) was devoid of permanent residents by 1950: see Sansom Provisional Report [28]. The difference between Professor Sansom and Mr Graham was really a matter of emphasis; I do not think it controversial to say that, by the mid-20th century at the latest, the Peron LC area and surrounds was home to very few permanent Aboriginal residents.

45. Later in the 20th century there was a 'reaggregation' of people from the region at Belyuen (formerly Delissaville), located on the Cox Peninsula: Sansom Supplementary Report [21]. The residents at Belyuen comprised several Aboriginal groups from different regions in the Top End, including those said to have traditional ties to the Peron LC area: see generally *Kenbi LC Report* per Gray J as Commissioner.

46. It is important to note that the 'Wogait/Wagaitj' label is no longer used in the sense employed by Elkin, as it is now understood to in fact comprise six language groups. These language groups are usually mentioned in three pairs: Wadjigan and Kiyuk, Amiyenggal (Ami) and Menthayenggal, and Marriamu and Marrtjaben: see *Kenbi LC Report* at [5.1.1]. Of particular relevance to the Peron LC is the first pair, whose traditional lands are said to include the claim area. As was pointed out by Kiyuk claimant Mr James Sing during the course of oral evidence, the term 'wogait' or 'wagaitj' simply means 'beach people' or 'coastal people': see, e.g., Transcript 16 June 2021 p 89[37], p 92[02]. It is largely accepted that the term obscures a set of complex social relations.

2.2.2. 1950 to 1992: Return to Country

47. The evidence indicates that in the mid to late 20th century, nearly all of the claimant families began revisiting the claim area on a temporary but consistent basis, initially camping on the beach at 'First Camp' and 'Second Camp'. Both First and Second Camps are said to be located to the north of Channel Point.

48. In the 1980s an outstation comprising several beach shacks was established at Balgal (Bulgul), which is situated to the immediate north of the claim area within the Wagait ALT. Each of the claimant families gave evidence that they had consistently visited Balgal since then and continue to do so.

49. South of Balgal, adjacent to the approximate mid-point of the claim area at NTP 4042, lies the Channel Point Community. It was established by a group of Darwin businessmen, and is held and managed by Fitzroy pursuant to Crown Lease in Perpetuity 1066, which commenced in 1992. The Channel Point Community consists of 27 blocks that are subleased to individuals and families principally for recreational use.

50. There was some evidence of Ms Maggie Rivers, a senior family member of some of the claimants prior to her passing, living on at least a semi-permanent basis in or around the site of the Channel Point Community prior to its establishment in and after 1992. In particular, Wadjigan claimant Ms Sue Piening said that Ms Rivers was made to 'sign over Channel Point' without a proper appreciation that she would not be permitted to return: Transcript 17 June 2021 pp 227[23]–228[45].

51. It is not clear whether affected Aboriginal persons were consulted in respect of the development of the Channel Point Community or the activities undertaken by its constituents, although Fitzroy notes that 'Channel Point Community has enjoyed the benefits provided to the general public through the cooperative approach taken by the Northern Land Council on behalf of traditional owners': Submissions on Detriment filed by Fitzroy dated 8 November 2021 (Fitzroy Detriment Submissions) [4].

52. That matter has no direct bearing on my functions under s 50(1) of the ALRA on this Inquiry.

53. As noted, following the introduction of the ALRA in 1976, the Wagait ALT and Daly River ALT areas automatically became Aboriginal land pursuant to Schedule 1 of the Act. Subsequent events have shown that there has been significant disputation about who is entitled to the benefit of the lands held by the Wagait ALT. Given that these two areas were not reported on by the Commissioner but included in Schedule 1 of the ALRA upon its enactment, a number of materials were thereafter produced by institutional bodies in order to ascertain the traditional Aboriginal owners (as those terms are defined in the ALRA) of the area of the Wagait ALT and surrounds. For example, Mr W. Ivory and Mr A.F. Tapsell's *Report on the Traditional Ownership of the Wagait Reserve and North and South Peron Islands* (1978) was commissioned by the Northern Land Council. Further, Professor Elizabeth Povinelli's 1990 Report for the Aboriginal Areas Protection Authority (AAPA) (Exhibit AC21) (Povinelli 1990 Report) documented sacred sites and associated Dreamings in the general area including the now-Peron LC area and its vicinity. Mr Michael Pickering's *Wadjigan/Kiyuk (Wagaitj) Land Interests: Anthropologists Report* (1993)

(Exhibit AC28) (Pickering Report) examining those interests in the Wagait ALT area is also of note, having been prepared in the context of what has been termed the 'Wagait Dispute'. I explore this further below.

54. A mere cursory glance at these materials reveals a prior understanding of the existence of traditional Aboriginal ownership of the claim area and surrounds but that the detailed entitlement of traditional Aboriginal owners, as that term is defined in the ALRA, was murky at best, although generally thought to comprise the traditional lands of the Wadjigan and/or Kiyuk groups. A brief revisiting of the Wagait Dispute is illustrative in this sense.

2.2.3. 1992 to 1995: The Wagait Dispute

55. The *Enquiry into Competing Claims to Traditional Ownership of the Wagait Land Trust Area – Report of the Wagait Committee to the Northern Land Council* (July 1995) (Exhibit AC14) (*Wagait Enquiry Report*) contains a comprehensive history of the Wagait Dispute. I do not need to recite the *Wagait Enquiry Report* in detail; however, it is important to highlight several points.

56. The Wagait Enquiry was established by the Northern Land Council in 1992 to inquire into competing claims to traditional ownership of the Wagait ALT: Wagait Enquiry Report p 20[3.2.1]. It consisted of several Land Council members, a senior lawyer and a senior anthropologist, as well as legal counsel and anthropologists on behalf of each Aboriginal group involved. Those groups were the Kungarakan, Warai, Marranunggu, Wadjigan/Kiuk [Kiyuk] and Werat. Of relevance to the Peron LC is the composite Wadjigan/Kiuk group, the members of whom largely constitute the claimants in this claim.

57. Chapter 4 of the *Wagait Enquiry Report* details the source and subsequent history of the Wagait Dispute. In sum, the dispute arose following the Ivory and Tapsell report of 1978, referred to above. The findings of that report provoked anger amongst competing groups of Aboriginal people. This was exacerbated by the Finniss River LC, which was heavily contested between the relevant claimant groups. The findings and recommendations of Toohey J as Commissioner were subsequently and unsuccessfully challenged in the Federal Court and an application to the High Court for leave to appeal was refused: Wagait Enquiry Report p 26[4.3]; see *R v Toohey; ex parte Meneling Station Pty Ltd* (1982) 158 CLR 327; [1982] HCA 69 (*Meneling Station*).

58. A series of determinations regarding traditional ownership of the Wagait ALT were then made by the Northern Land Council. One such determination was the subject of a successful appeal to the Federal Court: see *Majar v Northern Land Council* [1991] FCA 209 (Olney J). That decision in essence held that the Northern Land Council had not afforded procedural fairness in respect of that particular determination, failing to provide adequate assistance to one of the groups in their pursual of a claim to be recognised as traditional owners of the Wagait ALT (see section 21(1)(f) of the ALRA).

59. The Wagait Enquiry, in which each of the groups were afforded separate legal representation and anthropologists, was established in the wake of this decision. I have listed above the groups involved.

60. Of particular relevance to the Peron LC is the joint participation in the Wagait Enquiry of the Wadjigan and Kiyuk groups, who were advanced as a single 'corporate local descent group' termed 'the Wadjigan/Kiuk [Kiyuk]'. Despite comprising two 'distinct language groups', this corporate group was advanced as having 'shared social and religious institutions'. It was also said that membership of the Wadjigan/Kiuk group could be inherited 'through either father or mother': Wagait Enquiry Report pp 54–55[6.3.1]. It thus appears that the Wadjigan and Kiyuk groups were understood at that point to have effectively merged into one language group, united by the principle of cognatic descent.

61. The Wadjigan/Kiuk were found to hold primary spiritual responsibility for sites located in the western extremities of the Wagait ALT: see Wagait Enquiry Report pp 60–61[7.1.1.]. Those findings did not concern the Peron LC area specifically.

62. As will become evident below, that previous understanding of an effective merger between the two groups was not advanced in the Peron LC. In fact, it was categorically refuted by many claimants, both Wadjigan and Kiyuk.

2.2.4. 1995 onwards: the Kenbi, Lower Daly and Peron LCs

63. In the late 20th and early 21st centuries, several ALRA land claims concerning proximate areas to the north and south of the Peron LC were reported on by past Commissioners. Of particular relevance to this Inquiry are the *Kenbi LC Report* of 2000, relating to the Cox Peninsula to the north of the Peron LC area, and the *Lower Daly Land Claim (No. 68) Report No. 67* (30 April 2003) (*Lower Daly LC Report*) by Olney J as Commissioner, regarding the beds and banks of the lower Daly River immediately to the south and south-east of the Peron LC claim area.

64. Many of the previous generations of the claimant families in the Peron LC, and in some cases the claimants themselves, participated in the Kenbi LC hearing and in the Lower Daly LC hearing. Further, the findings of those Reports, particularly on the issue of traditional Aboriginal ownership, were often referred to in evidence and in submissions.

65. I consider that these materials provide a useful historical context to the Peron LC. In relation to the *Kenbi LC Report*, it suffices at this point to note that Gray J found that the 'Belyuen group', which comprised members of, among others, the composite Wadjigan/Kiyuk group (as seen in the Wagait Dispute), were not the traditional Aboriginal owners of the Cox Peninsula: see *Kenbi LC Report* [4.17]. Relevantly, Gray J noted that some of the evidence given by the Belyuen group concerned 'the coast to the south [of the Cox Peninsula], including the Finniss and Daly Rivers': *Kenbi LC Report* [5.1.4].

66. The *Lower Daly LC Report* is also clearly of relevance to the Peron LC, because the Bwudjut group of claimants in this Inquiry also claimed to be traditional Aboriginal owners in the Lower Daly LC. The Bwudjut claimants are, in simple terms, an estate group who sit within the broader Wadjigan language group (I return to this below). Their claim to the Peron LC area is unremarkable given its proximity to the area claimed in the Lower Daly LC.

67. In the *Lower Daly LC Report* Olney J found that the Bwudjut people constituted a 'local descent group' in the sense required by the ALRA. However, his Honour also

found that that group did not meet the other requirements in the Act, principally due to issues with defining the geographical extent of their estate in respect of the Daly River: see *Lower Daly LC Report* at [68].

68. It follows that the claimants in the Peron LC referred to several anthropological reports prepared in support of both the Kenbi LC and the Lower Daly LC. These reference materials include, amongst others, Professor Povinelli's *Lower Daly Land Claim No. 68 Anthropological Report* (2001) and *Lower Daly Land Claim No. 68 Supplementary Anthropological Report* (2002) (Exhibit AC27) (Povinelli 2001 and 2002 Reports), and numerous reports, genealogies and the like concerning the Kenbi LC. They are a useful starting point, but are by no means determinative.

69. I also note that several claims under the *Native Title Act 1993* (Cth) (*Native Title Act*) were lodged over the adjacent Labelle Downs pastoral lease in 2001 and 2002 by the Northern Land Council (Labelle Downs native title claims). Those claims were made on behalf of several of the claimants who participated in this Inquiry and/or their family members. I return to this issue at various points in this Report.

70. The reference materials help to paint a background picture in which to examine the expert reports relied upon by the claimants in the Peron LC. However, it is also clear that the ascertainment of the traditional Aboriginal owners of the claim area and surrounds has been the subject of considerable contestation. The Wagait Dispute, which concerned the Wagait ALT area immediately to the north and north-west of the Peron LC area, is a prominent example.

71. I now turn to the procedural history of the Peron LC.

2.3. THE PERON LC INQUIRY

72. Like the history of the Peron LC area, the procedural history of the application and the Inquiry is extensive.

73. As I have noted above, the Peron LC application was made on 27 May 1997. From that time onward, it was mentioned at periodic land claims call overs.

74. As is the case with several land claims made during that period, the areas originally included in the claim were more extensive than have been pursued in this Inquiry. As recounted above, the Peron LC application originally included two areas, which can be generally described as relating firstly to the intertidal zone of the Anson Bay area, and secondly to land seaward of the low water mark, off the coast between the Daly River ALT area and the Wagait ALT area. This area seaward of the low water mark off the coast has been recognised as unavailable for claim as a result of the decision of the High Court of Australia in *Risk v Northern Territory of Australia* 210 CLR 392; [2002] HCA 23. It is only the claim over the intertidal waters area which is now pursued.

75. Notice of intention to commence an inquiry in respect of the Peron LC was given by Olney J as Commissioner on 19 October 2004. The Attorney General of the Northern Territory and the Northern Land Council filed notices of intention to be heard on 3 November 2004 and 15 November 2004 respectively. That hearing was not pursued by either the Northern Land Council on behalf of the claimants, or the Northern

Territory. The issue of traditional Aboriginal ownership of intertidal zone areas was still to be determined by the High Court.

76. The decision of the High Court in 2008 in the *Blue Mud Bay case* resolved that question. It decided that the permission of the traditional Aboriginal owners is required to access intertidal waters overlying Aboriginal land to the low water mark. Until that time, the rights of traditional Aboriginal owners to control access to those areas was not clear. As was the case with the Peron LC and other land claims over the beds and banks of rivers and intertidal zones, both the Northern Land Council on behalf of the claimants and the Northern Territory indicated at periodic call overs that it was preferable for any inquiry to be deferred while negotiations were undertaken to explore an overall resolution of the issues. The Commissioner was periodically notified of the progress of those negotiations. To date, and despite now the elapse of some years, those negotiations have not produced a long-term resolution.

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

78. Given the elapse of time since the *Blue Mud Bay case* decision, it was obviously appropriate to require the claim to proceed. The primary claim material of the claimants represented by the Northern Land Council was lodged with my Office on 25 January 2018. That group of claimants referred to themselves as the 'Bwudjut group'. The materials encompassed the Graham Report, which also included a site register, map and claimant profiles. The Submission on the Status of Land Claimed (Exhibit A1) was also provided in those materials, in tandem with the Genealogy prepared on behalf of the claimants by Robert Graham dated 23 January 2018 (Exhibit A3).

79. On 1 February 2018 I gave to the Bwudjut group and to the Northern Territory, and to other potentially interested persons and entities, notice of an intention to commence an inquiry into the Peron LC. That notice was also publicly advertised on 3 February 2018 in the Northern Territory News. The notice included a similar intention in respect of the Woolner/Mary River Land Claim (No. 192), which has been the subject of a report to the Minister and the Administrator: see *Woolner / Mary River Region Land Claim (No. 192) Report No. 75* (8 December 2021) (*Woolner LC Report*). In respect of the Peron LC, the notice stated that the area subject to inquiry was to be the intertidal zone area described above.

80. Apart from the proper interest of the Northern Territory in the identification of the traditional Aboriginal owners, the persons and entities who initially responded were concerned with the matter of detriment. I use the word 'initially' because, as will become apparent below, in the period subsequent to that notice, additional Aboriginal groups joined the Inquiry, seeking to participate on the issue of traditional Aboriginal ownership. For the sake of convenience, enclosed with this Report is a list of claimants in the Inquiry contained in Annexure B which contains a list of the

members of the competing claimant groups, save for the Cubillo family. It is referred to in greater detail later in this Report.

81. The detriment interests are referred to in detail when addressing that issue below. A list of those who gave notice of intention to participate in the Inquiry is also contained in Annexure C to this Report.

82. I commenced the Inquiry on 2 March 2018 in Darwin, and the claim materials of the Bwudjut group were tendered without objection. Counsel for the Bwudjut group and the Northern Territory were present, and in addition counsel appeared for the Northern Territory Cattlemen's Association (NTCA), Excess Pty Ltd (the Block Owners), and Fitzroy. Mr David Ciaravolo of the Amateur Fishermen's Association of the Northern Territory (AFANT) was also present. At the commencement of the hearing I fixed a timetable for the ascertainment of the Northern Territory's position on traditional ownership and the extent of the detriment interests in the land claim.

83. On 22 June 2018 the Northern Territory wrote to the Northern Land Council identifying its perceived issues with the Bwudjut group's case in respect of traditional Aboriginal ownership of the claim area, considering that it was not yet sufficiently satisfied so as to accept traditional ownership. It specifically noted the findings of Olney J as Commissioner in the *Lower Daly LC Report*. The Northern Territory reaffirmed this position on 17 September 2018 by letter to my Office.

84. The hearing of detriment evidence took place partly in conjunction with that of several other land claim inquiries. There were two sessions of oral evidence in relation to the Peron LC: the first between 25-29 June 2018, and the second on 16 May 2019. Both were held in Darwin.

85. On 30 October 2018 my Office received a letter from the solicitors for the family members of some of the individuals named in the originating application. The letter advised that the solicitors were instructed by a group of prospective claimants called the 'Kiyuk'. On 1 November 2018 one of those family members, Mr James Sing, contacted my Office directly and indicated that he held significant knowledge in respect of traditional Aboriginal ownership of the claim area. On 2 November 2018 Mr Sing on behalf of the Kiyuk group wrote to me in order to indicate their intention to participate in the inquiry on that issue, separately from the Bwudjut group represented by the Northern Land Council.

86. A hearing of traditional ownership evidence was held at Batchelor on 5-6 November 2018. That hearing was initially intended to comprise solely the evidence of the Bwudjut group. Counsel for the Bwudjut tendered a Substituted Peron Islands Area Land Claim 190 Map (Exhibit A3(A)), a Revised Genealogy prepared on behalf of the claimants by Robert Graham dated 5 November 2018 (Exhibit A3(B)), and a photo from a film involving the Bwudjut group entitled 'When the Dogs Talked'.

87. Also present at that hearing were counsel for the Northern Territory, and Mr Sing on behalf of the Kiyuk group.

88. Additionally in attendance on that occasion were counsel for a group of people who referred to themselves as the 'Wood/Morgan families' and counsel for Fitzroy, both of whom indicated their desire to participate on the issue of traditional Aboriginal

ownership. The basis for the attendance of the Wood/Morgan families and Fitzroy at the hearing, and their participation on that issue, was at the time unclear. This was particularly so in respect of Fitzroy, who initially gave notice of its intention to participate only on the issue of detriment and called evidence on that issue in relation to the Channel Point Community. Consequently, directions were made establishing a timetable to ascertain the positions of each of those parties.

89. On 6 December 2018 my Office received an email from the solicitors for the Kiyuk group advising that they had assumed 'formal responsibility for the Kiyuk People in the Peron Islands Area Land Claim'. A copy of that email is annexed to this Report as Annexure D.

90. On 14 December 2018 Fitzroy wrote to my Office indicating that it wished to further participate on the issue of traditional Aboriginal ownership in order to 'retain the capacity to protect its interests by being apprised of the evidence'. A copy of that letter is annexed to this Report as Annexure E. On 19 February 2019 the solicitors for the Wood/Morgan families also confirmed that they wished to participate on that issue, claiming to be traditional Aboriginal owners of the Peron LC claim area. A copy of that letter is annexed to this Report as Annexure F.

91. On 20 February 2019 I requested that each of the parties seeking to participate in the Inquiry on the issue of traditional ownership convey their views on the following matters:

    - The correct identification of the traditional Aboriginal owners of the claim area (so as to narrow the areas of dispute in the Inquiry); and
    - The extent to which the issues which arise on that issue have previously been addressed by anthropologists.

92. I received responses from the solicitors for the Kiyuk group and for the Wood/Morgan families on 5 March 2019, from the Northern Territory on 6 March 2019, from the solicitors for Fitzroy on 7 March 2019, and from the Northern Land Council on behalf of the Bwudjut group on 10 March 2019.

93. A directions hearing was held on 11 March 2019 to determine the future conduct of the Inquiry. Counsel for each of the then claimant groups and the Northern Territory were present. The chief issue raised at that hearing was funding for the respective claimant groups. Over the following months, correspondence was exchanged between the parties with a view to each group securing funding from the Northern Land Council for the ongoing engagement of counsel and anthropologists.

94. By letter dated 18 April 2019 the solicitors for a further group claiming to have an interest in the proper identification of the traditional owners of the claim area alerted my Office of that interest. That group identified themselves as the 'Piening/Rivers family'. A copy of that letter is annexed to this Report as Annexure G.

95. On 16 May 2019, at a directions hearing in Darwin, a timeline was set for the comprehensive ascertainment of the respective views of each parties' anthropologists on the issue of traditional ownership. To that end, I directed that mediation take place between those anthropologists in order to narrow the issues in dispute to the extent possible. That mediation was thereafter referred to as the 'conference of experts'.

Those directions also contemplated the further participation in the Inquiry of the Piening/Rivers family, for whom counsel were present at the hearing. Counsel were also present on behalf of the Bwudjut, Kiyuk and Wood/Morgan claimants, and for the Northern Territory and Fitzroy.

96. In July 2019 my Office received from the Kiyuk and Wood/Morgan claimants their primary claim materials. For the Kiyuk, this included the Kiyuk Genealogy dated 19 July 2019 prepared by Gareth Lewis (Exhibit AK4) and the Lewis Report. For the Wood/Morgan, their materials comprised the Barber Report, their genealogy dated 2019 prepared by Kim Barber (Exhibit AM5) and a sites map dated 10 July 2019.

97. The conference of experts took place in Darwin on 2 August 2019 before Federal Court Registrar Nicola Colbran, after which a report detailing the areas of dispute was provided. It consequently became clear that it would be necessary for further hearings of traditional ownership evidence to be held in order to afford procedural fairness to those claimants other than the Bwudjut group (whose evidence had been presented).

98. In the following months further correspondence was exchanged between the Northern Land Council and the solicitors for the other claimant groups, principally on the issue of funding.

99. A directions hearing was then held in Darwin on 5 December 2019 in order to substantively progress the claim. Counsel for the Bwudjut, Kiyuk, Wood/Morgan and Piening/Rivers claimant groups were present, in addition to counsel for the Northern Territory and Fitzroy. A timetable was thereafter set for the presentation of each parties' case on the issue of traditional ownership.

100. On 20 December 2019 counsel for the Piening/Rivers family group wrote to my Office in order to indicate that they would be relying on the anthropological material produced by the Wood/Morgan family, but also sought to rely on the Barber Report. That group did not provide further anthropological materials.

101. On 17 January 2020 my Office was notified that the Wood/Morgan families would thereafter have different legal representation from the legal representation they had had to that time.

102. The timetable allowed for an anthropological report to be filed by the Northern Territory's expert anthropologist, Professor Basil Sansom. The Sansom Provisional Report was filed on 18 February 2020.

103. However, the ability to meet the remainder of that timetable throughout 2020 was severely impacted by the COVID-19 pandemic, particularly due to restrictions placed upon travel to and from remote Northern Territory communities and so the difficulties in completing instructions. Consequently, a new timetable for the progression of the Inquiry was agreed upon on 19 November 2020, contemplating its completion by late 2021. This included directions for an on-country hearing of each claimant group's evidence in respect of traditional Aboriginal ownership of the claim area.

104. On or about 1 June 2021 my Office received an inquiry from Ms Nicole Hucks on behalf of 'the Cubillo family' regarding attendance and possible participation at the

on-country hearing of traditional Aboriginal ownership evidence. Ms Hucks and other members of the Cubillo family attended a directions hearing on 3 June 2021, during which they asserted their links to the claim area and made clear their desire to participate in the Inquiry on the issue of traditional Aboriginal ownership. I hereafter refer to that group of claimants as the 'Cubillo family'.

105. During that hearing I expressed my hesitancy, in the interests of fairness to the other claimant groups, to further delay the Inquiry. The identification of the traditional Aboriginal owners of the claim area had, at that point, been a live issue for nearly three years. It had not been substantively progressed during that time. This view was accepted by all the parties present at that hearing. It was, however, accepted that the Cubillo family, notwithstanding their lack of legal representation at that point, would be permitted to participate in the on-country hearing of lay evidence.

106. That hearing was then held at Balgal, on the Wagait ALT, on 15–18 June 2021. The Bwudjut, Kiyuk, Wood/Morgan, Piening/Rivers, and Cubillo family claimants were each present. Each had legal representation save the Cubillo family, who were effectively represented by Ms Hucks at that hearing. Counsel for the Northern Territory was also present. Anthropologists for the Bwudjut, Kiyuk and Wood/Morgan claimant groups and the Northern Territory attended: Mr Graham, Mr Lewis, Mr Barber and Professor Sansom respectively. Further materials were tendered by each group during the course of that hearing. Fitzroy did not attend.

107. Further evidence in respect of traditional ownership was then heard on 22–23 June 2021 at the Botanic Gardens Visitor Centre in Darwin. The same parties were present.

108. Following the conclusion of the hearing of traditional ownership evidence, in August 2021 the Bwudjut and Kiyuk claimants provided supplementary anthropological reports from their respective experts, Mr Graham and Mr Lewis, namely the Graham Supplementary Report and the Lewis Supplementary Report. No other claimant group provided a supplementary report at that time.

109. On 20 August 2021, my Office received confirmation that the Cubillo family claimants would thereafter have legal representation for the remainder of the Inquiry, including Mr Patrick McIntyre of counsel.

110. On 26 August 2021 the Northern Territory provided a supplementary report of Professor Sansom (Sansom Supplementary Report), which in substance responded to the evidence received at the hearing of traditional ownership evidence and the supplementary reports of Mr Graham and Mr Lewis.

111. A hearing of expert anthropological evidence on the issue of traditional Aboriginal ownership was held on 2–3 September 2021 in Darwin. Counsel for the Bwudjut, Kiyuk, Wood/Morgan, Piening/Rivers and Cubillo families and the Northern Territory attended, as well as their respective experts.

112. Prior to that hearing, the solicitors for the Cubillo family gave notice that they intended to provide a preliminary expert anthropological report of Dr Stephen Bennetts dated August 2021 (Bennetts Preliminary Report). Dr Bennetts also participated in that hearing, and his report was received in evidence.

113. At the close of the hearing an issue was raised as to the status of the claims by certain Aboriginal people to be recognised under the *Native Title Act* as the holders of native title of the area of the Labelle Downs station. Consequently, on 6 October 2021 the Northern Territory and the Northern Land Council provided to my Office a joint letter detailing the process by which the Labelle Downs native title claims were dismissed for want of prosecution: see *Bulabul on behalf of the Kewulyi, Gunduburun and Barnubarnu Groups v Northern Territory of Australia* [2017] FCA 461. That letter is annexed to this Report as Annexure H.

114. The Labelle Downs native title claims were nevertheless the subject of some submissions relating to the issue of traditional Aboriginal ownership of the Peron LC area. I explore these submissions below.

115. Submissions concerning detriment and traditional ownership were exchanged in the following months. It is not necessary to set out in detail that process, which was subject to various modifications and extensions. It suffices to note that detriment parties, including the Northern Territory, received the opportunity to file primary submissions on the issue of detriment, to which the Northern Land Council on behalf of the Bwudjut claimants responded on 3 December 2021. No other claimants provided responsive submissions. The detriment parties were then afforded the opportunity to provide submissions in reply. Final submissions on the topic of detriment were received on 21 January 2022, signalling the end of that part of the Inquiry.

116. A similar process occurred in respect of the issue of traditional Aboriginal ownership. Claimant groups filed primary submissions in November 2021, to which the Northern Territory and Fitzroy responded. The Fitzroy submissions were made although it had not adduced any evidence relating to traditional Aboriginal ownership, and it had not sought to test the evidence by asking questions of any witness including any of the anthropologists who provided reports or gave oral evidence. As is the usual course, each claimant party was afforded the opportunity to reply.

117. The Submissions on Traditional Ownership filed by Fitzroy dated 11 March 2022 (Fitzroy Traditional Ownership Submissions) raised a constructional issue as to the meaning of 'traditional Aboriginal ownership' as it appears in the ALRA. It appeared to me that, despite its lack of active participation during the hearings on the topic, Fitzroy wished to put forward a construction of the term 'traditional Aboriginal ownership' that differed from that of the other parties on the issue. I regarded that as potentially unfair unless I gave an opportunity to the other parties to respond. I note that the Fitzroy submissions also differed significantly from those presented by the Northern Territory, and if correct may have resulted in a finding that there are no traditional Aboriginal owners of the claim area in the Peron LC.

118. Consequently, I sought further submissions from Fitzroy, provided on 22 May 2022 and responsive submissions. They were provided by the Bwudjut claimants through the Northern Land Council and by the Northern Territory on 6 July 2022 and by the Kiyuk claimants and, the Wood/Morgan claimants on 7 July 2022. The responsive submissions of Fitzroy were received on 2 August 2022.

119. An issue also arose as to whether certain material and submissions put by the Cubillo family opened the issues more widely than was fair. I indicated that I considered the reception of that material would be fair if those objecting had an opportunity to respond. The Kiyuk claimants on 18 July 2022 and the Bwudjut claimants and the Northern Territory on 20 July 2022, and then the Wood/Morgan claimants on 25 July 2022 made further submissions.

120. Subsequently, on 11 November 2022 I received a request from the Bwudjut claimants through the Northern Land Council to give parties the opportunity to consider my ruling on traditional Aboriginal ownership before providing this report to the Minister. I had adverted to the possibility following receipt of the Fitzroy Traditional Ownership Submissions, because those submissions – if accepted – may have resulted in all the claimants failure to establish traditional Aboriginal ownership as they had not addressed the continuity of their connection to the claim area from the time of white occupation of the general area. The claimants should have been given the opportunity to call witnesses on that aspect. This is explained further in Section 3.1 of this Report. Subsequently, at a hearing, counsel for Fitzroy significantly qualified that submission, so an interim ruling was not necessary. Nevertheless, in case the submissions on traditional Aboriginal ownership had proceeded on the basis that they would later be supplemented, I gave parties the opportunity to file supplementary submissions on the topic of traditional Aboriginal ownership by 24 February 2023. No such supplementary submissions were received by my office and I was informed that none were intended. At that point I considered that the evidence for the Person LC Inquiry was complete.

121. I turn now to my consideration of traditional Aboriginal ownership of the Peron LC area.

3. TRADITIONAL ABORIGINAL OWNERSHIP

122. Having set out the history of the claim area and the Inquiry, I now address the matters contained in sections 50(1)(a) and 50(3)(a) of the ALRA. This includes the strength of attachment of the respective claimants to the claimed land.

123. Section 50(1)(a)(i) of the ALRA requires the Commissioner, when inquiring into a traditional land claim, to 'ascertain whether those Aboriginals or any other Aboriginals are the traditional Aboriginal owners of the [claimed] land'. Pursuant to section 3(1) of the ALRA, 'traditional Aboriginal owners' means a 'local descent group of Aboriginals', who:

    (a) have common spiritual affiliations to a site on the land, being affiliations that place the group under a primary spiritual responsibility for that site and for the land; and

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

124. I first note and comment upon the submissions of Fitzroy. I will then turn to the claims of each of the now five claim groups and address in detail their claims in respect of: 1) their status as a local descent group; 2) having common spiritual affiliations to a site on the Peron LC area that place that group under a primary spiritual responsibility for that site and for the Peron LC area; and 3) their entitlements to forage as of right over the Peron LC area.

3.1. MEANING OF TRADITIONAL ABORIGINAL OWNER

125. In recent claims, it has not been common for those who assert a relevant detriment to engage in the issue of whether or not traditional Aboriginal ownership of the claimed area is established. Fitzroy, however, from an early stage, indicated its interest in participating in the hearing on that issue, and a concern that its views might not be adequately reflected in the position of the Northern Territory. The interest of Fitzroy is understandable. As its submission indicates, if no traditional Aboriginal ownership of the claimed area is established, Fitzroy and the individual lessees of the Fitzroy land will then continue to have unrestricted access to the sea and the beach area in front of the Fitzroy land, as publicly held land.

126. On 13 February 2019, I indicated that, despite the objection of the Northern Land Council, Fitzroy should be permitted to participate in the Inquiry on that issue. I sought from Fitzroy an indication of its proposed role, but it remained somewhat ambiguous: it '… remain(s) vitally interested in the question of traditional ownership […] but cannot presently express a view as to the identity of the traditional owner (if any) of the land subject to claim'.

127. As the hearing was progressing, on 8 June 2021 Fitzroy indicated that it did not wish to participate directly in the hearing of the traditional ownership evidence, but formally reserved its position as to whether it would make a submission different from that of the Northern Territory. At the appropriate time, it sought the opportunity to make such a submission on traditional Aboriginal ownership after the Northern Territory submission on that topic had been provided. That opportunity was allowed for, and its submission (if any) was to be provided 2 weeks after that of the Northern Territory in response to the several claimants' submissions. The Fitzroy Traditional

Ownership Submissions were provided on 11 March 2022, after Fitzroy had sought 4 extensions of time to do so.

128. That submission put the proposition that the concept of 'traditional Aboriginal owners' as defined in the ALRA in effect had the same meaning as the expression 'native title' or 'native title rights and interests' as defined in section 223 of the *Native Title Act*. As discussed by the High Court in *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422; [2002] HCA 58, that provision requires that the traditional laws and customs must be shown to have had a continuous existence since sovereignty. The reasoning was that the Parliament must have intended the concept of Aboriginal traditional ownership under the ALRA and the *Native Title Act* should operate consistently and harmoniously, so the later legislative provision in the *Native Title Act* should retrospectively inform the meaning of the term used in the ALRA. The submission of Fitzroy also indicated that it expected its submission to be rejected, but that it reserved its right to pursue the point by way of judicial review.

129. I regarded the submission as one which might operate unfairness to the several claimant groups. That was simply because, had Fitzroy made its contention at an earlier stage of the Inquiry, they each might have taken the opportunity to adduce further evidence to cover that contention. They had not been put on notice of it. It was not consistent with the view which the Northern Territory had advanced through the Sansom Provisional Report or his later Sansom Supplementary Report, or in its submissions. The Northern Territory did not contend that there were no traditional owners of the claimed area, although Professor Sansom was somewhat cautious about that position.

130. Consequently, it was necessary to give the other parties, including the Northern Territory the opportunity to address the issue so bluntly presented. Responsive submissions were provided by the Northern Territory and the Bwudjut, Kiyuk and Wood/Morgan family claimants. Not surprisingly, the responsive submissions were critical of the position that Fitzroy had taken. I then required a more detailed submission from Fitzroy to develop its contention.

131. Fitzroy then provided a further submission on 9 May 2022 and again later on 1 August 2022. It did not adhere to its earlier primary contention in the same way. Its submission was more conventional, namely that the word 'traditional' must be given significant content, and accepted that the approach of the High Court in *Meneling Station*, especially per Brennan J, described the proper conceptual analysis to be followed. That is the analysis that the Commissioner has subsequently followed in claims under the ALRA. It is the status of the current persons claiming traditional Aboriginal ownership which must be assessed. As is generally acknowledged, that satisfaction of the elements of the statutory definition can involve some evolution or adaptation of what was previously the form of that traditional attachment to the claimed land.

132. It is now only in marginal respects that I do not accept the contention of Fitzroy. I reject the proposition that the relevant provisions of the *Native Title Act* inform the proper construction of the definition of traditional Aboriginal ownership in the ALRA. The ALRA well preceded the *Native Title Act* by almost 20 years. The wording of the relevant provisions is quite different. In *Certain Lloyd's Underwriters*

v Cross 248 CLR 378; [2012] HCA 56, French CJ and Hayne J at [25] emphasised that the purpose of a statute is to be found in its text, context and structure, and where appropriate with elucidation from extrinsic materials. There are many similar expressions in other cases. The policy considerations underlying the ALRA are clear. They represent a clear beneficial intention to facilitate the grant of unalienated Crown land to its traditional owners. It does not intend to impose an obstacle to such grants by demonstrating that, for a period of time, by the intervention of colonisation the capacity to practise traditional laws and customs at a particular location was impaired or displaced. I find it difficult to accept that, where traditional Aboriginal ownership has been acknowledged by the grants to the Wagait ALT and to the Daly River ALT to the north and south of the claim area, there can be said to have been no traditional Aboriginal owners of the claim area because of the colonisation history referred to. That history is of course generally common to the much wider area including those to granted areas.

133. In *Meneling Station*, Brennan J at 359 observed that 'Aboriginal tradition' under the ALRA and in relation to the claimed area may be 'eroded or renewed with the passing of time'. His Honour accepted that the status of traditional Aboriginal ownership could be unaffected, even if the connection to the area waxed or waned over time, and that the connection may be 'so renewed that it is right to regard that group as traditional Aboriginal owners'. The Full Court of the Federal Court (Northrop, Hill and O'Loughlin JJ) in *Re Northern Land Council; Tibby Quall and Northern Land Council v the Honourable Justice Olney, Aboriginal Land Commissioner and the Attorney-General of the Northern Territory* (1992) 34 FCR 470; [1992] FCA 69 reached the same view at 485-486. Their Honours noted that the definition of 'traditional Aboriginal ownership' speaks in the present tense, and applies where tradition has changed over time, including that 'groups may die out' but later revive without falling outside the definition. See also *Myoung v Northern Land Council* (2006) 154 FCR 324; [2006] FCA 1130.

134. In each claim, it is of course necessary to test the existence of the elements of traditional Aboriginal ownership against the evidence, including the evidence of the claimants themselves and of the anthropologists. Not one anthropologist asserted that the evidence did not support the conclusion that there was traditional Aboriginal ownership of the claim area (although there were disagreements about where that ownership lay). Not one of the claimant witnesses was challenged by Fitzroy as having created a sense of tradition where that tradition did not exist. The Northern Territory in its role as the guardian of the wider public interest has not contended that there are no traditional Aboriginal owners of the claimed area.

135. I turn to consider the elements of the statutory definition and the evidence and submissions.

3.2. LOCAL DESCENT GROUP

3.2.1. The meaning of 'local descent group'

136. The meaning of 'local descent group' as it appears in the ALRA was the subject of contrasting submissions by the claimants.

137. It is in this context that I recall the discussion of the Full Court of the Federal Court in *Northern Land Council v Aboriginal Land Commissioner* (1992) 105 ALR 539; (1992) 33 FCR 470 (Northrop, Hill and O'Loughlin JJ) (*the NLC v ALC case*). In that case, the Court at 553 unanimously agreed with the view of Toohey J as Commissioner in the *Finniss LC Report,* noting that a 'local descent group' in the sense of the ALRA requires that there be:

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

138. The Court went on to explain that Toohey J's interpretation has two important qualifications. First, it was said that descent could be by adoption. In the context of the Peron LC, so much is uncontroversial.

139. Secondly however, the Court at ALR pp 553–54 considered it necessary to further expand on what Toohey J intended when noting that the relevant principle of descent is one that is 'deemed relevant by the claimants'. This did not mean that a principle of descent might be deemed relevant 'on a whim to fit the circumstances of a land claim': rather, they explained, Toohey J as Aboriginal Land Commissioner simply meant that the relevant principle of descent in operation will depend upon the circumstances of the group at hand. As such, the Court said that 'the principle of descent will be one that is *recognised as applying in respect of the particular group* [emphasis added]'. The evidence of the claimants is a significant key in ascertaining that recognition.

140. The Court added that a principle of descent need not be rigid or fixed, saying that 'there is no reason [why] the particular principle of descent traditionally operating may not change over time': ALR pp 553–54.

141. The Court further explained that the way in which the Commissioner approaches the ascertainment of the relevant principle of descent, and its relationship to the other components of the definition of 'traditional Aboriginal owners', depends on the way in which each claim is formulated. At ALR pp 556–57 it was said:

> There is little doubt that the way the Commissioner will proceed with the task before him must vary depending upon the way the evidence is presented. The task of the Commissioner is first to ascertain the relevant group to be investigated and then to determine whether the members of that group have the requisite common spiritual affiliation such that the group is as a result under a primary spiritual responsibility for the site and the land. A group necessarily comprises persons. Clearly it is not necessary to call each member of the group to give evidence to establish that they have the appropriate spiritual affiliation. It will be sufficient if the evidence establishes, on the balance of probabilities, that the Aboriginal who comprise that group have that affiliation.
>
> It may be noted that the definition of "traditional Aboriginal owners" speaks of: "… a local descent group of Aboriginals who –
>
> (c) *have* common spiritual affiliations…; and
>
> (d) *are* entitled… to forage."
>
> The use of the plural in each case suggests that the common spiritual affiliations have to be possessed by the individuals who comprise the group, rather than, if there be a difference, by the group as a group. Similarly it is the Aboriginal members of the group who *are* entitled to forage, not the group. Thus if a group of persons having an appropriate genealogy is found to exist, but some members of the group, whether

> because of age or others, eg infants, lack the requisite spiritual affiliation, those persons will be excluded from the group. If only the group itself were looked at, then the fact that the group as a whole was recognised as having the appropriate spiritual affiliation would not disqualify individual members of that group lacking the necessary spiritual affiliation from belonging to the group.
>
> This accords too with the policy of the [ALRA] in requiring, after grants of land have been made, the consent of traditional Aboriginal owners to various decisions of the relevant Land Council in respect of traditional land. It would be indeed strange if persons themselves lacking the necessary spiritual affiliation, or even knowledge of it, could participate in the decision-making process. Rather, the Act contemplates that each member of the local descent group must share in common with each other member the common spiritual affiliations to a site on the land of which the definition speaks.
>
> Provided, however, that this is recognised, the manner of proof to be adopted will depend upon the way the claim is presented.

142. That explanation of 'local descent group' has been applied in many subsequent Reports since that decision: see, e.g., *Ngaliwurru/Nungali (Fitzroy Pastoral Lease) Land Claim; Victoria River (Beds and Banks) Land Claim (Nos. 137 and 140) Report No. 47* (22 December 1993) at [3.1] per Gray J as Commissioner; *Kenbi LC Report* [1.4.3]–[1.4.5] per Gray J as Commissioner; *Frances Well Land Claim (No. 64) Report No. 73* (16 June 2016) at [58]–[60] per Mansfield J as Commissioner.

143. The correct application of the above principles to the Peron LC was the subject of some dispute. As will become apparent, the evidence in this Inquiry presented various issues in this respect. I return to those issues as appropriate below.

3.2.2. The respective claims

144. As noted above, there are five claimant groups: the Bwudjut, the Wood/Morgan, the Piening/Rivers, the Cubillo family, and the Kiyuk. It is accepted that there are many family ties and a general history of association between them: see, e.g., Submissions on Traditional Aboriginal Ownership prepared on behalf of the Bwudjut claimants dated 23 November 2021 (Bwudjut Traditional Ownership Submissions) at p 4[5]. This was made clear at the hearing of lay evidence at Bulgul, during which the various interrelationships were the subject of voluminous and at times tense discussion.

145. At a broad level, it is asserted that the Peron LC area falls within the traditional country of two language groups, the Wadjigan and the Kiyuk. This has been the general perception for some time: see Sansom Provisional Report (Exhibit NT10) at [6](i).

146. The long history of association between the groups has seen the Kiyuk language fall into disuse. The Wadjigan language Batjemal (Bachemal) is now spoken by both groups: Lewis Report [3.5].

147. The Bwudjut, Wood/Morgan, Piening/Rivers and Cubillo claimants each identify as belonging to the Wadjigan language group, whereas the Kiyuk 'stand alone': Lewis Supplementary Report [6.5]. In my noting of the historical background to the Peron LC, I recorded the previous anthropological understanding that these two language groups had effectively merged to become one composite 'Wadjigan-Kiyuk' local

descent group as a result of historical circumstances. That perception pervaded the earlier Wagait Dispute and the Kenbi LC: see Sections 2.2.3–2.2.4 above.

148. The earlier anthropological material indicated that the Wadjigan-Kiyuk group was understood to comprise those two formerly separate language groups: see, e.g., Barber Report [85]–[90]. Further, while it is often the case that a language group could also comprise smaller 'estate' groups united by patrilineal descent (for example) and holding primary spiritual responsibility for specific sites and surrounding land, it appears that this lower-level structure was generally thought to no longer be the principal means of identification with country: see, e.g., Lewis Report at [3.8]–[3.10]; Barber Report [90].

149. That is to say that, at the time of the Wagait Dispute and of the *Kenbi LC Report*, it seems to have been thought that the composite 'Wadjigan-Kiyuk' language group structure was the principal basis for identification of group membership in respect of these claimants, although a generally coherent idea as to their traditionally separate territories remained. The relevant descent principle was generally considered to be cognatic. I use the word 'generally' because the anthropological materials are not settled on this point, with some materials identifying the potential for the ongoing relevance of the estate structure, and with it the principle of patrifiliation: Barber Report [87], see, e.g., Michael Walsh 'The Wagaitj in Relation to the Kenbi Land Claim Area' (1989) p 4 cf. Pickering Report p 15; see also Povinelli 1990 Report p 3.

150. In any case, as in the Lower Daly LC, the composite Wadjigan-Kiyuk language group model was not advanced in the Peron LC by any of the claimant groups as being the relevant local descent group for the purposes of the ALRA. Indeed, many witnesses in this claim outright rejected that model in oral evidence.

151. Specifically, the composite language group model is resisted in several important respects. First, it is clear from the evidence and submissions of each group that the separation between the Wadjigan and Kiyuk language groups in terms of, for example, the principle of decent and common spiritual affiliations to sites (as well as traditional land interests more broadly), should be maintained: see, e.g., Lewis Report [3.10]; Lewis Supplementary Report [6.5].

152. Second, while the Kiyuk say that all Kiyuk language group members are the traditional owners of all or at least part of the Peron LC area (see, e.g., Lewis Report [5.7]), the same cannot be said of Wadjigan claimant groups' respective contentions. Rather, each of the Wadjigan-identifying claimant groups (with the exception of the Piening/Rivers group as explained below) advance their claim on the basis that the estate group structure or *rak* (as it is called in the local Batjemal language) has been maintained in one form or another.

153. Consequently, it is common ground in the Bwudjut, Cubillo and Wood/Morgan groups' submissions that the Wadjigan language group is not the relevant local descent group for the purposes of the ALRA. That is, it is not the correct line of inquiry when considering common spiritual affiliations to and primary spiritual responsibility for the Peron LC area. Rather, it is said by each of these claimant groups that membership of the estate group termed 'Rak Bwudjut' is paramount.

154. Other estate groups within the Wadjigan language group have been found to be the traditional owners of areas to the south of the Peron Islands LC area on that basis: see, e.g., *Lower Daly LC Report* [40], [67]. Those estate groups are not said to be traditional owners of the Peron LC area either in whole or in part.

155. Thus, the key issue amongst the majority of the Wadjigan identifying claimant groups is the relevant principle of descent in respect of Rak Bwudjut: put simply, whether it remains patrilineal or has 'shifted' to cognation. On the one hand, the Bwudjut group say that the recognised and operational principle is that of patrilineal descent (including some 'one step' matrifiliates). On the other hand, the Cubillo family and the Wood/Morgan claimants rely on the proposition that they are the matrifiliates of Rak Bwudjut, and that members of the estate group are recognised on a cognatic basis. This is not accepted by the Bwudjut group.

156. The Piening/Rivers group, whilst also claiming to be descended from matrifiliates of the Bwudjut estate, appear to contend that the relevant local descent group for the Peron LC area is the Wadjigan language group as a whole.

157. It follows that there cannot be a composite Wadjigan-Kiyuk language group that are the traditional owners of the Peron LC area: so much is uncontroversial. Further, and in light of the *NLC v ALC case*, it is not difficult to see that the respective arguments of the Wadjigan-identifying claimants regarding the relevant local descent group give rise to several issues.

158. I turn now to consider each claim in detail.

3.2.3. The Bwudjut group

159. The Genealogy prepared on behalf of these claimants by Mr Graham dated 23 January 2018 (Exhibit A3) and the Revised Genealogy prepared on behalf of the claimants by Mr Graham dated 5 November 2018 (Exhibit A3(B)) (Graham Genealogies), as well as the claimants' personal particulars contained at Appendix C to the Graham Report, show that the Bwudjut group largely consists of members of the Henda and Lane families. A complete list of the claimants belonging to this group is annexed to this Report at Annexure B.

160. As I have noted above, the Bwudjut group identify with the Wadjigan language group, but claim to constitute, in its entirety, the Bwudjut estate group or *rak* at one level below. In that sense, their claim is advanced on the same model as in the Lower Daly LC: see *Lower Daly LC Report* [40], [43]. Mr Graham, despite admitting that there is 'some degree of uncertainty as to their genealogical connections' describes that principle at [3.6.1] of the Graham Report:

> … there is a closely related patrilineal group with descent from known ancestors… At the highest genealogical level the Rak Bwudjut claimants are descended from 'close' brothers (although it is not known whether they were actual biological brothers). They were Lambudju Maldjin (deceased), A Kuk Madpuk (deceased), Mungaland (Mungulun) (deceased), Djulaidji (deceased) and Ngarrain (deceased). Only Lambudju (deceased) and Djulaidji (deceased) had offspring. Despite this the group remains viable with a mix of patriline members and persons associated through descent from female members.

161. The brothers Djulaidji and Lambujdu were themselves descendants of Berrk and Kirril: see Graham Genealogies. The Graham Genealogies clarify that the Henda family claimants are descended from Djulaidji, and the Lane family claimants are descended from Lambudju.

162. The Bwudjut group submit that it is united by a principle of patrilineal descent, including 'one-step matrifiliates where a person's life circumstances mean that the person identifies as a member of the group and is accepted as such'. 'One-step' matrifiliates are those who claim group membership through their mother's father, rather than directly through one's father. It is also said that the group can on occasion include further matrifiliates: Bwudjut Traditional Ownership Submissions p 22[48].

163. The inclusion of one-step matrifiliates within the Bwudjut local descent group is said to reflect 'the different ways that people acquire affiliations to country within a patrilineal system': Bwudjut Traditional Ownership Submissions p 17[29]. Mr Graham in the Graham Report at [3.2.1]–[3.2.2] explained as follows:

> Primary spiritual affiliations arise from patrilineal descent… [however] There are other means of obtaining spiritual responsibility for sites and land. Individuals who take a country through their mother (*Kalhangbalnak*) and mother's father (Tjemmeny) also have spiritual responsibilities. In culturally stable circumstances, such spiritual responsibilities (e.g. assisting in ritual and protecting sites and country) are subordinate to the rights of the patrilineal group. Where local descent group membership is low or non-existent or where an individual's father was of non-Aboriginal descent he or she can exercise primary spiritual responsibility through the mother and mother's father. In these circumstances it is possible for a cognatic descent group to form under the woman (women) who is affiliated through her father)…

164. The situation in which one has a non-Aboriginal father does not arise for the Bwudjut group. Thus, it is said that Bwudjut group membership may be through one's father or mother's father in certain discrete circumstances.

165. The Northern Territory and the Kiyuk group do not contest the Bwudjut's asserted constitution as a local descent group in accordance with this principle.

166. The other Wadjigan identifying groups, however, took issue with the inclusion of matrifiliates within Rak Bwudjut's supposedly patrilineal system. I do not propose to recount these submissions in detail. It suffices to say, I think, that submissions were made to the effect that the patrilineal model is no longer followed in practice. It is said that the relevant principle for Rak Bwudjut has shifted to cognation given the inclusion of several matrifiliates within the local descent group, that is, descendants with links through their mother's father.

167. The Bwudjut patrilineal model is thus said by them to have been reconstructed to fit the circumstances of the Peron LC, without a proper foundation, and so (it is said) to be a contrived model. They submitted that such an approach is contrary to the state of the law as expressed in the *NLC v ALC case* above.

168. There are several important points which weigh against that conclusion. First, I have noted above that in the Lower Daly LC the Bwudjut group were found to constitute a local descent group in the sense required by the ALRA: see *Lower Daly LC Report* [68]. While recognition in another land claim alone would not be sufficient for the

purposes of the Peron LC, it is nonetheless an important historical and contextual factor which should be taken into account. Indeed, the principle of descent described above by Mr Graham was similarly advanced in the Lower Daly LC by Professor Povinelli, who termed it 'presumptive patrifiliation': see, e.g., Povinelli 2001 Report (Exhibit AC27) pp 26–27.

169. Second, the evidence of the Bwudjut claimants themselves emphasises how patrilineal descent remains the dominant recruitment principle: see, e.g, Transcript 5 November 2018 pp 41, 49, 56. In the case of one-step matrifiliates, an individual's subjective circumstances are paramount in considering whether that individual is accepted as belonging to the Bwudjut estate group.

170. Furthermore, the evidence demonstrates that, while membership through one's father or mother's father (if circumstances permit) confers differing roles in relation to country, that does not override the central principle of patriliny: it merely reflects the different ways that people acquire common affiliations to country within a patrilineal system. For example, Mr Tommy Henda said that the child of a Bwudjut woman and a non-Aboriginal man could be recognised as a Bwudjut person. The grandchild of that Bwudjut woman could also be Bwudjut: Transcript 22 June 2021 pp 335–36. However, it was common ground amongst the witnesses that the roles of the child and the grandchild, as 'caretakers' for Bwudjut country, would be different to those of a patrifiliate, who would be considered a 'boss' who could 'speak for' Bwudjut country: see, e.g., Transcript 22 June 2021 p 326, 333.

171. This was articulated in evidence regarding Ms Vanessa Henda (a one-step matrifiliate through her mother's father, but who was raised by Ms Theresa Henda, a direct patrilineal descendant of Djulaidji): see Transcript 22 June 2021 pp 333–335, Ms Theresa Henda in contrast to her children (all one-step matrifiliates): see Transcript 5 November 2018 p 131; 22 June 2021 pp 326–27, 336–37, and Lorraine Lane (a patrilineal descendant of Lambudju) when compared to her children and grand-children: 5 November 2018 pp 52–53; 22 June 2021 p 331. Each of these categories of people are capable of being recognised as Bwudjut in accordance with their life circumstances.

172. In contrast, Bwudjut witnesses also specifically identified that other matrifiliates were not recognised as part of the group because they followed their father: see, e.g., Transcript 5 November 2018 p 49.

173. Finally, the issue of when, if ever, a patrilineal descent group makes the shift towards adopting a cognatic principle was the subject of discussion among the expert anthropologists during the hearing in Darwin on 2–3 September: see generally Transcript 2 September 2021 pp 483–489. The experts agreed that specific exceptions to traditional rules of descent have for a long time been practised by Aboriginal groups, whether out of necessity or otherwise. Professor Sansom said that such exceptions are made when 'dealing with facts of human life and exigencies that give you an escape clause', and Mr Graham detailed the 'mechanisms' by which such exceptions would be made without detracting from the overarching patrilineal descent model: Transcript 2 September 2021 p 485. It is not a system of absolutes.

174. Further, Mr Graham was directly asked the question of when it can be said that a patrilineal descent group becomes cognatic, in contrast to recruitment by presumptive patrifiliation (in which patriliny remains the principal basis for group membership with some exception). He answered thus:

> Where, once you've been taken in, as the professor [Sansom] explained, you'll become part of the group, you've got kinship terms applied to you, where your descendants are just the patrilineal descendants who are considered a part of that system then it's still a traditional system. When you're able to pass it onto all of your descendants it would be a cognatic system. And that's easily in evidence when you go and see a group, when you see them in operation: Transcript 2 September 2021 p 489.

175. The evidence of the Bwudjut claimants does not indicate that all matrifiliates, one-step or otherwise, are automatically accepted as Bwudjut. If the evidence were to the contrary, that would tend, I think, to tip the scales in favour of a cognatic model, consistently with Mr Graham's comments. In contrast, where one-step matrifiliates are included in the Graham Genealogies there is a justification for doing so, just as there is a reason for when other matrifiliates are not included.

176. In sum, in the case of the Bwudjut, matrifiliates may be recognised and accepted if their individual circumstances permit. However, the patrilineal model remains the dominant mode of recruitment. So much is reflected in the difference between the roles that flow from group membership through one's father (boss) and one's mother's father (caretaker). Indeed, the Bwudjut do not see themselves as comprising a wider group including, as a matter of course, all cognates.

177. It is a coherent model of descent and group membership that was satisfactorily explained by the Bwudjut claimants. Suggestions that the patrilineal model is no longer followed or of other internal inconsistency are not well founded.

178. I accordingly find that the Bwudjut constitute a local descent group in the sense required by the ALRA. That group is united by a principle of patrilineal descent including one-step matrifiliates where a person's life circumstances mean that the person identifies as a member of the group and is accepted as such.

3.2.4. The Wood/Morgan and Cubillo families

179. I have included these groups together as their claim is essentially of the same character, particularly in respect of their challenge to the Bwudjut's contention that Rak Bwudjut is united by patrilineal descent. That is, both the Wood/Morgan and Cubillo groups say that the Rak Bwudjut estate group, and hence the relevant local descent group, includes both patrifiliates and matrifiliates i.e., that it is bound by cognatic descent.

180. The Wood/Morgan claimants do, however, seek to exclude the Cubillo family on the basis of a perceived lack of certainty regarding their genealogical links: I deal with this issue below.

181. The Genealogy prepared by Mr Barber is the 2019 Wood/Morgan (Exhibit AM5) (Barber Genealogy). It indicates that the Wood/Morgan group of claimants constitute members of Wood, Morgan, McCarthy and Olsen families. The eldest generation

of the Wood/Morgan claimants are children of Harry Morgan (Wadjigan) and Kitty Tjalmutj, daughter of Ngarrang, who himself is shown on the Wood/Morgan or Barber Genealogy to have been a patrilineal member of Rak Bwudjut through his father Berrk (as mentioned above, Ngarrang was a 'brother' of Lambudju and Djulaidji, the apical ancestors of the Bwudjut patriline).

182. Thus, the Wood/Morgan claimants comprise part of the Rak Bwudjut matriliny.

183. A list of the Wood/Morgan claimants is annexed as Annexure B to this Report.

184. Consistent with my description above, the Wood/Morgan group's formulation of the relevant local descent group is described at [5] of the Morgan Wood Family Outline of Submissions dated 23 November 2021 (Wood/Morgan Traditional Ownership Submissions):

> The Morgan/Wood family do not claim that they alone constitute a local descent group for the purposes of the Land Rights Act. Rather, their claim is that they form part of a single local descent group that encompasses, with the exception of the Cubillo family, all the parties in this claim. This local descent group may be identified as the Bwudjut descent group of the Wadjigan linguistic group.

185. It follows that, rather than being confined to the patrilineal descendants of Djulaidji and Lambudju (as the Bwudjut assert), the Wood/Morgan say that the relevant local descent group (and hence Rak Bwudjut) comprises all cognatic descendants of the apical ancestors Berrk and Kirril: see Barber Genealogy.

186. The Cubillo claimants frame their claim to membership of Rak Bwudjut in similar terms. At [55] of the Traditional Ownership Submissions of the Cubillo Claimants (Cubillo Traditional Ownership Submissions) it is said:

> The local descent group is made up of families who are related to each other through one or both parents, and the families are associated with particular areas of country that are owned collectively by the Ruk Bwudjut (to which the families belong). The Ruk Bwudjut families are descended from ancestors with a recognised connection with the region where the Claim Area sits, who are bound together by their linguistic affiliation with each other, their common descent, and their common spiritual affiliation with the area. The apical ancestor for the Ruk Bwudjut with a universally recognised association with the Claim Area is Berrk, the father of the Cubillo Claimants' ancestor, Kudang. Kudang was the sister of the male ancestors from whom the Henda/Lane Claimants claim descent.

187. The Barber Genealogy demonstrates that the daughter of Kudang (also Gudang or Kudung) was Rose Cubillo. The Cubillo family claim descent from Rose Cubillo. Similar to the Wood/Morgan claimants, their putative connection to the Rak Bwudjut estate group is therefore matrilineal: Cubillo Traditional Ownership Submissions [1](b).

188. The Barber Genealogy notes, however, that there is some dispute as to Rose Cubillo's descent from Kudang. This was raised at the hearing at Bulgul, and pursued in the Wood/Morgan Traditional Ownership Submissions at [5].

189. None of the other claimant groups raised an issue on this point; nor did the Northern Territory.

190. I do not need to repeat in detail the content of that dispute, particularly in light of the fact that the Wood/Morgan submission was not explained in any great detail

other than to briefly note the exclusion of the Cubillo family. It suffices to say that I accept the contentions of the Cubillo family contained at [96]–[97] of the Cubillo Traditional Ownership Submissions, being that on the evidence before me I can and do find that Rose Cubillo was descended from Kudang if not biologically, then at least through adoption. Indeed, Mr Barber himself accepted the significant evidence of such a familial relationship, irrespective of proven biological links: see Transcript 3 September 2021 p 538.

191. Additionally, the Cubillo group did not provide a list of the specific claimants belonging to that group; nor does the Barber Genealogy identify them. This is understandable given the limited time and resources made available to Mr Barber (see Barber Report [2]–[3]). The same can be said of the other genealogies relating to the Kenbi LC that were provided by the Cubillo claimants (see Exhibits AC1 and AC8).

192. There is sufficient evidence before me to conclude that there are the links as claimed by the Cubillo family to Kudang and her daughter Rose. No party other than the Wood/Morgan group contested these links and I have already rejected that particular submission.

193. The eldest of the Cubillo claimant group is Mr Ben Cubillo Snr, son of Rose.

194. I also note that there is some inconsistency between the opinions of Mr Graham and Mr Barber regarding the genealogical links of Wood/Morgan families to the Bwudjut estate as asserted. Mr Graham for example records the uncertainty as to whether Ngarrang had any children: Graham Report [136]. However, the Bwudjut do not contest the links asserted by the Wood/Morgan group: see Bwudjut Traditional Ownership Submissions [131]. Nor, it appears, do any of the other claimant groups or the Northern Territory. I have therefore proceeded upon the basis that those links are uncontroversial.

195. I move now to the substantive issues regarding the Wood/Morgan and Cubillo formulation of the local descent group: that is, whether Rak Bwudjut can be said to include those claimants with matrifilial connections such that the relevant principle of descent is cognatic.

196. The Wood/Morgan group say that the history of the wider region of the Peron LC area has caused ‘lasting changes to the socio-cultural organisation of the local descent group and their relationships with sites on the claim area’: Wood/Morgan Traditional Ownership Submissions [19]. It is substantively very similar to the submission of the Cubillos, who say that the ‘significant disruption caused by European colonisation of the area… [which] resulted in substantial changes by necessity’ including ‘a move to cognatic descent’: Cubillo Traditional Ownership Submissions [58].

197. In this respect, both the Wood/Morgan and the Cubillo groups rely largely upon the expert opinion of Mr Barber who, in the Barber Report, reviews the existing literature regarding the Peron LC region (as opposed to the claim area specifically) and concludes that ‘the proposition [as put forward by the Bwudjut claimants] that recruitment which privileges patrifiliation over matrifiliation within the Rak Bwudjut estate is inconsistent with the historic and regional data’: Barber Report [162].

198. The Cubillos also rely upon the Preliminary anthropological report of Dr Stephen Bennetts dated August 2021 (Exhibit AC7) (Bennetts Preliminary Report). Dr Bennetts agrees with the conclusion of Mr Barber: see Bennetts Preliminary Report p 13.

199. It is therefore necessary for me to consider the basis for Mr Barber's opinion in detail. The Barber Report contains a thorough analysis of the pre-existing materials in relation to the general region of the Peron Islands LC and surrounds.

200. In coming to his conclusion, Mr Barber points out inconsistencies in the work Ivory and Tapsell (1978), who concluded that the Rak Bwudjut recruited patrilineally: Barber Report [56], [68]. Mr Barber also places weight upon the evidence of social disruption before the Commissioner in the Finniss River, Malak Malak, Upper Daly, and Jawoyn land claims, which resulted in the principal social structure in the region being that of cognatic language groups, rather than smaller patrilineal estate groups or patri-clans: Barber Report [69]–[77]; [91]. Of some relevance to the Peron LC is the Finniss River LC, however, whilst considering the extent of Wadjigan (spelt 'Wadjigany' in that claim) language group country, that claim did not concern the Rak Bwudjut estate group specifically.

201. The same can be largely said of the material tendered in the Kenbi LC, in which the composite Wadjigan-Kiyuk model was advanced: Barber Report [78]–[90]. This structure was also emphasised by Mr Pickering as 'the local descent group' and 'the primary justification for affiliation to land': Pickering (1993) p 14 in Barber Report [105].

202. Mr Barber points out the difference of these opinions to those in Professor Povinelli's 2001 and 2002 Reports, whose work for the Lower Daly LC is the first in his Report to specifically emphasise the continuing relevance of the estate group structure. As pointed out by Mr Barber at [122] and [126], Professor Povinelli did not include any matrifiliates as part of Rak Bwudjut, but noted that one-step matrifiliates could in some circumstances be considered Bwudjut. In those cases, their rights would be subordinate to those of the patriline: Barber Report [118]–[120].

203. According to Mr Barber, Professor Povinelli did not 'engage with the proposition… about significant social change': Barber Report [121]. Nor, it is said, did she adequately consider the relationship of the Cubillo (as descendants of Kudang) or the Wood/Morgan families to the Bwudjut estate specifically.

204. As noted above, Mr Barber says that the regional ethnography therefore weighs in favour of two conclusions. First, that the patrilineal estate group model gave way to identification with country by either language groups or cognatic estate groups. Second, that the descendants of Ngarraing and Kudang (which, among others, include the Wood/Morgan and Cubillo claimant groups respectively) are the matrifiliates of the Bwudjut estate.

205. I have already noted that I do not consider the putative genealogical links to be in issue, in accordance with the views of the Bwudjut group. There remain, however, several difficulties in accepting Mr Barber's first proposition regarding the relevant principle of descent for Rak Bwudjut.

206. The first is that many of the ethnographic materials that Mr Barber cites in support of his opinion are premised on the composite Wadjigan/Kiyuk language group model. Indeed, it is only his consideration of Professor Povinelli's material which traverses in any detail the estate group or *rak* form of identification with country. For the reasons explained above (namely that none of the Peron LC claimants rely on the language group structure), previous research which advances that model should be viewed with caution when ascertaining traditional ownership of the Peron LC area. Whilst providing a helpful background, I do not consider such materials alone to be sufficient to conclude that there has in fact been a shift to cognation here.

207. Further, Mr Barber cites materials that were utilised in support of other claims. I accept that those materials discuss traditional ownership of areas which are geographically proximate, yet it is also true that they do not specifically concern either the Peron LC area or the ways in which the claimant groups are advanced in this particular claim. I am therefore hesitant to prioritise the descent models proposed therein before evidence from claimant parties themselves.

208. In this sense I agree with the statement of Northern Territory in its Submissions of the Northern Territory as to Traditional Ownership dated 27 January 2022 (Northern Territory Traditional Ownership Submissions) at [19] where it says:

> The notion of Traditional Aboriginal Owners is a composite definition for which each part interlocks with the other parts. Further, although not an adversarial process, the nature of an inquiry is such that the evidence of Aboriginal claimants and witnesses will be paramount. It is an inquiry into the spiritual affairs and beliefs of those claimants. In that way, whilst expert evidence may assist – even in substantive ways – to understand and contextualise the evidence of those lay witnesses, it cannot 'make the case' where there is a want of evidence.

209. Thus, the second and related point is that the cases of the Wood/Morgan and the Cubillo family substantially rely upon pre-existing research and expert evidence regarding principles of descent in the general region of the claim. There is a lack of evidence from those groups themselves regarding identification with Bwudjut estate rather than Wadjigan language group identification more broadly. Agatha Morgan, for example, rejected the notion that one could identify as a Bwudjut person, instead asserting that the correct identity was Wadjigan: Transcript 17 June 2021 p 172[30]. No Wood/Morgan claimant contradicted this.

210. The Cubillo claimants also did not provide any evidence regarding identification with Rak Bwudjut.

211. It is consequently unsurprising that there is a lack of evidence from the Wood/Morgan and Cubillo claimants regarding the relevance of the cognatic model to the Rak Bwudjut estate group structure specifically, in contrast to the evidence from the Bwudjut claimants detailed above.

212. It is largely common amongst all the claimant parties to the Peron LC that one may appropriately identify as part of the Wadjigan language group both patrilineally and matrilineally. But that is not the issue at hand, nor the case of the Wood/Morgan and the Cubillos as presented. The question posed by the evidence of the Wood/Morgan and Cubillo claimants is whether identification, recruitment and membership in respect of the Wadjigan language group is different from that of the more confined

Rak Bwudjut estate group. When considered in light of the evidence of the Bwudjut claimants, that question, I consider, must be answered in the affirmative, despite the well-documented history of social disruption in the region. Indeed, in circumstances where one claimant group (the Bwudjut) has displayed that a predominantly patrilineal model continues to operate at the estate group level, it is difficult for me to accept that a lack of knowledge regarding that structure on the part of the Wood/Morgan and Cubillo claimants is not an obstacle to a finding adverse to their claims. Put simply, given their lack of evidence as to their recruitment to or membership of the Rak Bwudjut local descent group, it is not clear on the evidence that the Wood/Morgan and Cubillo families consider themselves to be part of Rak Bwudjut.

213. Their evidence is strong regarding identification with the Wadjigan language group. But it is not sufficient to rely upon a general shift to cognation in the region, particularly in light of the Bwudjut group's evidence. Social disruption should not be expected to have impacted all in an equal manner. Consequently, it is not unreasonable to find that there may be pockets where more traditional structures have been maintained.

214. The third and final obstacle to a finding that accords with Mr Barber's opinion relates to the present state of the law as contained in the *NLC v ALC case*. The implications of that case for the circumstances at hand were understandably the subject of discussion during the hearing of expert evidence (see, e.g., the conversation regarding the Bwudjut and Kiyuk claimants having 'set the scene' in respect of the local descent group: Transcript 2 September pp 482–483) and in submissions: see, e.g., Wood/Morgan Traditional Ownership Submissions [40]–[41].

215. The Bwudjut have, as recorded above, satisfied me that Rak Bwudjut is an estate group which recruits on the principle of patrifiliation. That includes, in some instances, matrifiliates where their specific life circumstances permit recognition as a Bwudjut person. In accordance with the law in the *NLC v ALC case*, a parallel claim that Rak Bwudjut is constituted on a wider, cognatic basis is not compatible with the requirements of the ALRA. It is not that the timing or order of lodging of each group's claim is determinative of the relevant principle of descent, as is suggested by some. Rather, the Bwudjut claimants have necessarily excluded the possibility of a wider cognatic principle through successful proof of patrilineal recruitment with specific exceptions. It is that non-acceptance of cognation amongst the Bwudjut patriline themselves which is the key issue: it cannot be said to have been deemed relevant.

216. Indeed, they do not perceive themselves as belonging to an estate group united by the broader principle of cognatic descent, even in the face of the significant evidence of social disruption in the general region. Nor, I add, do the Wood/Morgan or Cubillo claimants accept that patriliny is the applicable principle. The respective positions are not reconcilable.

217. Further, I do not think it appropriate under the ALRA to impose a principle of descent upon a group which has, on the evidence, demonstrated a different mode of recruitment.

218. In any case, and as canvassed above, the evidence of the Bwudjut claimants weighs heavily against a finding that accords with the submissions of the Wood/Morgan and Cubillo claimants. Moreover, the difficulty in accepting that Rak Bwudjut recruits on a cognatic basis, and thereby recognises matrifiliates as a matter of course, is compounded by the evidentiary issues with the Wood/Morgan and Cubillo cases identified above.

219. For that reason, it may be said that the result would have been the same were a cognatic model the first to have been proffered. The timing of each claim is irrelevant.

220. For the sake of completeness, I note that the Cubillo family make separate submissions regarding the perceived inconsistency between the models advanced in the claims under the *Native Title Act* for recognition of native title over the Labelle Downs pastoral lease and in the Peron LC under the ALRA: Cubillo Traditional Ownership Submissions [29]–[32]. In sum, the Cubillos submit that, in light of the cognatic Wadjigan language group model advanced in the claims under the *Native Title Act*, the patrilineal model advanced by the Bwudjut claimants in the Peron LC is unreliable and should not be accepted.

221. I make two brief points. First, notwithstanding that the rights and interests recognised under the *Native Title Act* are different from those of the ALRA, native title has not been determined over that area. As noted above, the Labelle Downs native title claims were dismissed for want of prosecution: thus, that model has not been put to proof. In that light, I am hesitant to accept their submission that any inferences should be drawn from the purportedly differing genealogical models relied upon.

222. Second, and more crucially, the Cubillo claimants do not claim that the Wadjigan language group are the traditional Aboriginal owners of the Peron LC area in the sense required by the ALRA. Thus, they do not advance their claim here on the same basis as was put in the Labelle Downs native title claims. Rather, as I have detailed above, the Cubillo claimants assert that a cognatic estate group within the Wadjigan language group, namely Rak Bwudjut, are the traditional owners of the Peron LC area, and that they comprise part of that group. It is therefore inconsistent, in my view, to attempt to draw inferences as to the relevant principle of descent from a different model.

223. In light of these issues, including the three issues with Mr Barber's conclusions as set out above, I find that the Wood/Morgan and Cubillo claimant groups do not form part of, nor otherwise constitute of themselves either together or individually, a local descent group for the purposes of the ALRA.

3.2.5. The Piening/Rivers group

224. The basis upon which this group claims to meet the requirements of the ALRA that there be a local descent group is not clear from the Piening/Rivers Claimant Amended Submissions dated 22 November 2021 (Piening/Rivers Traditional Ownership Submissions). On the one hand, the Piening/Rivers claimants expressly rely upon the model contained in the Barber Report, being that the cognatic descendants of Berrk and Kirril (i.e. Rak Bwudjut) are the traditional Aboriginal owners of the Peron LC area: Piening/Rivers Traditional Ownership Submissions [8].

225. Similar to the Cubillos, the Barber Genealogy demonstrates that the Piening and Rivers families are descendants of Kudang through her daughter Maggie Rivers. That group did not provide a comprehensive list of claimants. However, their asserted genealogical links were not contested. The Piening/Rivers witnesses gave coherent evidence to this effect: see Transcript 17 June 2021 pp 217–219.

226. I have proceeded on the basis that their descent from Kudang is uncontroversial.

227. However, to the extent that the Piening/Rivers group claim that the Rak Bwudjut are a local descent group which recruits according to a principle of cognatic descent, that claim encounters the same issues as those of the Wood/Morgan and Cubillo claimants explored above. In sum those issues are that: a) the ethnographic materials that Mr Barber cites in support of his opinion are either premised on the language group model or relate to other land claims in the wider region, and thus provide, at best, a starting point from which to analyse the estate group-based claims in the Peron LC; b) the Piening/Rivers group did not provide any evidence of their identification with the Rak Bwudjut estate group, nor did they demonstrate any knowledge of the asserted cognatic principle of descent as it operates at that specific level; and c) that the Bwudjut group do not accept that Rak Bwudjut membership is cognatic, and have satisfied me of that position.

228. On the other hand, the Piening/Rivers Traditional Ownership Submissions could be construed as identifying the relevant local descent group at the language group level. That is to say that there is a local descent group comprising all Wadjigan people, united by cognatic descent, who are the traditional Aboriginal owners of the Peron LC area: Piening/Rivers Traditional Ownership Submissions [6].

229. Again, that submission relies heavily on the Barber Report: see Piening/Rivers Traditional Ownership Submissions [8]–[22]. This alone gives rise to several issues.

230. Obviously, the Piening/Rivers Traditional Ownership Submissions do not accord with the model advanced in submissions by the Bwudjut, Wood/Morgan, or Cubillo family claimants (the latter two of whom also rely on Mr Barber's expert opinion). Thus, while to some extent according with what Mr Barber terms 'the historic and regional data': Barber Report [162] (notwithstanding the findings contained in the *Lower Daly LC Report*), I do not accept the contentions of the Piening/Rivers claimants that the local descent group in respect of the Peron Islands LC area is a cognatic, language based one that is inclusive of all Wadjigan identifying people. Again, that claim is contradicted by the Bwudjut who, whilst identifying as Wadjigan at a general level, do not claim that all Wadjigan people are the traditional owners of the Peron LC area. The Rak Bwudjut estate group model upon which those claimants rely (as do the Wood/Morgan and Cubillo claimants in submissions) is much more confined.

231. The findings of the *Lower Daly LC Report* support this conclusion, as does the evidence of Mr Rex Edmunds, a senior Emiyenngel man assisting the Bwudjut claimants. Mr Edmunds, whilst acknowledging that all Wadjigan people made up 'one big group', explained that this comprises smaller estate groups for discrete areas: Transcript 5 November 2018 p 98.

232. So much is true even before one considers whether the relevant principle of descent is patrilineal or cognatic at that level. As noted above, I have found it to be in essence patrilineal with some particular qualifications.

233. The other difficulty in accepting the Piening/Rivers' position concerns a seeming contradiction contained within that position itself. That is, the Piening/Rivers' argument in favour of a Wadjigan language based local descent group appears to be irreconcilable with their reliance on Mr Barber's conclusions that it is the Rak Bwudjut cognates who are the relevant local descent group. For example, Mr John Piening was seemingly unequivocal in his identification primarily as a Wadjigan person: Transcript 17 June 2021 p 219. Consistent with that position, neither he nor any other Piening/Rivers claimant gave evidence as to an association with Rak Bwudjut. That view and the view of Mr Barber do not complement each other.

234. In simple terms, the Piening/Rivers reliance in submissions upon a Wadjigan language group model is not supported by the conclusions contained in the Barber Report.

235. I accordingly find that the Piening/Rivers group of claimants have not established that they comprise, either as a whole or in part, a local descent group as the ALRA requires.

3.2.6. The Kiyuk group

236. The Kiyuk genealogy prepared by Gareth Lewis dated 19 July 2019 (Exhibit AK5), the Kiyuk Genealogy Update contained at Annexure 4 to the Supplementary Anthropologist's Report for the Kiyuk People of Gareth Lewis dated August 2021 (Exhibit AK9) (together termed the Lewis Genealogies), the 'Kiyuk personal particulars with genealogy references - Name order' (Exhibit AK2), and the Kiyuk personal particulars with genealogy references – Gene Reference order' (Exhibit AK3) shows that the Kiyuk group consists of members of the Rankin, Moreen, Potts, Hammer, Woodie, Sing, and Scrubby families. A complete list of the Kiyuk claimants is annexed as Annexure B to this Report.

237. The Lewis Genealogies show that the Kiyuk claimants are descended from apical ancestor Ngamurwarruk. They also show a history of inter-marriage between Kiyuk and Wadjigan language group members.

238. However, the Kiyuk claim is of a different character to that of the Wadjigan-identifying Bwudjut, Wood/Morgan, Cubillo, and Piening/Rivers groups. While those groups maintain that the relevant local descent group is to be identified at the estate group level (except to the limited extent of the Piening/Rivers arguments), the Kiyuk perceive themselves as a local descent group comprising the Kiyuk language group united by the principle of patrilineal descent: Kiyuk Claimant Submissions dated 22 November 2021 (Kiyuk Traditional Ownership Submissions) [2].

239. That principle is said at [10] to include some non-patrilineal descendants. Mr Lewis describes at [5.1] of the Lewis Report this inclusion:

> Kiyuk are a patrilineal descent group descended from a single Kiyuk apical ancestor Ngamawarrak. Membership of the group is achieved almost exclusively through descent in the father's line. Adoptions are allowed when they are recognised and

> accepted by the group and activated through ceremonial and/or other socially recognised milestones. The presumptive patrifilial model applied to Wadjigyn and to the Wadjigyn – Kiyuk groupings by various authors in the past (e.g. Walsh 1989a: 4) which allows for children of Kiyuk women with absent or ineffective fathers, is not practiced by Kiyuk and not regarded as applicable to them.

240. In the Lewis Supplementary Report Mr Lewis at [2.6.5] qualified to some extent this opinion:

> …when I noted in the above quote that the Kiyuk do not consider presumptive patrifiliation to be applicable to them as a model, it is because they consider themselves capable of managing their group identity, their modes of descent, their marriages and children in accordance with their traditions, and wherever necessary making their adjustments as required and endorsed by the group within part of the broader regional Aboriginal frameworks within which they live, intermarry and operate. Ultimately this probably in itself meets a definition of 'presumptive' patrifiliation being practiced by the Kiyuk, but not in the seemingly (from a Kiyuk perspective) more flexible or open manner perceived to be being the practiced by various neighbouring groups.

241. Consistent with that notion, Mr Lewis says, is that 'the overwhelming majority of children of Kiyuk mothers follow their fathers from other countries – Wadjigyn, Larrakia, Marriamu, Amiyengel, Menda, etc, even Jawoyn and Rembarranga and beyond': Lewis Supplementary Report [2.6.3]. It is thus said that the Kiyuk claimants largely inherit Kiyuk status patrilineally, with only 'occasional adaptations or concessions': Lewis Supplementary Report [2.6.9].

242. The Kiyuk local descent group composition was accepted as meeting the requirements of the ALRA by both the Northern Territory (see Northern Territory Traditional Ownership Submissions [61]) and the Bwudjut group (see Bwudjut Traditional Ownership Submissions [145]–[147]).

243. Adverse contentions are limited in respect of the Kiyuk claimants comprising a local descent group. In essence it is said that, consistent with the Barber Genealogy, some of the Kiyuk claimants (namely, the Sing family) constitute part of a cognatic Bwudjut estate group: Wood/Morgan Traditional Ownership Submissions [66]. It is further said that the evidence of adoption into the Kiyuk group 'strongly resembles, or may be said to be identical to, presumptive patrifiliation or cognatic descent' and that matrifiliates are thus recognised as Kiyuk in a similar manner to patrifiliates': see, e.g., Wood/Morgan Traditional Ownership Submissions [71]–[73].

244. I deal with each of these submissions in turn.

245. It is difficult to accept the first contention that some members of the Kiyuk claimant group are in fact part of a cognatic Rak Bwudjut group in light of the evidence of those Kiyuk claimants themselves, which does not weigh in favour of this conclusion. James Sing, for example, said that he was 'offended' by the idea that his family members were members of the Bwudjut estate group, or shared any spiritual affiliations with them: Transcript 16 June 2021 p 132. The Wood/Morgan group do not point to sufficient evidence to contradict the primary identification of those families with the Kiyuk language group.

246. The second contention, in my view, appears to mistakenly equate presumptive patrifiliation with cognatic descent. Having regard to the evidence of both the Kiyuk

claimants and the expert anthropologists, those concepts must be kept distinct. On the one hand, presumptive patrifiliation may be said to operate where patriliny is the principal mode of descent or group membership, with discrete exceptions or departures from that rule such that specific matrifiliates may be included as part of the group. On the other hand, cognatic group membership may be said to exist where both patrifiliates and matrifiliates are included within the group as a matter of course: see, e.g., Transcript 2 September 2021 pp 488–499.

247. Characterising the distinction in these terms is supported by the expert opinion of Mr Lewis who, in the Lewis Supplementary Report at [2.6.5], posits a difference between 'full cognation by second or third generation matrifiliates and beyond' and Kiyuk presumptive patrifiliation, which involves actively managing and endorsing group membership.

248. Consistent with this, the evidence of the Kiyuk group demonstrates that it is manifestly not the case that all matrifiliates are accepted to be Kiyuk as a matter of course. For example, James Sing at Transcript 26 June 2021 p 129 said it is a 'collective decision' as to whether non-patrilineal members such as Natalie Harwood could be recognised as Kiyuk:

> If they choose to take it up and all the Kiyuk people agree to it then that's fine. That's a collective decision. It may not have the same ceremonial activities attached to it, but it still has that approval by the Kiyuk people as a group.

249. Thus, the fact that matrifiliates such as Ms Harwood are recognised as Kiyuk through her mother is one of few exceptions to what is, on the whole of the evidence, a dominantly patrilineal system of group membership. Central to Ms Harwood's explicit acceptance was the fact that she has a Kiyuk mother, but a non-Aboriginal father: Transcript 16 June 2021 p 112.

250. It is clear that, in contrast to the Wood/Morgan submission, this does not indicate that Kiyuk cognates are automatically accepted as part of the group. Rather, Kiyuk claimants consider there to be certain circumstances which permits Kiyuk group membership and identity on the part of matrifiliates. This does not, in my view, undermine their claim to constitute a local descent group united by patrilineal descent (in the terms expressed by Mr Lewis in his Supplementary Report and canvassed above).

251. So much is also consistent with the Lewis Genealogies, which include, on the whole, few matrifiliates in comparison to patrifiliates.

252. I conclude that the Kiyuk group have satisfied me that they constitute a local descent group within the meaning of the ALRA.

3.3. COMMON SPIRITUAL AFFILIATIONS AND PRIMARY SPIRITUAL RESPONSIBILITY

253. The next task of the Commissioner in respect of the issue of traditional Aboriginal ownership is to determine whether any of the claimant groups can be said to 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': ALRA s 3(1)(a).

254. It is uncontroversial that the ALRA does not require that the site or sites be on the specific land subject to claim in the Peron LC. The requisite common spiritual affiliations and primary spiritual responsibility for the Peron LC area may be established by demonstrating a connection between nearby sites and that land: see, e.g., *Meneling Station* and *R v Kearney; Ex parte Jurlama* (1984) 158 CLR 426; [1984] HCA 14.

255. So much is well recognised and was not contested by the claimants and the Northern Territory in this Inquiry.

256. I turn now to each group's claim that their common spiritual affiliations place them under primary spiritual responsibility for the Peron LC area, in whole or in part.

3.3.1. The Bwudjut group

257. The Bwudjut group claim to have common spiritual affiliations to the sites *Bwudjut Moyin* "hill" (Site 3 on the Substituted Peron Islands Area Land Claim No. 190 Map (Exhibit A3(A))) (Bwudjut Site Map) and *Banda-walga-nalgin* (*Bunda-walga-nalgin*) (Site 10) which place them under primary spiritual responsibility for those sites. To avoid confusion, I will call Site 3 'Bwudjut Hill'.

258. There are a range of other sites which are said to be the subject of affiliations held by the Bwudjut claimants. However, it is said that Bwudjut Hill and *Banda-walga-nalgin* are the principal sites that place the Bwudjut claimants under a primary spiritual responsibility for the wider 'Bwudjut estate' area. The larger Bwudjut estate area is to be distinguished from the Bwudjut Hill site and immediate surrounds, which the Bwudjut group characterised in submissions as a 'localised area': Bwudjut Traditional Ownership Submissions [105]–[107].

259. The Bwudjut estate area purportedly extends from as far north as *Nikmingayn* (*Nikmingayin*) (Site 1, a small creek to the south of Bulgul) to the very south of the Peron LC area: Bwudjut Traditional Ownership Submissions [115]–[120].

260. Neither Bwudjut Hill nor *Banda-walga-nalgin* is located within the Peron LC area. The Bwudjut Site Map shows Bwudjut Hill to be located inland to the east of Channel Coastal Point Reserve. *Bunda-walga-nalgin* is located within the Daly River at or near its mouth. As I have noted above, that is not necessarily critical. A connection to the claim area must, however, be shown.

261. I consider the Bwudjut group's affiliations to each of these sites in turn.

Bwudjut Hill

262. The common spiritual affiliation of the Bwudjut claim group to Bwudjut Hill is said to be embodied in the site's status as a locus for the *Moiyin* (dog) dreaming. The *Moiyin* is a key ancestral being or *Durlg* that formed the land as it travelled across it. Mr Graham at [3.3.1] of the Graham Report describes the concept of *Durlg* and its relationship to the land as follows:

> Each patrilineal based local descent group is associated with a roughly bounded area defined by the ancestral beings (*Durlg*) that travelled across it, formed its sacred and

> other sites and gave it form and meaning. The term Rak is used by the claimants and the term 'estate' is utilised in the anthropological literature. The term Rak is often attached to a major site within the state to describe the entire estate. Thus the local descent group with primary spiritual responsibility for the Claim Area is identified as Rak Buudjut or as it is more commonly spelt, Bwudjut after its predominant site. Estates (Rak) usually comprise a number of named sites, some with mythic (dreaming) references, (for which the term 'totem' is often used by Claimant Group members), others to camping or hunting sites and grounds.

263. Mr Graham then goes on to say that 'the dominant Rak Bwudjut Durlg is Moiyin (dog) and its most important site is Bwudjut': Graham Report [3.5.1].

264. Bwudjut Hill is the location of a *Moiyin* dreaming story. For the purposes of cultural sensitivity I do not propose to repeat it here: it is adequately described in the Barber Report at [3.5.1]–[3.5.2].

265. The *Moiyin* dreaming has an associated dreaming track, which starts at *Milik* on the Cox Peninsula in the north and travels to Bwudjut Hill where it stays. It is said to have travelled through Balgal Beach (Site 6), *Nikmingayn* (Site 1) and *Ngadput* (Site 2).

266. The Bwudjut claimants, when asked about the *Moiyin* dreaming, its associated story and location at Bwudjut Hill, each clearly identified with it: see, e.g, Transcript 5–6 November 2018 pp 66–70, 92–3, 172–74, 194–96, 210–212, 240, 248. They expressed that *Moiyin* is Bwudjut Hill in a spiritual sense: Transcript 5 November 2018 pp 173–74, 194; 6 November 2018 p 212.

267. The Bwudjut claimant's versions of the *Moiyin* story largely corroborated that of Mr Graham: see, e.g., Ms Robin Lane's recount at Transcript 5 November 2018 p 69, and Mr Tommy Henda's separate accounts at Transcript 6 November 2018 p 195–6 and 18 June 2021 p 280–81. I use the term 'largely' because the versions sometimes differed slightly from each other.

268. Mr Graham, in the Graham Supplementary Report dated 6 August 2021 p 38, notes the 'susceptibility to variation between tellers' of oral tradition. This is, I think, well accepted and I therefore do not consider that anything turns on those slight inconsistencies: it is clear from the evidence that the Bwudjut group perceive themselves as having a common affiliation to the Bwudjut site and the *Moiyin* dreaming.

269. Mr Tommy Henda further explained that the Bwudjut group considered that the *Moiyin* dreaming story belongs to 'Bwudjut people', being the Henda and Lane families. He further said that the story 'stays with that Bwudjut, that place'. Mr Timothy Henda, another Bwudjut claimant, agreed with this: Transcript 18 June 2021 p 281–282. Mr Edmunds identified the site as being associated with the Henda and Lane families: Transcript 5 November 2018 p 111.

270. The evidence of the Bwudjut claimants was that both Bwudjut and non-Bwudjut persons were aware of Bwudjut affiliations to the Bwudjut Hill, or even passed on the dreaming story to the Bwudjut claimants, some time before this Inquiry commenced. Mr Andrew Henda Jnr said that he was told by his father (Mr Andrew Henda Snr) that Bwudjut Hill was his country, and that there was a '*Moiyin* place' there. His 'aunties', Ms Lorraine Lane and Ms Robin Lane, also told him similarly: Transcript 6 November 2018 pp 240–241. Ms Robin Lane herself was told by her grandmother:

Transcript 5 November 2021 p 69. This is similar to Mr Tommy Henda, who said that the story was passed on to him by his 'grandmothers'. Some of those 'grandmothers' may not have been Bwudjut people: see Transcript 18 June 2021 p 277. The same can be said of Ms Robin Lane, Ms Lorraine Lane and Ms Theresa Henda: Transcript 5 November 2018 pp 68, 95, 133.

271. Additionally, Ms Maria Lippo (not a Bwudjut claimant) said that she was told about Bwudjut Hill and the *Moiyin* dreaming by her father when she was a young girl in or around the 1960s: see Transcript 18 June 2021 p 288–89. Ms Lippo was not questioned further on this point.

272. I do not consider it material that some of the Bwudjut claimants became aware of the *Moiyin* dreaming story or the Bwudjut Hill site only relatively recently. That does not prevent a finding that those claimants have common spiritual affiliations to the site. Indeed, it is generally well-known in the land claims context that Aboriginal group members will have bestowed upon them knowledge at different points in their lives.

273. Further, the fact that non-Bwudjut people knew of and/or told the story to the Bwudjut claimants is not adverse to the Bwudjut claim: to the contrary, it supports the notion that others were aware of the Bwudjut affiliations to the site, and felt it important that the Bwudjut claimants in the Peron LC knew of their spiritual affiliations. It indicates recognition of that affiliation outside of the group itself.

274. In this respect, it is also not detrimental to the Bwudjut case that non-claimants assisted them in giving evidence. So much is routine in land claims hearings under the ALRA.

275. Consistent with that notion, the evidence does not weigh in favour of a finding that the Bwudjut claimant's affiliations to Bwudjut Hill and the associated *Moiyin* dreaming story are of such recent invention or apparition that they do not satisfy the requirements of the ALRA.

276. The lay evidence is fortified by the anthropological reference materials in this respect. That is, those materials generally indicate that knowledge of the *Moiyin* story and its associated site, and the Bwudjut affiliations to it, had been held for some time prior to this Inquiry: see, e.g., Brandl, Haritos and Walsh, *Kenbi Land Claim* Report (1979) p 165; Povinelli 1990 Report p 18; Lower Daly Anthro Report (2001) p 29; Lower Daly Supplementary Report (2002), p 15. That knowledge was held by both Bwudjut people and other knowledgeable persons from other regional groups.

277. The Bwudjut claimants in this Inquiry are evidently aware of and know about the Bwudjut Hill site and associated story. That is reinforced, not undermined, by the fact that others might have known of the story and imparted it upon those claimants.

278. Detailed contentions were made regarding the purportedly uncertain location and nature of the Bwudjut site, as well as the reliability of the work of Professor Povinelli in and after the Lower Daly LC: see, e.g., Kiyuk Claimants' Reply to Submissions on Traditional Ownership dated 11 April 2022 (Kiyuk Responsive Submissions) [23]–[36]; Fitzroy Traditional Ownership Submissions [44], [45]–[59]. I do not need to repeat those submissions here. That is simply because, while it may be said that the reference materials are not unequivocal as to Bwudjut Hill, the overall picture,

painted by the evidence (particularly that of the claimants), is one in which the Bwudjut group have common spiritual affiliations to that site. In that light, those materials largely support such a conclusion.

279. This is further strengthened by the evidence of the expert anthropologists in this Inquiry, all of whom save Mr Lewis were agreed on the location and nature of, and the Bwudjut affiliation to, Bwudjut Hill: Transcript 3 September 2021 p 617. Mr Lewis accepted that the discrepancies in the reference materials in relation to the site were minor: Transcript 3 September 2021 p 612. Mr Lewis' doubts regarding Bwudjut Hill also largely related to the Kiyuk claimants' knowledge of the site: Transcript 3 September 2021 p 613, an issue to which I return below. For now, it suffices to say that lack of knowledge on the part of one group of another group's spiritual affiliations should not prevent a finding that such affiliations exist.

280. Thus, I consider that there is sufficient evidence to determine that members of the Bwudjut group have common spiritual affiliations to Bwudjut Hill. This is consistent with the findings of Olney J as Commissioner in the *Lower Daly LC Report* at [68].

281. Mr Graham says that it is this shared affiliation which places the Bwudjut under primary spiritual responsibility for Bwudjut Hill. In contrast, Fitzroy and the Kiyuk claimants submit, in effect, that the Bwudjut group have not in fact established that their common spiritual affiliations to Bwudjut Hill place them under a primary spiritual responsibility for it. Fitzroy advanced several detailed contentions in relation to the evidence explored above, including: the reliability of the Bwudjut witnesses; their need for assistance from non-claimants; the lack of evidence of visitation to Bwudjut Hill; inconsistencies regarding the *Moiyin* story; lack of clear evidence regarding the inheritance of that story from senior Bwudjut people; and the absence of ceremonial activity connected to Bwudjut: see Fitzroy Traditional Ownership Submissions [35]–[43].

282. In light of my consideration of the evidence of common spiritual affiliations above, and the evidence to be explored now, it will be apparent why the Fitzroy contentions are not accepted.

283. The expert anthropologists were agreed upon the following indicia for primary spiritual responsibility (as distinct from secondary or tertiary roles):

- The ability to say yes or no, that is, the ability to control the area, including the responsibility of giving the appropriate permission to visitors (e.g. through putting sweat on people), such that the dreaming does not harm them (Professor Sansom gave particularly insightful evidence on this topic: see Appendix 2 to Sansom Provisional Report);
- Being culpable to the associated dreaming if the site is damaged, in the sense that the dreaming will 'go for' or 'zap' those people if there is any 'wrongdoing' in the area. This role may or may not be made explicit in ceremony;
- The strength of a group or person's identification of and with the site and dreaming, being evidence of the centrality of the dreaming to one's physical, social and cultural being;
- Links between 'the life process of the claimants' (such as rituals relating to births and deaths) and the dreaming;

- One's perception of direct descent from the dreaming and carrying the 'spark' of the dreaming and ancestors by virtue of that descent;
- Engagement with the dreaming through ceremony; and
- Descent from a person possessing or demonstrating the above affiliations to the site.

284. In contrast, the following affiliations to land were considered, without more, to be insufficient to indicate primary spiritual responsibility for a site, albeit demonstrating residential, cultural and emotional ties:
    - Conception or birth on or near the site;
    - Growing up on the country;
    - Having relatives or ancestors who died or who are buried at or near the site;
    - Hunting and fishing on the country; and
    - Some elements of 'caretaking' or protection of the site from third-party activity (such as surveying), although obviously responsibility for caring for a site an preserving it may contribute to indicating primary spiritual responsibility.

285. These points were substantially agreed upon by the experts as a matter of elementary anthropology: see Transcript 2 September 2021 pp 452–461, although it was also agreed that context plays an important role. In this sense, Mr Barber noted that the latter category of activities may be sufficient to confer primary spiritual responsibility when negotiated and agreed upon by people who possess the former: Transcript 2 September 2021 p 460.

286. The obvious difference between the two is that the former category of affiliations involves the involvement in some capacity of the specific Dreaming linked to that site. Considered in this light, the Bwudjut claimant's evidence of their affiliations to the *Moiyin* dreaming site at Bwudjut Hill demonstrated many of the agreed upon indicia for primary spiritual responsibility.

287. First, it cannot properly be said that the connection between the Bwudjut group and Bwudjut Hill is not a spiritual one. That is, central to the Bwudjut group's affiliation to Bwudjut hill is the *Moiyin* dreaming. The *Moiyin* is Bwudjut Hill.

288. The responsibilities in respect of that dreaming, demonstrated on the evidence, were as follows.

289. Passing on knowledge to one's children regarding the site and its associated story is an essential component of responsibility for Bwudjut. Mr Tommy Henda said that this ensures that those children will 'know, they will have their song and… country and their totem and Dreaming': Transcript 6 November 2021 p 214. The *Moiyin* is therefore central to a Bwudjut person's social and cultural identity: it is plainly spiritual in nature.

290. The phrase 'looking after' the site was also mentioned. 'Looking after' encompasses, for example, allowance of hunting in the surrounding area but does not allow for the taking of anything from Bwudjut Hill itself. Mr Tommy Henda (with whom Mr Edmunds agreed) said that the inability to fulfil such responsibilities due to

fencing around the site 'hurt' him and made him 'feel bad': Transcript 18 June 2021 pp 282–284, 311–12. There is therefore a real sense of culpability to the *Moiyin* that invokes visceral emotional reactions amongst claimants when responsibilities to it are not met.

291. Bwudjut people have a duty to ensure that non-Bwudjut people visit Bwudjut Hill in the company of a Bwudjut person. Mr Tommy Henda explained the importance of this, noting that it would be dangerous for a stranger to do so alone. Mr Edmunds said that he would visit Bwudjut Hill accompanied by the Bwudjut person in order to avoid *pulluj* or spiritual sickness: Transcript 18 June 2021 pp 282–285. Thus, granting permission to visit or conduct activities on the site can be said to an aspect of a Bwudjut person's responsibilities to care for it and the associated dreaming. Mr Edmunds said that any Bwudjut person could give such permission: Transcript 5 November 2018 p 106. Further, concern for the potential of non-Bwudjut people to experience *pulluj*, and indeed the ability to and knowledge of the means of avoiding it, demonstrate that Bwudjut people are responsible for doing so.

292. Evidence of permission being granted upon a visit to Bwudjut Hill by the Bwudjut claimants and others was described by Mr Graham in the Graham Supplementary Report pp 33–34. Professor Sansom, in his Supplementary Report [68], says that in this respect:

> The visitation is, in my view, also to be counted as a demonstration of the exercise of primary spiritual responsibility in relation to the Moyin site. The showing of the site to 'new men' and discussion of the Moyin story with the 'new men' during their visit to the site, is a demonstration of the transmission of tradition. Tradition is thereby strengthened because proper knowledge of the tradition (based on actual experience in situ) has been more widely established among members of the Bwudjut group. In addition, persons introduced to a sacred site qualify to be regarded as 'properly witness for' that site. Where appropriate, they can tell others about the site or take them to it and introduce them to its Dreaming. For the 'new men', the visit to the site is a rite of induction that endows them with 'properly witness' status.

293. Furthermore, ceremonial initiation of Bwudjut men at other places of residence such as Belyuen creates a relationship to Bwudjut and the dreaming, and solidifies or even gives new responsibilities for it. Such responsibility can be displayed and recognised by others through, for example, bestowal of a name specific to that country: see generally Transcript 6 November 2018 (Gender Restricted Male Only) pp 14, 18–23. Mr Edmunds identified Mr Darryl Lane and Mr Tommy Henda as initiated men who had an increased responsibility and connection to Bwudjut in this way: Transcript 6 November 2018 (Gender Restricted Male Only) p 20. I have made only generalised reference to that evidence.

294. Finally, it was made clear by the claimants that the above affiliations and responsibilities to the Bwudjut Hill site and the *Moiyin* dreaming arise through descent. I have considered this in detail above.

295. In conclusion, the Bwudjut claimants have satisfied me that their common spiritual affiliations to Bwudjut Hill and the associated *Moiyin* dreaming place them under a primary responsibility for that site. The indicia above, agreed upon in expert evidence, supports this conclusion.

Banda-walga-nalgin

296. The Bwudjut group also claim that they have common spiritual affiliations to the site *Banda-walga-nalgin* (Site 10) which place them under primary spiritual responsibility for that site. That responsibility is shared with the neighbouring Banagula estate group. It follows, it is said, that *Banda-walga-nalgin* is an indicator of the wider Bwudjut estate area for which the Bwudjut have primary spiritual responsibility more generally: Bwudjut Traditional Ownership Submissions [120].

297. None of the other claimant parties nor the Northern Territory contested this. Fitzroy, however, argued that the perceivably heavy reliance of the Bwudjut claimants on the evidence of Mr Edmunds means that such a finding cannot be made: Fitzroy Traditional Ownership Submissions [38]. In light of the evidence of the Bwudjut claimants, experts and the reference materials, I find it difficult to accept that submission.

298. The Graham Report of 2017 does not mention the site *Banda-walga-nalgin*. It is, however, included on the Bwudjut Site Map (Exhibit A3(A)) created after the Graham Report. That site was also the subject of evidence from the Bwudjut claimants themselves, as well as Mr Edmunds.

299. The map shows a Barramundi dreaming track extending to the north-west of the site's locus at the Daly River mouth. It travels adjacent to the claim area past sites *Ngagluku* (Site 8), *Ngalenbara* (Site 4) and *Ngatpuk* (Site 2, located at NTP 4043) and the Channel Point Reserve (NTP 6362), straightening to the west and continuing between the North and South Peron Islands before finally turning to the south.

300. Mr Tommy Henda and Mr Daryl Lane, aided by Mr Edmunds, were the principal informants in respect of this site and its associated Barramundi dreaming. Mr Tommy Henda described the story at Transcript 6 November 2018 pp 65–66 and 194–95 as involving two barramundi, who travelled as follows:

> …the two barra, the sister of her and one went into Daly [to the freshwater] with her inside Daly and the other one went between the two islands [to the saltwater] and then up to Mabaluk and to Cape Ford, to Rex's [Edmunds] country there.

301. He repeated the story in similar terms at Bulgul, which was confirmed by Mr Edmunds: Transcript 18 June 2021 p 295–96.

302. The evidence of Mr Darryl Lane also supported the notion of Bwudjut affiliations and responsibilities to *Banda-walaga-nalgin*. He said, at Transcript 5 November 2018 pp 172–72, that he knew about the barramundi dreaming, and that it could cause a dangerous whirlpool for strangers if they were not introduced in the proper way to the area by a Bwudjut person:

> … if other people go in our land, they smell, like, they've got sweat . . . told that thing [the barramundi], and he start doing the whirly thing – whirlpool. But if – with us mob, like myself, Tommy or Timmy, if I go out there with them on the boat, like, you don't go there. Bwudjut area, go out fishing, like, take the boat Bulgul, round that area, near that Daly River mouth area, like, put our sweat right through that area, from the Bulgul area to Bwudjut area… Let him – let him know, the Dreaming.

303. Mr Tommy Henda also said that the Barramundi dreaming track goes close to *Ngalenbard* (site 9), and that people had to be welcomed to it as a consequence: Transcript 5 November 2018 pp 158–59.

304. Introduction of a person's sweat before visiting or travelling near to the site is therefore key. The dreaming recognises the sweat of Bwudjut people and must be made aware of that of non-Bwudjut people in order to avoid danger. Thus, there is a degree of culpability if the appropriate protocols are not followed, which includes the responsibility to protect non-Bwudjut people from the dreaming.

305. Mr Edmunds said that this introduction could be made by bathing the stranger in the river prior to taking them across the mouth, thereby placating the Barramundi and preventing the whirlpool. He confirmed that the dreaming track travelled to his country at *Mabaluk* (south of the Peron LC area) but that it also travelled to 'Henda's and Lane's area' to the north. Mr Edmunds could introduce people to the dreaming south, but only Bwudjut people could do so to the north: Transcript 5 November 2018 pp 100–101, 112–13.

306. I have already said that I do not consider it material in any adverse way that, in this instance, the Bwudjut claimants were assisted by non-claimants such as Mr Edmunds. Of course, there will be a point at which some claimants are not able to demonstrate the requisite knowledge. However, that was not the case here: Mr Tommy Henda and Mr Darryl Lane clearly demonstrated their affiliations to *Banda-walga-nalgin*, and indicated the way in which they, as Bwudjut people, are responsible for the Barramundi dreaming there. The evidence of Mr Edmunds merely shows that senior people from neighbouring groups recognise these affiliations and respect them, and may have similar responsibilities where a site is shared or at the boundary of the countries of neighbouring groups.

307. It is true that evidence from the Bwudjut claimants concerning *Banda-walga-nalgin* was not as extensive as that regarding Bwudjut Hill. That, however, is not necessarily unusual in light of the centrality of Bwudjut Hill and the associated *Moiyin* dreaming to the very identity of the group. The Barramundi dreaming at *Banda-walga-nalgin* is not of the same character as the *Moiyin*, yet it is nonetheless important in Bwudjut spirituality, as demonstrated by the necessity of alerting the dreaming of one's presence (especially non-Bwudjut people) before visiting the site so as to not disturb or anger it.

308. In that context, the notion that differing, yet nonetheless common affiliations to the respective sites among members of the Bwudjut group may be shown to exist is not inconsistent with the notion of having primary spiritual responsibility for both (albeit perhaps shared in the case of *Banda-walga-nalgin*).

309. I accordingly find that the Bwudjut group have common spiritual affiliations to the site *Banda-walga-nalgin*, and that those affiliations place them under a primary spiritual responsibility for that site. That site may or may not be shared with other groups, such as that of Mr Edmunds and his family: it is not necessary for me to decide that point.

The extent of the wider Bwudjut 'estate'

310. Given that neither site is located on the Peron LC area, the final issue for consideration is whether the affiliations to, and primary responsibility for, Bwudjut Hill and *Banda-walga-nalgin* can be said to place the Bwudjut group under primary spiritual responsibility for part or all of the Peron LC area. That is, whether the wider 'Bwudjut estate', as indicated by those two sites (cf. the localised Bwudjut Hill site and immediate surrounds), includes to any extent the Peron LC area.

311. I have mentioned above that the principal issue in the Lower Daly LC was defining the southern extent of the Bwudjut estate: *Lower Daly LC Report* [68]. Given that the Peron LC area extends only as far south as the intertidal zone adjacent to the Daly River mouth (put generally), I do not need to decide that much. The relevant question is whether the Bwudjut group's area of primary spiritual responsibility can be said to include, at least, those areas claimed. The task is characterised in the Bwudjut Traditional Ownership Submissions at [114] as follows:

> It is only necessary to inquire whether the Bwudjut estate, whatever its eastern and southern extent, includes the Claim Area. There are two aspects to this inquiry. The first is the northern extent of the Bwudjut estate and the second is whether the Bwudjut estate extends sufficiently south to include it.

312. That characterisation is a helpful one.

313. It is first necessary, however, to explore the evidence as to how one might identify, in a physical sense, the 'boundaries' of Aboriginal estates in land: see, e.g., Sansom Provisional Report [58]. This was the subject of much discussion amongst the experts, who were largely agreed that the extent to which primary spiritual responsibility for sites extended to land in the vicinity could be demonstrated by employing the metaphor of 'light globes' which have a 'halo effect'. Mr Graham, at Transcript 2 September 2021 p 453, described that metaphor as follows:

> The Aboriginal way of looking at it is that those sites are more like light globes on the land. You turn the light globe up really bright and the site extends well out from it. It includes the waters, the trees, other features around it. What we used to do at the sites authority [AAPA] is turn the light right down and it's just in this case the hill, so I'm saying the Aboriginal reality is that those sites have an area around them that is in fact a site and that becomes quite a sizable area when you made up a string of sites like a dreaming track such as the *Moiyin*.

314. Professor Sansom, in agreeing with Mr Graham's approach, also said:

> Mr Graham talked about the light bulb being brighter and so on - that there are main dreamings and they have this luminosity that lights up a whole area but they don't give you boundaries plural and a dreaming can be sort of towards the edge of an estate or in the middle of an estate. How do you get boundaries? My answer is that where tradition is not attenuated you get a proper site mapping that gives you site scatters and it's supplementary sites that are not the main site that will indicate the bounds because the people of the main dreaming have responsibility for a series of other dreamings, and it's by looking at the total set that you get a picture of all the land that is in the comforts of ownership of one set of owners.

315. Mr Lewis and Mr Barber both agreed with this characterisation: Transcript 2 September 2021 pp 458–59. Professor Sansom, at Transcript 3 September 2021 p 640, said that other geographical or topographical features, could supplement this in qualified way:

> … there are estates that have neat boundaries that are topographical features. The obvious ones are rivers and streams and lake edges and the seashore and ridges, but where there are not these evident features which draw a line and people recognise as a bound, then you have got what Povinelli [in her 1990 report for AAPA] in effect has, that you want the last site on this country and the first site on the next, and that's what your site scatter gives you because in several dimensions Povinelli was going up and down the coast there, but that's what you get. You get a last site and a first site and a country in between and that gives you your border land in that sense rather than a distinct line boundary.

316. Mr Graham therefore says that it is the Bwudjut group, who have responsibility for Bwudjut Hill and its associated dog sites along the coast, as well as *Banda-walga-nalgin*, who have primary spiritual responsibility for the Peron LC area in its entirety: see, e.g., Transcript 2 September 2021 pp 452–53.

317. I thus return to the question at hand: the southern and northern extents of the Bwudjut estate and whether it extends sufficiently to include the all or part of the Claim Area, recalling that neither *Banda-walga-nalgin* nor Bwudjut Hill are located within it.

318. As I have detailed above, the Barramundi dreaming which starts at Banda-walga-nalgin travels from that site in the mouth of the Daly River, adjacent to the Peron LC area at its southern extent, as far as *Ngatpuk* at Channel Point. It closely follows the coast before veering to the west to pass between the North Peron Island and the South Peron Island. Bwudjut claimants have responsibilities to this dreaming which include aspects of permission and consequences of a spiritual nature if the appropriate protocols are not followed, including at the site *Ngalenbard* (Site 9). Further, and relevantly, the Bwudjut estate was agreed upon by the Bwudjut claimants to extend from Bwudjut Hill south to the Daly River: Transcript 18 June 2021 p 315.

319. It is clear, then, that the Bwudjut estate includes the southern extent of the Peron LC area.

320. That conclusion leaves open the question: in relation to the Peron LC area, how far to the north does the Bwudjut estate extend? In accordance with the opinions of the experts, relevant to this question is the 'glow' of the principal dreaming sites as well as the presence of additional sites. The evidence before me presents two issues which call for consideration in this respect. The principal sites in the Peron LC area to the north of the Channel Point area are Balgal Beach (Site 6) and south of that *Nikmingayn* (Site 1).

321. The first is whether the Bwudjut claimant's have demonstrated sufficient knowledge and connection to other sites to demonstrate the northern extent of the 'glow' of the Bwudjut estate. Indeed, the Bwudjut Site Map includes several sites other than Bwudjut Hill, *Band-walga-nalgin*, and *Nalgenbard* (which were mentioned in the lay evidence discussed above).

322. As noted above, Mr Tommy Henda said that the *Moiyin* travelled through Balgal Beach (Site 6), *Nikmingayn* (Site 1) and *Ngadput* (Site 2) before stopping at Bwudjut Hill. He was consistent on this point: see, e.g., Transcript 6 November 2018 pp

193–94, 211–212, 248. These sites can therefore be said to be associated, to some degree, with the Bwudjut estate.

323. He further stated that south of *Nikmingayn* was Bwudjut country and that it extended to *Banda-walga-nalgin*, including *Ngaput*. This too was repeated: Transcript 6 November 2018 p 255–259. Ms Lippo said that *Ngagaluku* (Site 8) was Bwudjut country: Transcript 18 June 2021 pp 291–92.

324. Other claimants showed a general awareness of the geographical and topographic features of sites, and if they were associated with good hunting or foraging. For example, Ms Robin Lane said that *Nikmingayn* was good for hunting: 5 November 2018 p 75–76. Such evidence was also heard at various points regarding *Ngatpuk*, *Ngaguluku* (Site 8), and *Ngalenbara* (Site 4).

325. It is fair to say that knowledge of these sites was mixed. Yet in accordance with the opinions of the expert anthropologists, the evidence in respect of the more minor sites should not be considered in isolation from the dual 'glows' of *Banda-walga-nalgin* and the Barramundi dreaming track and the similar, albeit more extensively detailed responsibilities for and to the *Moiyin* dreaming at Bwudjut Hill (which is located immediately to the west of the Channel Point Reserve (NTP 6362)). As detailed above, that *Moiyin* travels from the north, also along the coast, visiting several of its associated sites before staying at Bwudjut Hill. The Barramundi comes up, adjacent to the Peron LC area, from the south.

326. The evidence on these points was consistently repeated.

327. One final matter in regard to the claimant evidence in respect of the Bwudjut estate warrants mention. When asked who the government should consult if it wanted to build a boat ramp at Channel Point, Mr Tommy Henda responded Wadjigan people. This was in contrast to a hypothetical phone tower at Bwudjut Hill, for which Mr Tommy Henda specifically stated Bwudjut people: Transcript 18 June 2021 pp 314–16.

328. The Northern Territory submits that such evidence is inconsistent with the notion of the Bwudjut group having primary spiritual responsibility north of Bwudjut Hill: Northern Territory Traditional Ownership Submissions [46]–[49]. What seems to be implied in that argument is that Mr Tommy Henda purportedly intended to convey that all Wadjigan-identifying people have the same spiritual responsibility for Bwudjut Hill and the wider Bwudjut estate more generally.

329. I do not accept that contention. First, the weight of Mr Tommy Henda's evidence during the course of this Inquiry is against that conclusion. Second, the context of those statements must be emphasised. Understood in light of all of his other evidence, Mr Tommy Henda's statements merely acknowledge that other Wadjigan identifying people have a traditional connection and an interest in the Channel Point area, and should be consulted about proposals concerning that land. His frankness does not, in my view, detract from the large majority of his evidence that it is the Bwudjut claimants who have primary spiritual responsibility for the Bwudjut estate area, and thus the Peron LC area inclusive of Channel Point.

330. That conclusion is consistent with the long-understood notion, explored above, that at least part of the Peron LC area is situated within the traditional territory of the Wadjigan language group. I do not need to revisit the history by which that understanding arose: it is sufficiently explained above.

331. The second issue in relation to the geographical extent of the Bwudjut estate is whether the evidence of the claimants is supported by the views of the expert anthropologists and the reference materials. The experts identified that Professor Povinelli's 1990 Report is important in this respect: it calls for some analysis. The Povinelli 1990 Report is significant for the fact that it, unlike many other of the reference materials, relates directly to the area claimed in the Peron LC (albeit also concerning the wider region to the north and south).

332. The Povinelli 1990 Report identifies some 78 sites in the region and assigns traditional 'custodianship' to each. Professor Povinelli also identifies the sites that are located at the borders of estates, that is, the sites that, in her opinion, mark territorial limits between groups. The sites are listed from as far north as the Cox Peninsula, to the south at Anson Bay. In her north-south progression, Professor Povinelli identifies the 'last' or southernmost site in a particular estate and the 'first' or northernmost site in the next estate along the line. In this way, the Povinelli 1990 Report intends to explicitly demarcate boundaries between estates by reference to an identifiable site.

333. The Povinelli 1990 Report identifies the site *Nikmingayn* as the effective boundary between the Wadjigan and Kiyuk land interests: pp 3–4, 17. It further identifies *Bandwagangalgin* (accepted to be *Banda-walga-nalgin*), *Ngadpuk*, *Bwudjut*, *Ngalenbara* and *Lir-rrka* (*Lirrkud*) as Wadjigan sites: pp 17–18. Each of the sites are also contained on the Bwudjut Site Map. *Lir-rrka* (Site 5 in this claim) is noted as the final site within the territory of the Wadjigan language group, though it outside the Peron LC area. The submissions of the Bwudjut claimants use the alternate spellings.

334. None of the experts in the Peron LC Inquiry sought to discredit Professor Povinelli's work. Each of them, in fact, relied upon it in differing ways. It is not necessary to repeat those views, but I make the following observations.

335. It is uncontentious that the Povinelli 1990 Report was not prepared in support of a traditional land claim under the ALRA. As is obvious and was accepted by the experts and in submissions, AAPA identifies sites and attributes significance or 'custodianship' in accordance with the requirements of the *Northern Territory Aboriginal Sacred Sites Act 1989* (NT) (*Sacred Sites Act*). That legislation, as noted by Mr Graham, does not distinguish between primary and secondary responsibilities. Further (and relatedly), while the Povinelli 1990 Report acknowledges the existence of patrilineal estate groups, it is largely premised on attributing responsibilities to sites to the wider language group: pp 2–3. As discussed above, that model is not advanced by the Bwudjut, Wood/Morgan or Cubillo groups (each of whom broadly identifies as Wadjigan) as being the relevant local descent group in the sense required by the ALRA here. That may be because the *Sacred Sites Act* contemplates the differing notion of 'custodianship'. I return to the relevance of the Povinelli 1990 Report to the Kiyuk claim below.

336. In any case, the existence of putative Bwudjut sites as within Wadjigan country generally (as demarcated by the Povinelli 1990 Report) does not detract from the Bwudjut claim. Nor, on the other hand, does it necessarily advance it. Consistent with the evidence of Mr Tommy Henda as explored above, the two are not mutually exclusive: the Bwudjut identify with the Wadjigan language group at the higher level, and recognise that all Wadjigan people have traditional interests in the claim area. Appreciated in that light, the Povinelli 1990 Report does not contradict the Bwudjut claim to primary spiritual responsibility for sites within the Bwudjut estate by identifying them as Wadjigan: it simply places the Bwudjut claim within the wider context of language countries. Such a view is supported by the opinion of Professor Sansom, who says that 'Povinelli's information is in accordance with the boundary assertions put forward by and on behalf of the Bwudjut claimants' at least as far north as *Nikmingayn*: see Sansom Provisional Report [53] as revised in the Sansom Supplementary Report [57]–[58].

337. So much is clear in light of Professor Povinelli's work in support of the Bwudjut group in the Lower Daly LC: see generally Povinelli 2001 and 2002 Reports. Those works are testament to the notion that Bwudjut and Wadjigan social identities are complementary.

338. In conclusion, the work of Professor Povinelli, as understood by the experts to be relevant to the Peron LC, is capable of supporting the Bwudjut claim that the Bwudjut estate, encompassing the area the subject of the combined 'glow' of Bwudjut Hill and *Banda-walga-nalgin* and the additional sites, extends north of Channel Point, at least to the site *Nikmingayn* (Site 1) in the Peron LC area. That notion is supported by the evidence of the Bwudjut claimants themselves as to their spiritual affiliations and responsibilities to Bwudjut Hill and *Banda-walga-nalgin*, and their general knowledge of sites such as *Ngadpuk*, *Ngalenbard* and *Nikmingayn*. Each of those have been identified as relating to those principal sites, forming parts of the *Moiyin* and Barramundi dreaming tracks.

339. Of course, I have acknowledged that the Bwudjut claimants' evidence was not strong on the additional sites. However, considered fairly, the weight of the evidence supports a finding that the Bwudjut estate extends from *Banda-walga-nalgin* to *Nikmingayn*. That is, the Bwudjut estate so described includes the area from the southern extent of the Peron LC area to the site *Nikmingayn* in the north.

340. I accordingly find that the Bwudjut group of claimants hold primary spiritual responsibility for the Peron LC area from its southern extent to *Nikmingayn* in the north.

341. That leaves an area north of *Nikmingayn* to the northern end of the Peron LC area, including Balgal Beach. At its northern extremity it runs into the intertidal zone which is part of the Wagait ALT area.

3.3.2. The Wood/Morgan group, Cubillo family and Piening/Rivers group

342. The Wood/Morgan family principally relies upon the notion that descent from a known ancestor confers common spiritual affiliations and, as such, primary spiritual responsibility. Thus, it is said, 'descent confers certain inchoate, collective rights

in relation to country that can be exercised at any time': Wood/Morgan Traditional Ownership Submissions [79]. The Wood//Morgan frame their claim in this respect in the Wood/Morgan Traditional Ownership Submissions at [82]:

> The existence of different levels of knowledge about Dreaming myths, traditions and rituals, and sites among members is consistent with a system of inchoate, collective rights. The group must possess a degree of general knowledge, but not all members will possess a high degree of knowledge of all areas of myths, tradition and rituals, and sites. Ordinarily, the most senior members will possess and exercise the most important knowledge on behalf of the entire group. The inquiry should not be so narrow so as to examine the knowledge of each individual. The appropriate approach is to take into account the wider socio-cultural structure of the group in assessing the existence of knowledge.

343. Primary spiritual responsibility is therefore said to be exercised collectively by the Bwudjut group (which, in their submission, includes matrifiliates): Wood/Morgan Traditional Ownership Submissions [96].

344. The Cubillo family claim is made on a substantially similar basis: see, e.g., Cubillo Traditional Ownership Submissions [77], although the lay evidence of the groups as to the content of those affiliations of course differs. That is, the Wood/Morgan and Cubillo claimants gave differing evidence as to totems, sites, and practices, amongst other things.

345. The basis on which the Piening/Rivers group claims to have 'common spiritual affiliations' is not clear. That is perhaps due to the uncertainty with the form in which their claim to constituting a 'local descent group' is posed. In any case, it is not material for the reasons which follow.

346. The obvious difficulty with the claim of the Wood/Morgan, Cubillo and Piening/Rivers submissions (to the extent that their submissions are substantively similar) that common spiritual affiliations and primary spiritual responsibility are largely a matter of descent is that, as I have found above, those claimants do not form part of a relevant local descent group. Indeed, they do not comprise all Wadjigan people, nor is their claim to membership of Rak Bwudjut recognised by the Bwudjut group. It follows that I cannot accept the Wood/Morgan, Cubillo and Piening/Rivers groups' claim to have common spiritual affiliations with Rak Bwudjut, and consequently primary spiritual responsibility, on this basis.

347. That issue aside, there are further problems with the cases of these claimants as stated in submissions.

348. First, the ALRA necessarily requires that the spiritual affiliations of the local descent group are held in 'common'. Beyond their collective identity as Wadjigan and a general association to and history of visitation to the claim area, there is very little evidence of spiritual commonality between each of the Wadjigan-identifying groups.

349. While the Bwudjut gave evidence that the *Moiyin* dreaming at Bwudjut Hill is pivotal to their social, cultural and spiritual identity, no knowledge of or association to that that dreaming was displayed by the Wood/Morgan, Cubillo or Piening/Rivers claimants. The Piening/Rivers families did not give evidence of any dreaming linked to the Peron LC area. Further, the Wood/Morgan and Cubillo groups say that their family totems and dreamings are crab and brolga respectively: see, e.g., Transcript

17 June 2021 pp 180–83; Document entitled 'Peron Islands – Brolga Story' (Exhibit AC30). Irrespective of whether these dreaming stories may be said to be linked with the Peron LC area, they are not held in common with the Bwudjut group to which these groups claim membership.

350. The second and related definitional point concerns 'sites'. To the extent that dreamings were identified by the Wood/Morgan and Piening/Rivers claimants, they were not said to be associated with any particular sites. While Mr Shane Rivers knew Bwudjut Hill was a sacred site, he did not give evidence as to why: Transcript 17 June 2021 p 248.

351. The Cubillo family at the final phase of the evidence addressed the Salt-water Brolga Dreaming as establishing or fortifying their common spiritual affiliations with the Peron LC area. Whilst I accept that that is a recollection of the members of the Cubillo family who spoke of it, I do not consider that it is sufficient to be satisfied that they share common spiritual affiliations with any part of the Peron LC area by reason of it. It is not mentioned in any anthropological report, even including the Bennetts Preliminary Report provided by the Cubillo family. It is not, as described, specific to any particular section or sections of the relevant area. It is not, as described, a shared or common ancestral token of the Cubillo family through their forebears.

352. Third, the experts' indicia as to primary spiritual responsibility as distinct from historical, social and emotional ties to land was not sufficiently met amongst the Wood/Morgan, Cubillo or Piening/Rivers groups. Conception, birth and burial sites were identified by these groups, yet it was not established how these sites confer primary spiritual responsibility. Further, the weight of the experts' opinions stands against a different conclusion: see, e.g., Transcript 3 September pp 543–44. Mr Barber, upon whose opinion these claimants rely significantly, himself acknowledged that burial and conception sites are not alone sufficient, and required, in effect, 'dialogue' with a senior person or with another who had a descent connection to the land: Transcript 2 September p 460. No evidence was given as to such a consultation or engagement.

353. The same can be said of the extensive evidence regarding activities, such as hunting, camping, fishing, and foraging on and around the Peron LC area. Each of the claimant groups gave evidence that they had engaged in such activities for some time. I have no doubt that it is accurate evidence. Yet without more, that evidence is not sufficient to establish primary spiritual responsibility as the ALRA requires. That is consistent with the indicia agreed upon by the experts.

354. I note that the Wood/Morgan, Cubillo and Piening/Rivers families gave evidence regarding the necessity of calling out to the spirit of ancestors when visiting the claim area and surrounds, or in some instances granting permission to non-Wadjigan people to visit the claim area and Wadjigan land more generally. However, those customs were not associated with the respect for or the dangers of or the obligation to or culpability for any particular dreaming, nor a particular site. Certainly, the observance of these kinds of protocols was regarded to be highly spiritual in nature, and the evidence of them is a testament to the continuation of traditional rituals that is widely practiced amongst each of the claimant groups. However, they are not sufficient to establish 'primary spiritual responsibility', as it appears in the ALRA, for a 'site' on or nearby to the Peron LC area, nor for any part of the Peron LC area itself.

355. As I have noted above, the expert evidence and the reference materials overwhelmingly support the conclusion that each of the claimant groups have significant historical ties to the Peron LC area. It would be very likely, for example, that the Wood/ Morgan, Cubillo and Piening/Rivers claimants have rights of the character contemplated by section 71 of the ALRA. Similarly, I think, they would likely fall within the category of Aboriginal people who should be consulted in regard to dealings in Aboriginal land (see, e.g., ALRA s 19(5)(b)), should the Minister be minded to make a grant to a land trust in accordance with the recommendation contained in this Report.

356. Findings in regard to such rights, however, are not within the functions of the Commissioner when conducting an Inquiry as to traditional Aboriginal ownership as specified in section 50 of the ALRA, save for noting the long standing historical ties of each of those groups to the area of the Peron LC.

357. In conclusion, the whole of the evidence does not permit a finding that the Wood/ Morgan, Cubillo or Piening/Rivers families have common spiritual affiliations to a site on the Peron LC area, being affiliations that place any of those groups under a primary spiritual responsibility for that site and any part of the Peron LC area generally.

3.3.3. The Kiyuk group

358. The crux of the Kiyuk claim is that, in terms of the Peron LC area, the area for which the Kiyuk have primary spiritual responsibility includes from the northern most point of the claim area to the mouth of the Reynolds River in the south. The Reynolds River runs into the sea of Anson Bay about 4 km north of the southern end of the Peron LC area, and about half way between the sites *Ngagaluku 'Creek'* (Site 8) and *Ngalenbard* (Site 9) at about the southern extremity of the claim area. This position is slightly revised, the claimants having previously claimed to have been the traditional Aboriginal owners of the entirety of the claim area: Lewis Supplementary Report [2.5.1].

359. Kiyuk claimant Mr James Sing gave evidence that he was told by his aunt, Ms Lorna Tennant, that Kiyuk country extended from the Finniss River (well to the north of the northern extremity of the Peron LC claim area) to the Daly River mouth: Transcript 16 June 2021 p 36. It is of course necessary to examine Mr Lewis' opinion and Mr Sing's belief in light of all of the evidence.

360. I note that it is not the subject of any real dispute that the Peron Islands themselves (both North and South) are Kiyuk country. The islands are the location of several important Kiyuk sites, some of which initiated persons only are able to visit. North Peron Island (also termed *Badjalarr*) is the site of a *memorandjamul* (dugong) dreaming track around its western and southern sides.

361. Their connection to the Peron Islands is well recognised in the anthropological reference materials and was accepted by the experts in this claim.

362. In relation to the Peron LC area specifically, the key sites for which the Kiyuk claim to be primarily spiritually responsible are *Ingarrayin* (*Ingarrain*), a *Debin* (dingo) dreaming at Bwudjut, a *Kidjarik Kidjarik* (willy wagtail bird) dreaming track extending from the site *Batjalarr* on North Peron Island to the site '*Kidjarik Kidjarik*

South' (as it is called on the Kiyuk Site Map dated 24 June 2021, Exhibit AK1) on the mainland adjacent to the mouths of the Daly and Reynolds rivers, and a 'Boiler/Sore' dreaming located in the vicinity of the *Debin* dreaming at Bwudjut.

363. It is the glow of these sites which is said to 'pervade' the Peron LC claim area to the extent identified by Mr Lewis in the Lewis Supplementary Report at [2.5.1], thus placing the Kiyuk under a primary spiritual responsibility for that area.

364. I turn now to consider the Kiyuk's evidence of common spiritual affiliations to and primary spiritual responsibility for each of these sites.

Ingarrayin

365. The Updated Kiyuk Site Map dated July 2021 (Exhibit AK10) (Kiyuk Site Map) shows that *Ingarrayin* (a rock feature) is located just outside of the claim area, to the north of Balgal outstation within the intertidal zone. As I have noted above, the fact that it is not itself within the claim area is not of itself significant, but the Kiyuk must demonstrate some connection between *Ingarrayin* and the claim area.

366. The Kiyuk group's common spiritual affiliations to and primary spiritual responsibility for the *Ingarrayin* site were not the subject of serious contest. In that light, I do not need to repeat the evidence in detail.

367. Mr Lewis in the Lewis Report at [6.2] describes the Kiyuk's affiliations to *Ingarrayin* as being the focal point for the *Ingarrayin* (green sea-turtle) dreaming or *durlg*. The *Ingarrayin* is said to be the 'boss' for the coastline, travelling past it, out to the Peron Islands and back to its focal point near Balgal. Its dreaming track is shown on Appendix II to the Lewis Report, entitled 'Map: Kiyuk Dreamings Peron Islands Area Land claim'.

368. Mr Lewis says that, being the Kiyuk group's main patrilineally-inherited, estate-based dreaming or *durlg* (in a manner similar to the *Moiyin* for the Bwudjut claimants), the *Ingarrayin* dreaming is central to a Kiyuk persons' social, cultural and spiritual identity, in effect embodying their connection to the Peron LC area thus:

> Kiyuk people consider themselves and their local descent group to be spiritually and physically localised to the Peron Islands, the claim area and the rest of Kiyuk territory. The consider that their personal life cycles commence with their inheritance of their patrilineal *durlg* and conclude with the return of their personal spirit version of that *durlg* as returning to the Peron Islands: Lewis Report [6.8].

369. The evidence of the Kiyuk claimants themselves strongly supports a connection and responsibility to the *Ingarrayin* site and associated dreaming, as well as North and South Peron Islands. James Sing, for example, said of the dreaming:

> … the *Ingarrayin* is the boss for this coastline. He's the boss. He's the main one. That's how Kiyuk mob identify their connection to this country. That's – that's it… the main one we connect to this country and this island is that *Ingarrayin*: Transcript 16 June 2021 p 42.

370. Mr Sing repeated this consistently throughout his evidence, also describing how the green turtle is inextricably linked to the Kiyuk cycle of births and deaths:

> What we've been told when I was kids that when we get buried we got to face our head, our body and our head facing towards - if we can't see the islands directly, say if we're on the other side of the continent, we've got to try and face it towards the ocean. But if

> we can see the islands, we face the bodies towards the islands so again, when we die we believe that our spirit goes into the turtle egg, and then the little hatchlings come out and carry those spirits back into the water. And that *Ingarrayin* goes from here, that takes it and takes it back and go back to the islands…: Transcript 16 June 2021 pp 40–41.

371. Mr Sing's evidence was corroborated by Simon Moreen and Freddy Scrubby: see, e.g., Transcript 16 June 2021 pp 110–20.

372. Simon Moreen also said that he knew a song for the *Ingarrayin* dreaming, but chose not to perform it at the hearing at Bulgul. I do not consider that anything of significance turns on this: I accept that Mr Moreen knows the story and its relationship to the *Ingarrayin* site.

373. Evidence was given as to correlated spiritual responsibilities to the *Ingarrayin* dreaming. For example, Kiyuk people must protect and regulate turtle breeding, hunt and take it only in certain ways, and prepare its meat in accordance with discrete rules: Transcript 16 June 2021 pp 57–59. There are associated protocols, such as washing a visitor in the ocean, that must be followed when approaching the *Ingarrayin* site so that the dreaming 'can smell you and know who you are'. Doing so avoids spiritual repercussions, for example, rough seas instigated by the *Ingarrayin*: Transcript pp 55–6.

374. The Kiyuk affiliations to and responsibility for the *Ingarrayin* site are also fortified by the anthropological opinions held by the other experts: see, e.g., Sansom Supplementary Report [74], [77]; Graham Supplementary Report pp 12, 20–21.

375. I accordingly find that the Kiyuk group of claimants have common spiritual affiliations to the site *Ingarrayin*, which place them under a primary spiritual responsibility for that site. As noted above, this was not the subject of serious contest.

376. The issue at hand, however, is whether the glow of the *Ingarrayin* site includes to any extent the Peron LC area. I return to this issue below.

***Debin*, *Kidjarik Kidjarik* and Boiler dreamings**

377. In addition to the *Ingarrayin*, the Kiyuk also claim primary spiritual responsibility for *debin* (dingo), *Kidjarik Kidjarik* (willy wagtail) and Boiler dreamings. Each of these, it is said, have associated sacred or dreaming sites and tracks that are located within and close to the claim area. The dreaming tracks are demonstrated at Appendix II to the Lewis Report.

378. Mr Lewis says that such sites and dreamings 'define and localise the Kiyuk local descent group's territorial or estate interests within and around the claim area': Lewis Report [6.4]. In contrast to the *Ingarrayin*, they are not patrilineally-inherited estate based dreamings. As such, whilst said to be significant, they are of secondary importance: see, e.g., Transcript 16 June 2021 pp 42, 120–21. Nonetheless, they are said to complement the glow of the *Ingarrayin* dreaming: Lewis Supplementary Report [6.3].

379. It is fair to say that knowledge of these dreamings and sites amongst the Kiyuk claimants was less extensive than of the *Ingarrayin*.

380. Mr Lewis says that the site '*Kidjarik Kijdarik South*' is linked to a dreaming track by which the *Kidjarik Kidjarik* flies south-west to the Reynolds River area and to North

Peron Island or *Badjalarr*: Lewis Report [6.7]. Mr Sing explained the story in relation to the helicopter flight taken over Kiyuk sites as follows:

> We flew down - we followed the path of the Kidjarik Kidjarik bird which is the willy-wagtail, and that flies from North Peron, fly to that corner where they - what they call the boat ramp is now with - that Bwudjut Point area, Ngadpuk area, and it flies down towards the boundary for what we say is that it protects that country for us. It watches it. Right down to, I think they call it Reynolds River: Transcript 16 June 2021 p 37.

381. Mr Sing was not able to provide any further detail on that story, other than it having been passed on by his uncle Mr Brian Sing. He did not know the precise location of the southern *Kidjarik Kidjarik* site on the mainland. Mr Freddy Scrubby identified that the bird flew to the south, and that other groups might know about it due to its status as a travelling dreaming: Transcript 16 June 2021 pp 104–105.

382. Mr Lewis also says that there is a "Boiler" or "Boiler Dreaming"' site near Channel Point, near to where the Kiyuk claimants locate the *Debin* dreaming site at Bwudjut. He further says that it is 'dangerous and to be avoided because if you touch the area there you will break out in boils': Lewis Supplementary Report [3.2]. Of the Boiler dreaming Mr James Sing said it was 'right next to that *Debin*' and 'just past *Debin*'. Mr James Sing heard about it from the Burrburr family (who were generally accepted by all claimants to have a long history of association with the Peron LC area): Transcript 16 June 2021 pp 44, 120.

383. Little further evidence was given by the Kiyuk claimants in relation to the Boiler dreaming site or an associated story.

384. Finally, Mr Lewis says that the *debin* dreaming travels from Larrakia country in the north to the sites *Bwudjut* and *Ngalenbara* near Channel Point, then on to Banakula (which is accepted to be Wadjigan country) in the south: Lewis Report [6.5.]–[6.6]. Kiyuk claimants Mr Tony Sing and Mr James Sing confirmed this, with Mr Tony Sing describing it as follows:

> Well, there that Dingo Dreaming on that Banagula Plain. It's a small one in the middle of the plain. It's one pandanus … in the middle of it. And the dingo travelled from there straight through here, didn't stop, went straight back to Delissaville, Belyuen community it's known now. And it's a main sacred site for him there, and it's got rocks around it, greenery. In the middle of the rock, it got a little hole and the water stays there all the time all year around: Transcript 16 June 2021 p 45.

385. Mr Tony Sing then said that there was 'no dog Dreaming in this country', with Mr James Sing saying that 'it's not permanent': Transcript 16 June 2021 p 45. Mr James Sing repeated this consistently.

386. There was some contention as to whether the *Moiyin* and *debin* dreamings at the site *Bwudjut* are mutually exclusive, the same, or if they co-exist. The implications of the answer to that question are said to be important in determining the respective portions of the Peron LC area for which the Bwudjut and Kiyuk may have primary spiritual responsibility: see, e.g., Bwudjut Traditional Ownership Submissions [156]–[157]; Kiyuk Traditional Ownership Submissions [34], [42]; Kiyuk Responsive Submissions [62]–[68]. The Kiyuk claimants also expressed some consternation at the idea that an introduced species could be recognised as a major dreaming: see, e.g., Transcript 16 June 2021 pp 53–54.

387. I do not need to decide that question for the reasons which follow.

388. The Kiyuk submit that 'it is erroneous to equate Dreamings from which the Kiyuk local descent group draw their *identity* with Dreamings for which they have *primary spiritual responsibility* and to conclude that it is only Dreamings from which they draw their identity which define the area of land for which they have primary spiritual responsibility': Kiyuk Responsive Submissions [79]. I accept that contention. Indeed, Mr James Sing articulated the distinction as follows:

> … the majority of all the Kiyuk people their identity is linked to that *Ingarrayin* or that turtle dreaming. There's other dreaming sites and sacred sites around this coastline, you know, like we said, you got your *muk muk*, owl dreaming, you got *Kidjarik-Kidjarik* dreaming, you got that Boiler dreaming just past *Debin* where it comes out, that ripple in the water near that point down there. When it comes out from Banakula it gets up and goes towards Djarrkuba. They are significant dreamings but they're not in the way that we identify to this country. The boss of us mob is that *Ingarrayin*. It starts with that and it ends with that. All the other ones are just like – they're important to us because they're associated with this country but we only mark down this one here, that's the main one for us: Transcript 16 June 2021 pp 120–21.

389. So much is also clear in light of the evidence in respect of the Bwudjut group above (both that of the claimants and the expert anthropologists).

390. The principal difficulty, in my view, in accepting the Kiyuk claim for primary spiritual responsibility of the *Debin*, *Kidjarik Kidjarik* and Boiler dreamings and sites is not that they do not draw their spiritual identity from them. Rather, there is very little evidence of the actual content of those responsibilities, that is, how those responsibilities manifest themselves and are fulfilled, before one even considers whether such responsibilities can be said to be primary (guided by the expert's indicia outline above). In simple terms, it is not clear what the Kiyuk's responsibilities to those sites are. For example, despite saying that the Kiyuk group have 'local responsibility' for the *Debin* dreaming and site at *Bwudjut* (Lewis Supplementary Report [6.5]), Mr Lewis does not go further to explain what that actually means in a spiritual sense. The evidence of the Kiyuk claimants themselves does not assist in this regard.

391. Professor Sansom effectively refutes the notion that the Kiyuk have established primary spiritual responsibility for the *Debin* dreaming: Sansom Supplementary Report [87].

392. Nor do the reference materials aid in filling this gap. Indeed, Mr Lewis accepted that the anthropological reference materials lend very little support to the very existence of the *Kidjarik Kidjarik* and Boiler sites: Transcript 3 September 2021 pp 629–635. Professor Sansom agreed that this posed a problem for the Kiyuk case: see, e.g., Transcript 3 September 2021 p 610, 634. Of course, the evidence of the claimants is material in this respect. However, that evidence, particularly as it concerned primary spiritual responsibilities, was not persuasive.

393. That is in contrast to the Bwudjut group's evidence in respect of what may be termed, for the purposes of comparison, their 'secondary' site at *Banda-walga-nalgin*. That evidence, although significantly less extensive than the evidence regarding the *Moiyin*

dreaming at Bwudjut Hill, indicated some degree of culpability to the Barramundi dreaming if the appropriate spiritual protocols are not followed.

394. I do not doubt the sincerity of the affiliations expressed by the Kiyuk claimants. However, the weight of the both the claimants' and experts' evidence does not support the conclusions of Mr Lewis that the Kiyuk group are responsible for the mainland sites associated with the *Debin*, *Kidjarik Kidjarik* and Boiler dreamings.

395. Accordingly, I do not find that the Kiyuk have primary spiritual responsibility for the Peron LC area as far south as the Reynolds River. The evidence in respect of these sites simply does not demonstrate that the area for which the Kiyuk claimants are primarily spiritually responsible extends to them.

The extent of Kiyuk country

396. It follows that the relevant question in determining the extent of Kiyuk country is whether the *Ingarrayin* site and associated story, as well as the Kiyuk's association to the Peron Islands, place the Kiyuk group under a primary spiritual responsibility for any part of the Peron LC area.

397. For the reasons that follow, the evidence before me permits a conclusion that the Kiyuk have primary spiritual responsibility for the Peron LC area from its northern most extremity, abutting the intertidal waters of the area of the Wagait ALT, to the south as far as the north side of *Nikmingayin*.

398. First, as explored above, the evidence in respect of the *Debin*, *Kidjarik-Kidjarik* and Boiler dreamings and sites is not sufficient to establish spiritual responsibility, let alone primary spiritual responsibility, for them. It follows that, while the Kiyuk claimants have some knowledge of them, they do not assist the Kiyuk claim to be traditional owners of the extensive portion of the Peron LC area as asserted.

399. The second reason concerns the extent to which the *memorandjumal* (dugong) dreaming track in the vicinity of North Peron Island assists the Kiyuk case. I accept that the *memorandjumal* (dugong), as a patrilineal *durlg* dreaming, is central to the spiritual identity of some Kiyuk people (particularly Kiyuk women: Transcript 16 June 2021 pp 33–34), and that there may be particular ways of hunting it (Transcript 16 June 2021 p 58, 59). However, I do not consider that its dreaming track aids in establishing Kiyuk responsibility for any part of the Peron LC area. Mr Lewis states that the relevant *memorandjamul* sites are 'offshore from *Badjalarr* [North Peron Island]' and 'in Larrakia territory at Darwin harbour near Talc head': Lewis Report [6.2]. The dreamings map at Appendix II shows that the *memorandjumal* dreaming track is located to the west and southern extent of North Peron Island. It does not appear to travel close to the Peron LC area.

400. Furthermore, Mr Lewis does not make the relationship between that dreaming and the Peron LC sufficiently clear other than stating the general opinion that the *memorandjumal*, in combination with the *Ingarrayin* dreaming, 'distinguish[es] Kiyuk from their southern Wadjigyn neighbours and confer[s] upon the Kiyuk their primary spiritual responsibility for sites and dreaming and country within and adjacent to the claim area which is distinct both from Wadjigyn in the south

and the conflated Kiyuk-Wadjigyn identity': Lewis Report [6.3]. The role of the *memorandjamul* is not further explained.

401. The evidence of the Kiyuk claimants did not throw any further light upon this issue. For example, Freddy Scrubby spoke about how some Kiyuk women were assigned the *memorandjumal* totem, but he did not elucidate its links to the claim area. Mr James Sing denied knowledge of any practices related to it: Transcript p 122–24. No evidence was given of the *memorandjumal* dreaming track, nor whether it extended further to the claim are than is depicted in the Lewis Report.

402. The final issue is the extent to which the Kiyuk's primary spiritual responsibility for the *Ingarrayin* dreaming and site includes or 'pervades' any part of the Peron LC area. The evidence in this respect is somewhat equivocal. Appendix II to the Lewis Report records its closest location to the claim area at its northern extent, before heading generally out to sea, west and south-west, towards *Badjalarr*. Mr James Sing said that the *Ingarrayin* was 'the boss for this coastline': Transcript 16 June 2021 p 42. Mr Simon Moreen and Mr Freddy Scrubby said the track started at *Ingarrayin*, roughly 200 metres north of Balgal outstation, going west along the beach and out to the Peron Islands: Transcript 16 June 2021 pp 118–120.

403. In contrast to the Bwudjut group's *Moiyin* dreaming, there do not appear to be any additional associated *Ingarrayin* sites on the mainland, apart from its focal point near Balgal, which might indicate a demarcation of its territory.

404. It may be said, however, that the *Ingarrayin* dreaming track as depicted in the Lewis Report is substantiated by the evidence given by the Kiyuk claimants. That is, the area within which the Kiyuk claimants must perform spiritual rites of permission and introduction to the *Ingarrayin* dreaming includes the northern extent of the claim area: Transcript 16 June 2021 pp 55-56.

405. Yet it is necessary to draw a line, however artificial, between the Bwudjut and Kiyuk areas for which they respectively have primary spiritual responsibility. As noted above, other sites, as well as natural features, may inform the ascertainment of such boundaries.

406. In that vein, there is support in the anthropological materials for the notion that Kiyuk country includes the northern extent of the claim area as far south as the site *Nikmingayn*, specifically the Povinelli 1990 Report. In that report, Professor Povinelli concluded that *Nikmingayn* was the final site belonging to the Kiyuk group: p 17. Mr Lewis traverses this point in some detail in the Lewis Supplementary Report [2.4], concluding by saying Povinelli's 1990 Report confirms that the claim area is Kiyuk territory from at least that site northwards: [2.4.9].

407. Professor Sansom endorsed this view on the proviso that Professor Povinelli's findings must first be accepted: Samson Provisional Report [53] read in light of Sansom Supplementary Report [57]-[58]. He also agreed that the Povinelli 1990 Report supported the view that south of *Nikmingayn* was Wadjigan language group country, rather than Kiyuk: Transcript 3 September 2021 p 610. That is supported by the evidence of Mr Tommy Henda in regard to that site as explored above.

408. As noted above, the experts were generally agreed that the Povinelli 1990 Report could assist to ascertain the halo effect of an Aboriginal group's main dreaming, and thereby demarcate boundaries between neighbouring groups: see, e.g., Transcript 2 September 2021 p 458.

409. In conclusion, the weight of the evidence does not lean in favour of a finding that the Kiyuk have primary spiritual responsibility for the Peron LC area from its northern extent to (generally speaking) the mouth of the Reynolds River. In light of the evidence regarding the *Ingarrayin* dreaming track from the claimants as well as Mr Lewis, it may be said that the 'glow' of that dreaming includes the northern extent of the claim area as far as *Nikmingain*. That view is supported by the Povinelli 1990 Report.

410. There is insufficient evidence to conclude that it extends any further south from that point.

411. I accordingly find that, in respect of the Peron LC area, the area for which the Kiyuk group have primary spiritual responsibility comprises its northernmost-point, as far south as the north side of the site *Nikmingayn*. It is at the southern side of that place that primary spiritual responsibility for the claim area may be said to transfer to the Bwudjut group.

3.4. RIGHTS TO FORAGE

412. The definition of traditional Aboriginal ownership as it appears in the ALRA also requires a finding that the claimants 'are entitled by Aboriginal traditional to forage as of right over that land': ALRA s 3(1)(b).

413. It was not disputed that each of the claimant groups has rights to forage over the Peron LC area. It would be wrong to conclude otherwise in light of the voluminous amount of evidence received on this topic, particularly from the claimants themselves during the hearings at Batchelor, Bulgul and Darwin.

414. Furthermore, there was no evidence to suggest that the Bwudjut group could, as a matter of Aboriginal tradition, exclude the Wood/Morgan, Cubillo and Piening/Rivers claimants from the claim area for the purposes of foraging. In fact, Mr Graham confirmed the opposite, agreeing with counsel for the Cubillo claimants that all Wadjigan-identifying people had 'usufructuary rights in that country [being the Peron LC area] according to tradition': Transcript 2 September 2021 pp 507–508.

415. Additionally, he said that the Bwudjut claimants had 'no issues with Kiyuk people going there fishing, hunting, visiting', in light of their recognition that 'Wadjigan Kiyuk are linked': Transcript 2 September 2021 p 510.

416. Mr Lewis said that permission, in accordance with tradition, would be required from the Kiyuk claimants for the Wadjigan-identifying claimants to visit and hunt or fish on Kiyuk country. He said, however, that such tradition included an implicit kind of permission which was mediated by 'relationships with other neighbouring groups' and that there were 'codes of behaviour' for sharing resources: Transcript 2 September 2021 pp 509–10.

417. Mr Graham confirmed that such relationships existed traditionally between the Wadjigan and Kiyuk: Transcript 2 September 2021 p 510.

418. The opinions of Mr Lewis and Mr Graham are reflected in the evidence of Mr James Sing (for example), who described the nuances of the historical relationship between Wadjigan and Kiyuk as it related to practices of ceremony, marriage and visitation: see, e.g., Transcript 16 June 2021 pp 75–76. He further said that he could 'go and visit' but not 'claim' Wadjigan country due to connections through his mother's side: Transcript 16 June 2021 pp 87–88.

419. As I have explored above, the various genealogies provided during this Inquiry demonstrate that Kiyuk and Wadjigan groups are closely related by, amongst other things, intermarriage of previous generations of members. There are many people like Mr Sing who share both Wadjigan and Kiyuk ancestry of some kind.

420. This long history of association, including in respect of marriage and ceremony, between the Wadjigan and Kiyuk language groups supports a conclusion that each have, generally speaking, some kind of tacit permission (at least) to forage on the other's country. Of course, that may be 'mediated' by time and place, relations between group members, who one is accompanied by when visiting the Peron LC area, and a range of other contextual factors.

421. As Mr Graham noted, however:

> I think in this region, taking status as a starting point, people had extensive rights to travel on each other's country. They did it. They camped together, they did ceremonies together. Like there may have been restrictions on the estates on the actual sites, "Don't go on top of Bwudjut Hill and start playing around" or "Don't go to Ingarrain" or, you know, the sites we've heard about on the island "and playing around", but the [traditional] system that Stanner describes for this region I can't see working if people have to wait at the boundary and get permission to go across: Transcript 2 September 2021 p 510.

422. That conclusion is supported by the evidence of the claimants themselves. The conflated 'Wadjigan-Kiyuk' identity, as explored above, may have been a function of such an understanding.

423. I accordingly find that each of the claimant groups in the Peron LC are entitled to forage as of right over the Peron LC area.

3.5. STRENGTH OF ATTACHMENT

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

425. There are a wide range of factors which previous Commissioners have taken into account when assessing strength of attachment. I do not need to repeat them here.

426. Each of the claimant groups has demonstrated a strong sense of attachment to the Peron LC claim area. Appreciated in the light of the considerable social disruption to the area and wider region, as detailed by the expert anthropologists and the claimants themselves, that evidence is fortifying.

427. The Bwudjut group have maintained the association and visits to the Peron LC area, including for hunting, despite difficulties accessing the area due to locked gates and a lack of appropriate equipment (such as four wheel drive vehicles). That group participated in the making of the film 'When the Dogs Talked' (Exhibit A3(C)), which was centred around the *Moiyin* dreaming at Bwudjut Hill. They have introduced young and new people to the Hill, passing on the *Moiyin* story and teaching them the relevant protocols. This includes rubbing a Bwudjut person's sweat onto them to protect them. Many of these activities indicate the strength of their spiritual beliefs about Bwudjut Hill and its associated stories.

428. The Wood/Morgan, Cubillo, and Piening/Rivers families also demonstrated that their attachment to the Peron LC area was significant. Each of these groups gave evidence regarding their regular and ongoing visits and stays at Bulgul outstation and the claim area, hunting, fishing and foraging in and around the claim area, 'calling out' to spirits, and knowledge of conception and burial sites of ancestors.

429. Some of these claimants also occupied formal positions as rangers in and around the claim area, working to actively care for their country.

430. Thus, since the region was recorded as having been 'vacated' the claimant groups have sought to reconnect with it and re-establish their presence there.

431. Moreover, the elder generations of these claimant groups have retained an impressive knowledge and memories regarding activities undertaken in and around the Peron LC area. For example, Mr Ben Cubillo Snr remembered spending time in the claim area as early as 1948: see Bennetts Report p 7. Mr Cubillo Snr spoke about how he was subsequently removed from the area, ostensibly as part of the Stolen Generations.

432. It is important for me to acknowledge that many of the claimants (from each of the claimant groups) in the Peron LC gave evidence in this Inquiry recounting the effects of the Stolen Generations on them and their families. Some of the more senior claimants, such as the eldest generations of the Wood/Morgan group, recalled close counters with government authorities when they were children. Others such as Mr Cubillo Snr specifically recalled being taken from their families as well as being denied their return to country. Others still, such as Mr Tony Sing of the Kiyuk group, recalled growing up in government institutions in Darwin and other locations.

433. Yet it is fair, I think, to say that such experiences have not negated the claimants' desires for their ongoing connection to their traditional lands to be recognised under the ALRA. So much was clear from the oral evidence. I commend their strength and willingness to share their experiences in this context.

434. Nor have those experiences impacted upon their ability to share their deep knowledge of the claim areas. This was exemplified by the evidence of Ms Imelda Wood, who demonstrated an in-depth knowledge of the resources in the claim area through her co-authored book *Batjemalh Emmi and Mendhe Plants and Animals* (Exhibit AM2). The eldest generations have also remained capable of passing on this knowledge to the younger generations.

435. Finally, as I have noted above, the connections of both the Wadjigan-identifying claimant groups and the Kiyuk group have been recognised in land claims, such as

the *Kenbi LC Report*, and other related contexts such as the Wagait Dispute. The Bwudjut, of course, whilst generally recognised as having a traditional association to the region, did not meet the particular requirements of the ALRA in the *Lower Daly LC Report*. In relation to this Inquiry, they have demonstrated that, for much of the claim area, they are the traditional Aboriginal owners of the area.

436. The efforts of each of the claim groups to engage with the evidentiary arduousness of the land claims process for the Peron LC once again indicates their desires to be recognised in this context. Such efforts are clearly demonstrative of a strong attachment to the Peron LC area.

3.6. ADVANTAGE OF A GRANT

437. Section 50(3)(a) of the ALRA also requires the Commissioner to comment on the number of Aboriginals with 'traditional attachments' to the land claimed who would be advantaged, and the nature and extent of the advantage that would accrue to those Aboriginals, if the claim were acceded to either in whole or in part.

438. That comment is not limited to those claimants found to be traditional Aboriginal owners in the sense required by the ALRA. It extends to all Aboriginal persons with traditional attachments to the claim area, such as through spiritual links and foraging rights: see, e.g., *Cox River (Alawa/Ngandji) Land Claim (No. 14) Report No. 18* (26 April 1978) (*Cox River LC Report*) pp 39-40 per Kearney J as Commissioner; *Warlpiri and Kartangarurru-Kurintji Land Claim (No. 2) Report No. 2* (4 August 1978) [243] per Toohey J as Commissioner.

439. I note, as in previous reports, that the nature and extent of the advantage of the grant of the claimed lands under the ALRA accruing to an individual will of course vary according to the nature of the person's interest in the claimed area.

440. A list of the claimants, including those who I have found to be traditional owners of the Peron LC area (i.e. the Bwudjut and Kiyuk groups) is contained at Annexure B to this Report. I do not propose to repeat it. So far as those claimants are concerned, a grant of land would have the following advantages for their respective sections of the claim area:

- the security of inalienable freehold title which preserves the country, not only for themselves, but also for their descendants;
- a higher degree of control over the claim area; and
- an enhanced capacity to protect areas of cultural or historical significance.

441. Of course, the Wood/Morgan, Cubillo and Piening/Rivers claimant groups, who I have found have extensive associations with the claim area (including rights to forage), would also benefit from a grant. Their long and active relationship with the claim area has been referred to above. The entitlement to continue to visit and forage has been recognised in this Report. The Northern Land Council, following any decision by the Minister to make a grant of the claimed area, and in carrying out its functions under the ALRA, would no doubt seek to ensure that those rights of the Wood/Morgan, Cubillo and Piening/Rivers families or groups are preserved, and

to ensure that they would be entitled to be consulted with respect to any significant proposed use of the land granted to the land trust.

442. Aside from the members of each of the claimant groups, there are likely to be further individuals and groups of people would benefit from a grant of the claim area to a land trust. These people include:

- Non-claimants affiliated with a claimant group/s by more distant genealogical connections;
- Non-claimants connected to the claim area through conception, place of birth or dreaming affiliation;
- Non-claimants with a strong historical link to the claim area, perhaps through living or working on or near the claim area; and
- Non-claimants who are married to or are children of the claimants.

443. It is therefore difficult to estimate in any useful way the number of people who would benefit from a grant of Aboriginal land. It would likely be several hundred Aboriginal persons.

444. The final matter that warrants mention is the well-recognised intangible advantage of a grant of land to a land trust. Indeed, despite being only a small portion of the claimants' respective traditional countries, the evidence of claimants' strength of attachment to the Peron LC area demonstrates that it is of significant value to them. A grant of land to a land trust would afford formal and significant recognition of the claimants' strong and meaningful relationship to country. As Gray J as Commissioner said in the *Malgnin and Nyinin Land Claim to Mistake Creek Land Claim (No. 133) Report No. 50* at [6.2.3]:

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

445. The importance of recognising this kind of advantage is amplified significantly in the context of the Peron LC. That is simply because each of the claimant groups' attachment to their country has persisted in the face of the heavy impacts of colonisation on them, their communities and their traditions. In relation to unalienated Crown land, the return of the claim area would do much to right the consequences of colonisation.

3.7. OTHER MATTERS FOR COMMENT

446. As the claim does not relate to alienated Crown land, section 50(3)(d) of the ALRA is not applicable.

447. For the sake of completeness, I also raise section 50(4) of the ALRA. That section requires the Commissioner, in carrying out their inquiry function, to have regard to the following 'principles':

    (a) Aboriginals who by choice are living at a place on the traditional country of the tribe or linguistic group to which they belong but do not have a right or entitlement to live at that place ought, where practicable, to be able to acquire secure occupancy of that place;

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

448. The claimants did not make any submission nor lead any evidence on these principles. That is understandable given that the claim area consists entirely of the inter tidal zone.

449. I simply note that I have had regard to these principles to the extent that they are relevant to my task.

3.8. FORMAL FINDINGS AND RECOMMENDATION

450. I conclude by recording my finding that the Bwudjut and Kiyuk claimants are local descent groups in the sense required by the ALRA.

451. I also record my finding that the Bwudjut and Kiyuk groups have common spiritual affiliations to sites on the land which place those groups under a primary spiritual responsibility for those sites and land. In terms of the Peron LC area, the Kiyuk are the traditional Aboriginal owners of the northern extent, continuing south to the northern side of the creek at the site *Nikmingayn* (Site 1). The Bwudjut then are the traditional Aboriginal owners of the Peron LC claim area from that point to the southern extremity of the claim area as described above and they have that responsibility from *Nikmingayn* to the southern extent of the claim area.

452. The Bwudjut, Wood/Morgan, Cubillo, Piening/Rivers and Kiyuk claimant groups are each entitled to forage as of right over the Peron LC area to the extent noted in Section 3.3.

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

454. A list of the claimant groups as provided to the Office of the Aboriginal Land Commissioner is annexed to this Report as Annexure B.

4. DETRIMENT AND PATTERNS OF LAND USAGE

455. Section 50(3)(b) of the ALRA requires the Commissioner, when reporting to the Minister and to the Administrator, to comment on the 'detriment' to persons or communities including other Aboriginal groups that might result if the claim were acceded to either in whole or in part. Section 50(3)(c) similarly requires the Commissioner to comment on the effect which acceding to the claim either in whole or in part would have on existing patterns of land usage in the region. This section of the Peron LC Report addresses those matters.

456. As I have done in previous reports, I shall refer to each of those matters collectively as 'detriment' until specific focus is required on the two matters dealt with under subclauses (b) and (c) of section 50(3).

457. Evidence and submissions concerning detriment were received from the Northern Territory Government, Fitzroy, the Block Owners (described at [513]-[514] below), Australian Agricultural Company Pty Ltd (AACo), the NTCA, AFANT, Northern Territory Seafood Council (NTSC), Northern Territory Guided Fishing Industry Association (NTGFIA), and Humbug Fishing (a fishing tour operator). The precise relationship between Fitzroy and the Block Owners, and related interests, is set out in Section 4.5 of this Report. The submissions largely traversed familiar territory, in the sense that the nature of much of the detriment asserted in this Inquiry was similar to that of previous land claims, and also that considered in the *Report On Review of Detriment: Aboriginal Land Claims Recommended For Grant But Not Yet Finalised*, provided to the Minister on 24 December 2018 (also known as the 'Detriment Review' or 'Detriment Report').

458. There were, however, some novel issues raised.

459. Overall, the asserted detriment was not as voluminous as in some previous inquiries. This is understandable given the remoteness of the claim area.

460. The Northern Land Council on behalf of the Bwudjut group, in its 'Submissions on behalf of the Bwudjut Claimants – Detriment and Patterns of Land Use' dated 3 December 2021 (Bwudjut Detriment Submissions) were the only claimant party who responded to assertions of detriment. The above parties were then each given the chance to reply: the Northern Territory, Fitzroy, and the Block Owners duly did so.

461. The Bwudjut Detriment Submissions at [6] broadly categorised the asserted detriment as follows:

    (a) impacts on the use of and access to the Channel Point Coastal Reserve and impacts on access to and maintenance of related government infrastructure;

    (b) impacts on the use of and access to Channel Point Community (NTPs 4042-3 & 4909-12);

    (c) impacts on recreational fishing in the claim area and the Northern Territory;

    (d) impacts on commercial fishing in the claim area and the Northern Territory;

    (e) impacts on the Northern Territory Government management of fisheries;

    (f) impacts on fishing tour operators and other tourism businesses;

(g) impacts on access to, and the use of, the claim area a by neighbouring pastoral lease holders; and

(h) impacts on mining and energy interests.

462. It is a useful structure which I will believe will be of assistance to the Minister. I have adopted it in my comments on detriment below.

463. It is first necessary however to address submissions regarding the meaning of 'detriment' as it appears in section 50(3)(a) of the ALRA, as well as the Commissioner's 'comment' function.

4.1. THE MEANING OF 'DETRIMENT'

464. The Northern Territory, in its 'Submissions of the Northern Territory as to Detriment' dated 8 November 2021 (Northern Territory Detriment Submissions), made several submissions as to the meaning of the term 'detriment' as it appears in section 50(3)(b) of the ALRA. The Northern Land Council on behalf of the Bwudjut group duly responded in the Bwudjut Detriment Submissions, advancing several of its own contentions.

465. It is not necessary to recite in detail those submissions. It suffices to briefly make the following observations.

466. I have taken the approach that detriment, in the context of the ALRA, bears its ordinary and expansive meaning of harm or damage. This is not contentious: it is the well-accepted definition of the term adopted by Toohey J as Commissioner in the *Borroloola Land Claim (No. 1) Report No. 1* (3 March 1978) (*Borroloola LC Report*) at [174]–[175], where he said:

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

467. His Honour added that to have no awareness of such a limit would effectively result in a report that would be of little use to the Minister: see *Borroloola LC Report* at [175]. It is therefore necessary that there be evidence which establishes a reasonable possibility of that detriment occurring should a grant be made.

468. It follows that section 50(3)(b) of the ALRA does not contemplate the Commissioner's comment on 'free-for-all' assertions of detriment. The Commissioner's comments should be evidence based: in that way, facts must be established from which it can fairly be concluded that some particular detriment might result. It might also be said that consequences that might reasonably be described as speculative, far-fetched, fanciful or remote do not constitute detriment. The Minister might properly consider that comments upon such 'detriment' would be of little use.

469. It is important to note, in the context of the Peron LC area (which consists entirely of intertidal zone) and the Northern Territory Detriment Submissions at [16]–[17], that a plain reading of section 50(3)(b) of the ALRA does not indicate that a strict legal entitlement must be demonstrated in order to give rise to a relevant detriment, and thus to provoke a comment from the Commissioner. At the same time however, I think that it would be contrary to the scheme of the ALRA if the Minister under section 11 were to consider claimed detriment based upon the impairment of interests that arise out of actions that contravene legislation, or based upon the loss of stakeholders' abilities to use the claim area that are not founded in any valid interests or entitlements. Further, the Minister may consider that money and time spent developing that benefit, especially in the face of a claim under the ALRA of which the 'detriment' contender was aware, constitutes a voluntary assumption of risk that the benefit would then be taken away. It might in that circumstance be seen as a detriment that the Minister should not place much weight on when deciding whether to make a grant of the claimed land as recommended by the Commissioner.

470. There may be shades of entitlement, or debatable entitlements, which colour that consideration. Each asserted detriment must really therefore be considered carefully and commented on accordingly.

471. It may be the case that a comment noting the absence of a legal entitlement would in any event be of assistance to the Minister, who has the ultimate task of balancing the claims of the traditional owners against the claimed detriment when deciding, under section 11 of the ALRA, whether to recommend that a grant be made by the Governor-General. Thus, while strict legal entitlement is not necessarily the test for 'detriment' as required, I have proceeded upon the basis that it is a relevant aspect of the Report under section 50(3)(b) of the ALRA following the Inquiry.

472. Finally, the Northern Land Council on behalf of the Bwudjut group submit that the Commissioner 'can and should inquire into and comment upon the time at which the asserted detriment arose and the state of knowledge of the person claiming the detriment': Bwudjut Detriment Submissions [18]. It is said at [19] to follow that:

> any harm or damage suffered by a person or entity where their relevant interests were acquired after the land claim was lodged on 27 May 1997, would not be detriment arising from a grant of land, rather it is the result of decisions or choices made by the person to assume the risk that their interests would be affected if a grant were made.

473. I do not go so far as to say that the timing of the alleged detriment goes to whether than detriment exists per se. However, as noted above, the Minister may take the view that, if it is shown on the evidence that the detriment was accrued on notice or in the face of the land claim, such detriment should not prevent a decision to grant the claimed land to the traditional owners. Ultimately, such a fine distinction probably does not matter, as it is for the Minister to weigh the asserted detriment (with the benefit of my comments) against the claims of the traditional owners in deciding whether to recommend that a grant be made.

4.2. THE COMMISSIONER'S TASK UNDER S 50(3)

474. The Northern Territory and the Northern Land Council on behalf of the Bwudjut group also made submissions as to the nature of the Commissioner's 'comment' function under section 50(3) of the ALRA.

475. Of course, I am bound to accept the contention of the Northern Territory that, while I must form a view and comment upon the likelihood of detriment arising, I must not weigh or assess whether the party asserting detriment 'ought to bear' that detriment: Northern Territory Detriment Submissions [22]. That is to say that it is for the Minister, not the Commissioner, to weigh and assess various considerations relevant to the grant of the claimed land to the traditional owners: see generally *Meneling Station*. The Northern Land Council on behalf of the Bwudjut claimants also accepted this contention: Bwudjut Detriment Submissions [7]–[9].

476. However, in past reports I have taken the view that, as my comment must be sufficiently detailed to enable the Minister to understand what the relevant detriment is or may be (including the likelihood of it arising) and to consider that detriment when deciding whether to recommend that a grant be made under section 11 of the ALRA, it is not necessarily inappropriate to also comment upon evidence of ways that a particular detriment might be accommodated: see, e.g., *Gregory National Park/ Victoria River Regional Land Claim (No. 167) / Legune Area Land Claim (No. 188) Report No. 74* (25 June 2021); *Woolner LC Report*.

477. The Northern Territory in its Northern Territory Detriment Submissions at [18] and the Northern Land Council on behalf of the Bwudjut claimants in its Bwudjut Detriment Submissions at [10] appear to agree on this point. This is especially important in the context of the *Blue Mud Bay case* which, as noted above, decided that permission from the traditional Aboriginal owners of land granted to a land trust is required for access to tidal waters overlying Aboriginal land to the low water mark, and the ongoing negotiations following that decision. Indeed, the Peron LC area the subject of this Report comprises entirely of a strip of intertidal zone.

478. As has been the case in other land claim inquiries, at times during the course of the Peron LC Inquiry the Northern Land Council on behalf of the Bwudjut claimants advanced solutions to the uncertainty and related detriment said to arise from the *Blue Mud Bay* decision. Many of these solutions in essence involved negotiation and agreements with traditional owners to provide access, on reasonable terms, to the intertidal zone following any grant. The approach that I have adopted in this Report (and also in past reports: see, e.g., *Woolner LC Report* at [192]) is that traditional Aboriginal owners should not be assumed to be resistant to accommodating or diminishing asserted detriment, including by agreement making on reasonable terms. Obviously, there is scope for different perspectives on what may or may not be reasonable. There is no reason however, in the absence of specific evidence, to expect the traditional owners of the claimed land in the Peron LC to be resistant to such arrangements.

479. Accordingly, the Minister may consider that submissions which ignore these kinds of avenues, which would have the effect of diminishing (or minimising) claimed detriment, cannot on their face be taken as necessarily demonstrating material

detriment. The same may be said of the process of negotiating any agreement with the traditional owners.

480. That being said, I have commented upon and evaluated each assertion of detriment and any potential resolution of that detriment in the light of the evidence before me. Whilst I anticipate that my comments may be of assistance to the Minister, I repeat that – in the light of the recommendation in the Report that the Minister make a grant of the claimed land to the traditional Aboriginal owners – it is ultimately for the Minister, under section 11 of the ALRA, to make the decision whether to do so.

4.3. PUBLIC ACCESS TO AND USE OF CROWN LAND

481. Before turning to specific topics of asserted detriment, it important to briefly examine the issue of rights of public access and use of Crown land, and therefore the claim area in the Peron LC. This was the subject of submissions from the Northern Territory, Fitzroy and the Block Owners, as well as the Northern Land Council on behalf of the Bwudjut group of claimants. Such claimed rights, in general, colour much of the specific detriment claimed and to some extent, determine whether such detriment (in the sense required by section 50(3) of the ALRA) can be said to exist at all.

482. The case of *Western Australia v Manado* (2020) 270 CLR 81; [2020] HCA 9 (*Manado*) is authority for the proposition that members of the public generally have a privilege to access and enjoy Crown land unless restricted or prohibited by the Crown through statute or regulation. That decision concerned the validity of section 14 of the *Titles (Validation) and Native Title (Effect of Past Acts) Act 1995* (WA), which was enacted in reliance on section 212(2) of the *Native Title Act*. Section 13 of the *Validation (Native Title) Act 1994* (NT) is the equivalent operative provision in the Northern Territory.

483. The chief issue at hand is whether *Manado* is applicable in the context of section 50(3) of the ALRA, such that the abrogation of that privilege by a grant of land to the traditional owners would give rise to a relevant detriment to be commented upon in a report to the Minister. The contentions are, in essence, similar to those raised in the *Woolner LC Report* (see [302]).

484. The Northern Territory says that, as a consequence of the tacit permission considered in *Manado*, that fact that there is no 'recognised right of use and access to the intertidal zone' does not mean that it is 'unlawful or impermissible' for the public to access and use that area. It also says that 'the available evidence confirms there is no intention to alter that status quo'. It is said to follow that, as a consequence of a grant of land to the traditional owners 'an area that has been consistently and lawfully used by many people will be dealt with in a way to confer a right of quiet use and enjoyment to a part of the community to the exclusion of all others': Northern Territory Detriment Submissions [23]–[29].

485. The Northern Land Council on behalf of the claimants respond by having regard to the separate opinion of Nettle J, and to some extent that of Edelman J, in *Manado*. That is to say that while there exists a tacit freedom of the public to access Crown land, that freedom 'rests on a basis that passes unnoticed' in the sense that it is

'inherently susceptible to abridgment or exclusion by many forms of superior regulation and Government action (including a grant under the ALRA) and is not a legal or enforceable "right" as such': Bwudjut Detriment Submissions [35]. The Bwudjut claimants cite the Northern Territory Government's *Usage of Vacant Crown Land Policy* (7 March 2020), perceivably in support of this notion.

486. Fitzroy, in the Fitzroy Detriment Submissions, and the Block Owners, in their 'Submission on behalf of Noonbrave Pty Ltd, Westside Pty Ltd, Excess Pty Ltd, and Sharon and Robert Wilson' dated 1 October 2021 (Block Owners Detriment Submissions) reply to those contentions in similar ways. In essence, both of those parties point out that their usage of the claim area, which consists of 'low impact activities' within the meaning of the Northern Territory's *Usage of Vacant Crown Land Policy*, is presently permitted by the Crown and that there are, on the evidence, no prospective plans for that usage to be abrogated. Indeed, the Bwudjut claimants' citing of that policy is said to support Fitzroy's and the Block Owners respective cases that their current rights to access the claim area are in fact recognised.

487. Both of those parties also say that the Bwudjut claimants' reliance upon *Manado* is misplaced and selective, but it is not necessary for me to consider that argument in light of the following.

488. As I have explored above, the meaning of 'detriment' as it appears in section 50(3)(b) of the ALRA is generally accepted as being very broad. Further, there is nothing before me in this Inquiry to suggest that Fitzroy or the Block Owners use of the claim area, which are explored in more detail below, are contrary to legislation or otherwise invalid. In fact there is force, I think, in their contention that the Bwudjut claimants' reliance upon the *Usage of Crown Land Policy* in this context is a recognition that their present use of the claim area, to the extent that it consists only of low impact activities, is currently permitted by the Northern Territory. It is clear that, should the claim area become 'Aboriginal land' in the meaning of the ALRA, such uses will only be permitted with the express permission of the traditional owners.

489. Accordingly, I have regarded the existence of the tacit public right to access and enjoy unalienated Crown lands, and its possible impairment by the grant of the area claimed or part of it, as a matter of possible detriment which should be inquired into.

490. I now turn to specific assertions of detriment in the Peron LC, as helpfully categorised in the Bwudjut Detriment Submissions.

4.4. CHANNEL POINT COASTAL RESERVE

491. The Channel Point Coastal Reserve (NTP 6362) is located adjacent to the claim area at or somewhat to the north of its midpoint (more or less directly opposite North Peron Island). It was declared under section 12 of the *Territory Parks and Wildlife Conservation Act* (NT) on 30 May 2005. It can presently be accessed by land via an extension to Marindja [Murrendja] Road, and by sea via the Channel Point Boat Ramp. Both of those methods require a permit issued by Northern Territory Parks, Wildlife and Heritage (PWH).

492. Evidence as to use of the Channel Point Coastal Reserve and infrastructure contained on it was given by Mr Lincoln Wilson, Acting Director Northern Australian Parks, within the PWH Division of the (then) Department of Tourism and Culture, in his statement dated 14 May 2018 (Exhibit NT6) (Lincoln Wilson Statement).

493. The location of the Channel Point Coastal Reserve in relation to the claim area is shown on Attachment C to the Lincoln Wilson Statement, which is annexed to this Report as Annexure I.

494. Mr Wilson in his statement at [9] identified a number of pieces of infrastructure within the Channel Point Coastal Reserve, including the Marindja Road extension, walking tracks, ranger compound, campgrounds, fences, radio tower, Channel Point Boat Ramp (which was constructed in 2008), carpark and picnic areas.

495. Of these pieces of infrastructure, it is fair to say that the Channel Point Boat Ramp is the most pertinent to the Peron LC Inquiry. That is because it 'extends into, and ends in, the Claim Area': Lincoln Wilson Statement [12]. The Channel Point Coastal Reserve is accessed and used by approximately 1300 members of the public annually, in accordance with a permit issued by PWH. Mr Wilson said in oral evidence that such permits are in high demand, and can require up to 12 months pre-planning to be secured: Transcript 28 June 2018 p 386. He also said that the Boat Ramp is the primary reason why the public access the Channel Point Coastal Reserve.

496. Police also use the Boat Ramp to undertake fisheries and associated compliance monitoring.

497. Thus, Mr Wilson said that the detriment consequent upon a grant of the claim area to the traditional owners was not that access to the Channel Point Coastal Reserve itself would be restricted. Rather, it is said that, as 'the majority of the park visitors use the Channel Point Coastal Reserve for ocean access for the purposes of fishing, and recreational boating', failure to reach an agreement with the traditional owners to allow public access (via a permit system or otherwise) would see 'visitor numbers to the Reserve decrease to virtually nil': Lincoln Wilson Statement [18]–[21].

498. Alternatively, Mr Wilson said that, even should an agreement be reached, delays in respect of obtaining permits under the *Aboriginal Land Act 1978* (NT) would constitute a detriment.

499. Relevantly, the Northern Territory, in its Northern Territory Detriment Submissions at [36]–[44], submitted that there is no evidence that an agreement with traditional owners would be reached in respect of the claim area. Thus, it is said, no comment could be made regarding how detriment might be ameliorated in that way. This submission was also made in relation to recreational and commercial fishing in the claim area more generally (topics which I return to below).

500. The Northern Land Council on behalf of the Bwudjut claimants made a number of points in response: see generally Bwudjut Detriment Submissions at [46]–[54]. These included contentions to the effect that the extent of the detriment is limited by the small number of people who access the Channel Point Coastal Reserve (numbers which are themselves dictated by PWH bylaws), and that permits are already

required, which demands a 'high degree of planning, preparation and commitment': [50].

501. Alternatively, it is said that, having regard to the agreement between the Wagait ALT (in accordance with the instructions of the relevant traditional owners), the Northern Land Council and the Northern Territory for Marindja Road (which traverses the Wagait ALT), conditions are favourable for agreement making under section 11A or 19 of the ALRA. That deed expired in 2015, since which public access has continued unimpeded.

502. It follows, it is said, that the asserted detriment would be alleviated by a similar agreement with the traditional owners of the Peron LC area. Other agreements over proximate areas, such as the Settlement Deed between the Northern Territory, Daly River/Port Keats ALT, and the Northern Land Council dated 7 August 2014 (Exhibit A7), are said to support this proposition.

503. It is also said that, given that the Boat Ramp was constructed in 2008 (after the lodgement of the Peron LC), no detriment arises as the Northern Territory assumed the associated risk that the land would be granted and access denied.

504. The Northern Territory, in its 'Submissions in Reply to the Bwudjut Submissions As To Detriment' dated 24 December 2021 (Northern Territory Detriment Response), rejected these contentions. It took particular issue with the idea that the detriment was somehow reduced by reference to the number of people who regularly visit the claim area, citing the remoteness of the Channel Point Coastal Reserve as an indication that the detriment suffered remained genuine. As noted above, the Northern Territory also rejected the proposition that access agreements with traditional owners in respect of proximate areas of land allowed the drawing of any similar inference in the Peron LC Inquiry.

505. I start by noting that, given that the Boat Ramp was constructed in 2008 (after the lodgement of the Peron LC), it may be possible to say that the Northern Territory did assume a certain degree of risk in knowing that access could be denied by the traditional owners in the event of a grant of land under the ALRA. Indeed, in light of Mr Wilson's detailed knowledge of the notification process under the *Native Title Act*: see Lincoln Wilson Statement [13]–[14], the Minister may consider that it would be difficult for the Northern Territory to argue that the Northern Territory were completely unaware of the Peron LC over the same area under the ALRA.

506. Yet it is not in dispute that, should the land be granted, use of the intertidal zone into which the Boat Ramp extends will only continue with the permission of the traditional owners. It is not difficult to imagine that, should the principal use of the Channel Point Coastal Reserve be forbidden, this will have an impact on visitor numbers to the Channel Point Coastal Reserve. While I find it difficult to accept Mr Wilson's assertion, in the absence of supporting evidence, that the consequence would be 'nil' visitors on an annual basis, I also do not accept the Bwudjut claimants' contention that the seemingly small amount of people who access the Channel Point Coastal Reserve necessarily equates with similarly small detriment to be suffered. The claim area is remote and relatively small, so the focus on that number is somewhat acontextual.

507. Thus, should the land be granted and the traditional owners deny access to the claim area adjacent to the Channel Point Coastal Reserve, members of the public who access the claim area via the Channel Point Coastal Reserve for the purposes set out above will suffer a detriment.

508. While there is force in the Northern Territory's contention that the existence of agreements with proximate Aboriginal land trusts does not amount to evidence that such agreements will in fact be entered into by the traditional owners of the Peron LC area specifically, I do not think it is appropriate to adopt the alternative position that there is no prospect of appropriate access agreements being made, or an appropriate permit system being introduced. Quite the contrary. The Minister may take the view that such access arrangements on sensible terms may be or will be available. That is a matter for the Minister. That is particularly so in the context of this Inquiry, where permits and agreements were the subject of much discussion.

509. In that context, I do not consider it to be inappropriate that the Minister be informed of how a permit system or agreement would impact upon or vary from the status quo in the Peron LC area. Indeed, it is true that members of the public seeking to access the claim area through the Channel Point Coastal Reserve, whether it be via Marindja Road or by the Boat Ramp, must already apply for a permit through PWH, and that such a process requires a degree of planning. Existing limits on the number of persons permitted to access the claim area via the Channel Point Coastal Reserve are put in place and managed by the Northern Territory.

510. Should the land be granted and an agreement be reached or a permit system be put in place by the traditional owners, the Minister may therefore consider that the detriment suffered by the public would be relatively insignificant, as permits are already required to access the Channel Point Coastal Reserve and indeed the claim area itself via the Boat Ramp. That, however, is a matter for the Minister.

511. For the sake of completeness, I note that no detriment will arise in respect of the other assets identified by Mr Wilson. They were not said to be located in the claim area.

4.5. FITZROY AND THE BLOCK OWNERS: CHANNEL POINT PROPERTIES

512. I have noted above at [49] the general location of the Channel Point Community at NTP 4042, and that it is held by Fitzroy pursuant to Crown Lease in Perpetuity 1066. I also there described its principal purpose, being a set of blocks for recreational use. In simple terms, the Channel Point Community is a 'community of holiday homes with access to good areas of recreational fishing, offering the amenity of a remote beachside location': Fitzroy Detriment Submissions [8]. Fitzroy relies upon the following evidence in support of its interests:

- Statement of Duncan McConnel (as director of Fitzroy) dated 14 May 2018 (Exhibit R9);
- Statement of Duncan McConnel (as block user) dated 14 May 2018 (Exhibit R10);

- Statement of Don Jackson dated 24 April 2018 (exhibit R12);
- Statement of Patrick Coleman (undated) (Exhibit R13);
- Statement of Patricia Mary Clark dated 14 May 2018 (Exhibit R14);
- Statement of Michael Rasmussen dated 13 April 2018 (Exhibit R15);
- Statement of Elsbeth Hannon dated 30 April 2018 (Exhibit R16);
- Statement of Chrissy McConnel dated 14 May 2018 (Exhibit R17);
- Statement of Terry Flowers dated 23 April 2018 (Exhibit R 18);
- Market Valuation, NT Portion 4042, Channel Point NT, by Mr Bill Linkson, Territory Property Consultants Pty Ltd (Exhibit R11) (Linkson Fitzroy Valuation); and
- Letter from Mr Ryan Sanders dated 27 May 2019 regarding corrections to assertions of claimants' counsel in cross examination and three enclosures (Exhibit R24) (Sanders Letter).

513. To the immediate north of NTP 4042 lie several properties that are utilised for a similar purpose to the Channel Point Community. These properties were subdivided off NTP 4043 in 1996, and include NTP 4909 (Crown Lease in Perpetuity 1607 held by Noonbrave Pty Ltd), NTP 4910 (Crown Lease in Perpetuity 1609 held by Westside Pty Ltd), NTP 4911 (Crown Lease in Perpetuity 1610 held by Excess Pty Ltd) and NTP 4912 (Crown Lease in Perpetuity 1611 held by Sharon and Robert Wilson).

514. The lessees of NTPs 4909–12 referred to themselves collectively as 'the Block Owners' during this Inquiry. I shall refer to their properties as 'the Block Owner Portions'. The Block Owners relied upon the following documents:
    - Statement of Alan Charles Garraway dated 11 May 2018 together with six annexures (Exhibit R5) (Alan Garraway Statement);
    - Statement of Robert and Sharon Wilson and annexures dated 11 May 2018 (Exhibit R6); and
    - Statement of Dr Katherine Campbell dated 12 May 2018 (Exhibit R7).

515. The Block Owners also rely upon Annexure 6 to the Alan Garraway Statement, titled 'Market Valuation, NT Portions 4909 to 4912, Channel Point, NT'. That valuation was also prepared by Mr Linkson: Block Owners Detriment Submissions [8]. I shall call it the Linkson Block Owners Valuation.

516. The locations of the Channel Point Community and the Block Owner Portions in relation to the claim area are shown on the map comprising Attachment 2 to the Submission on Status of Land (Exhibit A1). That map is annexed to this Report as Annexure J. Road access to both the Channel Point Community and the Block Owner Portions is possible only via Marindja Road pursuant to an agreement between the Wagait ALT, Northern Land Council and the Northern Territory Government. Marindja Road terminates at the eastern edge of NTP 4043.

517. That agreement expired in 2015, but it is not disputed that access to the Channel Point Community and Block Owner Portions has continued unimpeded.

518. At the point where Marindja Road terminates, access to the Channel Point Community and the Block Owner Portions continues via a gravel road through that NTP 4043, which is maintained by Fitzroy with the consent of the landowners: Statement of Duncan McConnel (as director) (Exhibit R9) [12]. That gravel road, as well as the end point of Marindja Road, is visible on p 5 of Attachment 15 to the Submission on Status of Land (Exhibit A1), which is annexed to this Report as Annexure K.

519. Both the Channel Point Community areas and the Block Owner Portions are also accessed by boat.

520. Finally, the features of the various survey plans provided as evidence in this Inquiry warrant further description prior to considering the specific detriment alleged. NTP 6456, described as 'Crown Seafront Esplanade Adjoining NT Portions 4043 & 4909–12 at Channel Point S2005/151/22', runs between the Block Owner Portions and the claim area. It is Crown land. In the case of the Channel Point Community, a triangular-shaped extension juts out from the western coastal extremity of NTP 4042, at the southern most extent of NTP 6456. Both NTP 6456 and the triangular extension are shown on the map contained on p 4 of Attachment 10 to the Submission on Status of Land. It is annexed to this Report as Annexure L.

521. Detriment submissions from Fitzroy and the Block Owners canvassed several topics, which were to some extent quite similar. This included evidence of loss of access to the portions by sea; loss of access to the intertidal zone and sea (including detriment to fishing, recreation and lifestyle); economic detriment in the form of diminution of property values; and uncertainty, cost and administrative burden associated with negotiation with the traditional owners for access agreements. I now consider each of these in turn.

4.5.1. Loss of access to the Channel Point Properties by sea

522. The Block Owners say that, should the claim area be granted to the traditional owners and access be forbidden (or a suitable agreement not reached), they will lose their only guaranteed, year-round access to their properties: Block Owners Detriment Submissions [23]–[24]. It is said that, while the Marindja Road easement has ensured access to the Block Owner Properties in the past, the expiration of that agreement means that access by sea is at present the only real form of guaranteed, legal access. This is despite the fact that access remains unaffected by the expiration of the Marindja Road agreement, as Mr Garraway accepted in oral evidence: Transcript 27 June 2018 pp 288–90. The history of access since 2016 indicates that that sensitivity is unrealistic.

523. It is fair to say that the existence of NTP 6456 (between the claim area and the Block Owner Portions) and referred to in [520] above is considered by the Block Owners to have little to no impact on access to their properties via the sea, to the extent that they were previously aware of its existence at all. Both Mr Garraway and Mr Wilson said that the high-water mark extends to the top of a rock wall at the front of the Block Owners Properties, and perhaps even further onto the properties themselves: see, e.g., Transcript 27 June 2018 pp 291–293; Transcript 28 June 2018 p 305.

524. Mr Terry Flowers, user of a block located in the Channel Point Community on NTP 4042, said that access via intertidal zone is the only way of maintaining his property during the wet season: Statement of Terry Flowers (Exhibit R18 [5]). This was, however, contradicted somewhat by Mr Duncan McConnel, who said that access to the Community is possible in the wet season via Batchelor and Marindja Road: Statement of Duncan McConnel (as director) (Exhibit R9) [12].

525. In response, the Northern Land Council on behalf of the Bwudjut group say that, due to the existence of NTP 6456, the Block Owner Portions are in fact 'landlocked': Bwudjut Detriment Submissions [63], [65]. Consequently, it is said that the Block Owners have never had the advantage of seafront access. This is to be contrasted with Fitzroy and the Channel Point Community, whose block users are said to retain access to the sea (and hence over the claim area) through the triangular extension to NTP 4042. It follows that the Block Owners rights to access their properties from the intertidal zone are 'substantially more limited than is suggested': [70]. It is in this context that the Bwudjut group also cite the perceived failure of the Block Owners to preserve their access to their properties by sea as militating against a comment that any detriment in fact arises from a grant of land to the traditional owners.

526. According to the Bwudjut, access to the Block Owner Portions is in any event ensured by both the air strip on NTP 4043 and an easement through that portion: see Submission on Status of Land (Exhibit A1), Attachment 8.

527. The Block Owners, in their 'Reply Submission on behalf of Noonbrave Pty Ltd, Westside Pty Ltd, Excess Pty Ltd and Sharon and Robert Wilson dated 24 December 2021' (Block Owners Detriment Response), first emphasised that the airstrip is for private use only, and that the easement provides access to the properties through Labelle Downs Station. It is said that that easement is no longer in use following the creation of the newer Marindja Road easement.

528. It was not disputed that access to the Block Owner Portions has been unaffected by the expiry of that newer easement.

529. Second, the Block Owners pointed to the evidence of the high water mark rising to at least the boundaries of their properties in submitting that it is open to determine that the boundaries of NTP 6456 are seaward of the high water mark. That is to say that there is in fact no 'strip of land' between the Block Owner Properties and the high-water mark: Block Owners Detriment Response [22]. It is said that in any case, the purpose of NTP 6456 is to guarantee access to the Block Owner Portions via the intertidal zone, and hence the claim area. Lack of exclusive possession 'should not be conflated with lack of access': Block Owners Detriment Response [24].

530. Finally, although Fitzroy did not appear to make submissions solely concerning use of the claim area to access the sea (and vice versa), it took issue with the Bwudjut submission that the triangular section of NTP 4042 preserves such access. It said, relevantly, that it is not certain whether that triangle extends beyond the mean low water mark, nor whether boats may be launched from that particular section (to be contrasted with the intertidal zone adjacent to Channel Point generally: see, e.g., oral evidence of Duncan McConnel, Transcript 28 June 2018 p 410). Fitzroy's access to the sea could therefore be denied, it is said, if the traditional owners so chose.

531. Even if that triangular section of NTP 4042 extends beyond the mean low water mark such that access to the sea is in fact preserved, Fitzroy also contends that detriment would arise through the costs of constructing, for example, a jetty which would allow the launching of boats from a point beyond the low water mark, to the extent that is possible from that particular location: see Reply Submissions on Detriment filed by Fitzroy Pty Ltd dated 21 January 2022 [17]–[19] (Fitzroy Detriment Reply).

532. I note that it is not for the Commissioner to determine the location of the high and low-water marks: such a task can properly be said to fall within the remit of the Surveyor-General by way of an approved Survey Plan.

533. In any case, NTP 6456 is Crown land: Submission on Status of Land (Exhibit A1) Attachment 10 p 2. In light of the discussion above regarding public access and use of Crown land, there is, I think, no issue as to the legality of the Block Owners use of that portion to access their properties (for example, via boat), provided it comprises solely of low impact activities within the meaning of the *Vacant Crown Land Policy*. There is little evidence before me to suggest that it would not, although that determination is also of course not for me to make.

534. Thus, despite the Block Owner Portions being 'landlocked' by virtue of NTP 6456, it remains the case that, should the claimed land be granted to the traditional owners, the Block Owners will suffer detriment in the sense that they will not be able to access their properties from the sea without first obtaining permission.

535. The same can be said of Fitzroy and the triangular segment extending from NTP 4042. If the Surveyor-General determines that the low water mark is located beyond the reaches of that triangular point, Fitzroy's block users will not be able to access the Channel Point Community from the sea without the requisite permission from the traditional owners, to the extent that that is already possible from that point.

536. Of course, the Minister may consider that such detriment is predicated upon loss of access. I return to this topic below.

4.5.2. Loss of access to the intertidal zone and sea: fishing, recreation and lifestyle

537. Much of the detriment advanced by Fitzroy and the Block Owners understandably concerns the principal purpose of the Channel Point Community and the Block Owner Portions, being holidays and recreational time away from Darwin. Central to this use and indeed the very enjoyment of those properties, it is said, is use of the intertidal zone (and hence the claim area) for fishing and other activities, such as the launching of boats, beachcombing and social and family gatherings: see, e.g., Fitzroy Detriment Submissions [10]–[13], [18]; Block Owners Detriment Submissions [16]. Accordingly, Fitzroy and the Block Owners say that their enjoyment of their properties would be substantially diminished should the land be granted to the traditional owners and access to the claim area denied.

538. It can fairly be said that the detriment claimed is experiential in nature.

539. Mr McConnel said that if access to the intertidal zone were restricted in any way, the predominant reason for the existence of Channel Point Community would be removed: Statement of Duncan McConnel (as director) (Exhibit R9) [20]. This sentiment was similarly held by other Channel Point Community block users: see, e.g., Statement of Patrick Coleman (Exhibit R13) [9]–[10]; Statement of Elsbeth Hannon (Exhibit R16) [18]. I do not propose to repeat in detail each of these concerns.

540. There was also a strong sense among the members of the Channel Point Community that they are entitled to freely use and access the claim area for recreational purposes. The disappointment at any prospective restriction was clear: see, e.g., Statement of Patricia Mary Clarke (Exhibit R14) [9]; Statement of Michael Rasmussen (Exhibit R15) [10]. For many witnesses, this feeling was entwined with the length of time that such use had been ongoing: for example, Ms Clarke said that she has used the claim area in this way for approximately 35 years.

541. It is appropriate to note at this point that Fitzroy says that it only became aware of the land claim in 2017, when notice of the commencement of this Inquiry was given.

542. In response, the Bwudjut group submit that these kinds of assertions evince a misunderstanding of the legality of the Channel Point Community's use of the claim area (see discussion above at [4.3]). It is said to follow that 'the weight to be attached to the claimed detriment to these alleged rights and interests should reflect their tenuous status at law': Bwudjut Detriment Submissions [75]. Relevantly, it is also said that when developing the Channel Point Community, Fitzroy elected to do so without securing a legal right to access the intertidal zone.

543. Further, the Bwudjut group argue that 'substantially the whole of the financial investment into the construction and development of the Channel Point properties occurred after the claim was lodged': Bwudjut Detriment Submissions [77]. Thus, it is said, Fitzroy failed to protect their own interests and acquired detriment of their own volition.

544. In response to Fitzroy's claims regarding notice of the land claim, the Northern Land Council on behalf of the Bwudjut say that the fact of the land claim was readily ascertainable, particularly having regard to the wealth of 'individuals to have the financial resources to construct a community in a remote location': Bwudjut Detriment Submissions [77].

545. The Bwudjut group also make submissions in respect of fishing specifically. I address these under the heading 'Recreational Fishing' at section 4.6 below.

546. Fitzroy, of course, rejected these contentions on numerous grounds. It is not necessary that I repeat them in detail, although I note that Fitzroy consider that the Commissioner's task under section 50(3) does not extend to 'assessing fault for loss of access': Fitzroy Detriment Reply [19]. In any event, it says, it is not disputed that the Northern Land Council did not provide Fitzroy with any direct notice of the land claim being lodged, and that the Channel Point Community were entitled to develop the Community in between that time and the present Inquiry: Fitzroy Detriment Reply [20].

547. I make the following observations in regard to the above.

548. It is not controversial that, whatever the basis for their perception of the legality of their access to the claim area, Fitzroy and the Block Owners currently enjoy that access and use subject only to revocation by the Crown (again, to the extent that such use constitutes low impact activities). It is also true that there is no evidence before me that such access is likely to be revoked.

549. I have remarked in other contexts on the importance of timing in establishing detriment in the meaning required by section 50(3)(a) of the ALRA, and the role of actual or deemed knowledge: see, e.g., *Woolner LC Report* [186]–[188]. Overall, it is important to consider each claim of detriment carefully in its own circumstances and in light of the evidence, when commenting upon that detriment. The weight to be given to that detriment is then a matter for the Minister in the context of the prescribed functions in section 11 of the ALRA.

550. In that way, I do not accept the submission that the timing of Fitzroy and the Block Owners investment in their respective properties (i.e., after the land claim was lodged) is relevant to whether that detriment would in fact accrue should a grant be made. It may be relevant to the exercise of the Minister's discretion.

551. Thus, should the land be granted to the traditional owners, Fitzroy and the Block Owners will suffer experiential detriment in the sense that the recreational activities which they currently undertake will not be able to continue without the permission of the traditional owners. The topic of permission, specifically in the context of the Channel Point Community and the Block Owner Portions, is addressed below.

552. The Minister may however generally and reasonably expect that inquiries would be made as to the existence of a land claim over an area upon which the enjoyment of an investment relies. It is clear that Fitzroy and the Block Owners rely upon the adjacent Crown land over which the Peron LC is made in the enjoyment of their properties. It is also the case (and not disputed) that some development of those properties has taken place post-lodgement, albeit prior to formal notice of the Inquiry being given. The investment has been substantial: Fitzroy Detriment Submissions [20]–[21].

553. There is no evidence before me that Fitzroy or the Block Owners had actual knowledge of the Peron LC over the intertidal zone adjacent to the Channel Point Community and Block Owner Portions. Subject to any restriction contained in the terms of the pastoral lease Fitzroy are, of course, entitled to develop the Channel Point Community in accordance with the interest it holds in NTP 4042: it is not suggested that Fitzroy or the Block Owners made investments in or developed the adjacent Crown land subject to the Peron LC.

554. That Crown land, however, consists entirely of intertidal zone. Notwithstanding Fitzroy's lack of knowledge of the Peron LC over that area, the Minister may therefore consider that a failure to make such inquiries that are necessary to identify the existence of a traditional land claim over adjacent intertidal zones represents a lapse in due diligence and risk assessment. Indeed, the outcomes and consequences of successful land claims over intertidal zones have been well-publicised since the *Blue Mud Bay case*. It may have been imprudent to disregard the possibilities of such consequences arising when continuing to develop a beachside village of holiday homes, the enjoyment of which more or less entirely relies upon intertidal zone.

555. That, however, is a matter for the Minister.

4.5.3. Economic detriment

556. Fitzroy and the Block Owners both make submissions to the effect that were the land to be granted to the traditional owners and access to the claim area denied they would suffer economic detriment through devaluation of the Channel Point Community properties and the Block Owner Portions. The Linkson Fitzroy Valuation (Exhibit R11), Sanders Letter (Exhibit R24), and Linkson Block Owners Valuation (Exhibit A5 Annexure 6) are said to support this argument.

557. Mr Linkson is a certified practicing valuer who at the time of giving evidence was employed by Territory Property Consultants Pty Ltd. His instructions were in essence to estimate the impact on the value, if any, of the Channel Point Community properties and the Block Owner Portions were the claim area to be granted and access to the intertidal zone denied by the traditional owners. Mr Linkson's valuation methodology in respect of both the Channel Point Community and the Block Owner Portions incorporates transacted leasehold sales of allotments in the Channel Point Community within NTP 4042, together with freehold sales in Dundee Beach (approximately 55 kilometres northeast of the properties) and Wagait Beach (approximately 110 kilometres northeast of the properties). This includes consideration of a mixture of properties with sea frontage and some without sea frontage: Linkson Fitzroy Valuation p 7; Linkson Block Owners Valuation p 6.

558. In respect of the Channel Point Community, Mr Linkson estimates that the current value of the beachfront lots on NTP 4042 sits within a range of $900,000.00 to $1,000,000.00. Without access to the claim area, those properties are said to be valued at $585,000.00 to $650,000.00 (i.e., a reduction in value of 35%). The non-beachfront lots are valued between $100,000.00 to $200,000.00, $200,000.00 to $300,000.00 and $400,000.00 to $500,000.00. The diminution in value is said to be in the order of $50,000.00 to $100,000.00, $100,000.00 to $150,000.00 and $200,000.00 to $250,000.00 respectively (i.e., approximately 50% for the non-beachfront lots): Linkson Fitzroy Valuation p 12.

559. The Linkson Block Owners Valuation estimates that the current market value range of the Block Owner Portions sits between $1,000,000.00 to $1,300,000.00. If the Peron LC area were to be granted and access denied, Mr Linkson estimates that they would be devalued by approximately 25% to 45%. He adopts a midrange of 35% in assessing the consequent values of the properties to be in the range of $650,000.00 to $850,000.00: Linkson Block Owners Valuation pp 9–10.

560. In oral evidence Mr Linkson accepted that there were general difficulties with using value comparisons for remote areas: Transcript 16 May 2019 pp 9–52. However, he maintained that the qualitative conclusion to be drawn is that the Channel Point Community and the Block Owner Portions currently have access to the claim areas, and that there would be a reduction in the value of the properties unless an access agreement or license was put in place: Transcript 16 May 2019 p 60. He did, however, accept that the imposition of a small fee for access to the intertidal zone would not result in a significant diminution in the value of the properties: Transcript 16 May 2019 p 52–53.

561. Mr Linkson's evidence was the subject of much contestation at the hearing and in submissions. I do not propose to repeat that here. It suffices to make the following comments.

562. I accept the contentions of the Northern Land Council on behalf of the Bwudjut claimants to the extent that there are bound to be some inaccuracies in Mr Linkson's valuations given the lack of directly comparable locations and tenures. Mr Linkson accepted this himself. In that light, I do not propose to estimate an exact figure by which the values of the properties at the Channel Point Community and the Block Owner Portions might be impacted.

563. Yet that does not, in my view, negate the qualitative conclusion pointed out by the Block Owners in the Block Owners Detriment Submissions at [15]. That is to say that it is reasonable, I think, to conclude from Mr Linkson's evidence that properties with access to the adjacent intertidal zone and sea, and indeed which are built with the principal purpose of utilising those areas, would suffer some reduction in value should that access be taken away. Put simply, the desirability of those properties would likely decrease, and accordingly so would the market value. The amount may differ according to whether access to the intertidal zone is direct from the property in question. This point is nevertheless subject to what is said in [566] below.

564. The Northern Land Council on behalf of the Bwudjut claimants submit that such devaluation would in any case be voluntarily accrued, given the lack of steps taken by Fitzroy and the Block Owners to secure access to the intertidal zone and the timing of their investment in their respective properties (i.e., after the land claim was lodged). I have addressed submissions of a similar tenor above at [213]–[220], and do not need to repeat them.

565. It was said that such depreciation in value of the Channel Point Community properties would have a flow on effect to Fitzroy through, for example, a reduced willingness by Channel Point Community members to pay management levies. This would, it is said, have adverse impacts on Fitzroy's financial viability: see, e.g., Statement of Duncan McConnel (as director) (Exhibit R9) [21]–[24]. I do not go that far without further supporting evidence.

566. There is an additional consideration that was not adverted to in the submissions or evidence. The present claim was made in 1997. It is now known to Fitzroy and to the Block Owners, and has been for some time. It is very likely that the effect of the claim itself has the diminishing effect on values, as it is not conceivable that Fitzroy or the Block Owners would now offer their respective properties for sale without diligently disclosing the existence of the claim. Any proposed sale, even some years ago, should have led to awareness of the claim. Any potential buyer would therefore have to make allowance for the claim succeeding following a recommendation from the Commissioner. The Northern Territory has attended callovers and reviews of the outstanding claims under the ALRA for over two decades. It must have been aware of the claim. The position adopted by Mr Linkson of either full and unchallenged entitlements to access, and loss of access by a grant of the land, does not accommodate that circumstance, and is in my view artificial for that reason. There is no evidence about that diminution in value where that realistic possibility existed at material times in any event. Moreover, it is clear that Fitzroy and the Block Owners

have not invested in their interest in any speculative way – there ownership is for enjoyment, not for profitable land dealing.

567. Should the Peron LC area be granted to the traditional owners without an access agreement in place, it is likely that Fitzroy and the Block Owners will suffer some economic detriment in the form of devaluation of the Channel Point Community properties and the Block Owner Portions, which currently enjoy access to the intertidal zone. I do not consider that the evidence of Mr Linkson indicates realistically the extent of that economic detriment for the reasons given. It may only be nominal. However, that is a matter ultimately for the Minister.

568. Of course, that detriment will largely be suffered only in the absence of an agreement for access to the claim area. I now turn to that issue.

4.5.4. Agreement making

569. Fitzroy, the Block Owners and the Northern Land Council on behalf of the Bwudjut claimants make contrasting submissions as to the extent to which the detriment identified above might be mitigated by an agreement with the traditional owners which permitted access to the claim area.

570. Fitzroy, in its Fitzroy Detriment Submissions at [33]–[44], says that there is no guarantee of an agreement being reached, and that the claimants' rights would not be enhanced by a grant (as they currently enjoy unrestricted rights of access, like other members of the public). In light of the considerable experiential detriment that would be suffered by Fitzroy should access to the claim area be denied, as well as the permanent nature of the Channel Point Community, it is said to follow that 'the grant of title should only be recommended where it is proposed that there be a grant in perpetuity of continued unimpeded access to that intertidal zone immediately in front of the community'. Fitzroy says that this would give effect to what is contemplated by the ALRA, namely that 'competing interests must be sensibly accommodated prior to any grant of Aboriginal freehold title'. Fitzroy concludes this submission by saying that:

> The detriment resulting from a grant over the intertidal zone adjacent NT Portion 4042 will only be sufficiently mitigated if binding and irrevocable arrangements are put in place under s 11A of the ALR Act [ALRA] prior to any recommended grant, such that Fitzroy and its community members maintain continuity of access to the beach and the sea. Fitzroy's rights to access the intertidal area would need to run for the term of Fitzroy's crown lease (that is, in perpetuity) and such rights would need to be fully and unconditionally assignable to any subsequent lessee.

The words "sensibly accommodate" really mean "prioritised over the interested of the traditional owners".

571. The Block Owners express reservations about the terms of any hypothetical agreement, including related fees (which were advanced as a detriment because access is currently free). It is said that a global approach negotiated between the Northern Territory government and traditional owners would be preferable to individual licenses.

572. Unsurprisingly, the Northern Land Council on behalf of the Bwudjut claimants resists these contentions. In particular, it is said that existing access agreements in

the region indicate favourable conditions for agreement making (which is itself not a detriment), and that road access to Channel Point and the Block Owner Portions, as well as the recreational use of surrounding regions is already reliant on agreements with traditional Aboriginal owners in the region. Indeed, the Bwudjut group point specifically to the agreement between the Northern Land Council, Northern Territory Government and Wagait ALT for the Marindja Road easement as evidence in this regard. It was then said, at [83], that in relation to the claim area specifically:

> The Channel Point leaseholders would be in a more favourable legal position if they entered into a formal agreement with traditional Aboriginal owners. Such agreements would provide the leaseholders a formal right to use the Claim Area, compared with the current informal arrangement that can be abridged or denied at any time.

573. In response, Fitzroy emphasises delays in reaching an agreement (to the extent that one would in fact be reached), and closures of other areas of intertidal zones subject to recommendations by the Commissioner to grant while access negotiations were ongoing.

574. I find it difficult to accept that other regional agreements are necessarily evidence of the intentions of the claimants in the Peron LC to enter into agreements with detriment parties. Yet it is true, as the Bwudjut group contend, that much of the detriment asserted and commented on above is predicated upon the notion that the traditional owners will deny the Channel Point Community and Block Owners access to the intertidal zone, should the Minister decide that a grant be made. It is also true, as I have remarked in other contexts, that the process of negotiating such agreements is contemplated by the ALRA and as such might not be considered to be a material detriment, to the extent that it qualifies as one at all.

575. While some witnesses did not accept that a permit system or agreement would alleviate the asserted detriment, it is appropriate to include in my comment to the Minister that several of the Channel Point Community members and Block Owners who gave evidence in this Inquiry were amenable to agreements with traditional owners: see, e.g., oral evidence of Patricia Mary Clarke at Transcript 28 June 2018 p 453; Michael Rasmussen at Transcript 28 June 2018 p 462; and Terry Flowers at Transcript 28 June 2018 p 481. Caution was expressed as to the specific terms of such agreements, and understandably so. Those terms would of course have to be accepted by all parties.

576. I am hesitant to accept Fitzroy's submission that competing interests should be accommodated prior to a recommendation to grant the claim areas to the traditional owners being made, irrespective of the nature of the Channel Point Community which is perceivably said to warrant special treatment. Such a view is not contemplated by the ALRA which, I think, should not be construed as prioritising any putative benefits received from or enjoyment of unalienated Crown land at the expense of successful claimants. The Minister may recommend that a grant be made irrespective of detriment, and that parties should be left to negotiate with traditional owners for access to those areas. I do not read Fitzroy's submission as going so far as to suggest that such agreement is not at least a realistic prospect.

577. Further, the kind of arrangement that is suggested by Fitzroy appears, on its face, to negate any kind of benefit that would accrue to traditional owners as a result of a

grant of the claim area. My view on submissions of this tenor is consistent with past reports: see, e.g., *Woolner LC Report* [236].

578. In that context, the Minister may consider that the detriment relating to loss of access to the Channel Point Community and the Block Owner Portions via the sea, experiential detriment associated with the loss of recreational activities, and the economic detriment due to the devaluing of those properties would to a large extent be accommodated by an access agreement on reasonable terms. That agreement could be reached between the traditional owners and either Fitzroy and the Block Owners, or the Northern Territory on a global basis. The fees associated with such agreements may be considered a nominal detriment, in that they introduce costs for access where there previously were none. The nominal amount of the fee would be emphasised having regard to the asserted value of the respective properties.

579. Having reported on said detriment, I again note that such a consideration properly falls within the remit of the Minister in the context of the functions prescribed in section 11 of the ALRA.

4.6. RECREATIONAL FISHING

580. I have mentioned in Section 4.4 above regarding the Channel Point Coastal Reserve, and in my consideration of Fitzroy and the Block Owners use of the intertidal zone adjacent to their properties, that recreational fishing takes place in the claim area. That is not disputed: Bwudjut Detriment Submissions [112]. The main areas of contention are the extent to which the detriment asserted to recreational anglers would in fact accrue, and how such detriment might be accommodated.

581. Evidence on this topic was received from the Northern Territory, AFANT, Ronald Voukolos (owner of the Fishing and Outdoor World store in Darwin), NTGFIA and several fishing tour operators who utilise the claim area.

582. I address the concerns of the NTGFIA and the fishing tour operators in my consideration of that topic below.

583. The detriment asserted was in substance very similar to that put forward and commented upon in the *Woolner LC Report*: see Section 4.4.1 of that Report. That is understandable given that evidence on detriment was given concurrently in both the Woolner LC and the Peron LC.

584. In this sense, it is appropriate to flag the issue of the redaction of the contents of the statement of David Ciaravolo, Chief Executive Officer of AFANT, dated 14 May 2018 (Exhibit R1) that relied upon the survey annexed to that statement. That statement traversed the topic of detriment in both the Woolner LC and the current Peron LC. I do not need to repeat my reasons for not receiving those contents, which are contained in the *Woolner LC Report* at [211]–[218]. Those reasons the same in respect of the Peron LC.

585. In short, to have received those parts of Mr Ciaravolo's statement which relied upon the contents of the survey would have been unfair on the claimants in the Peron LC, just as it would have been to the claimants in the Woolner LC. The general thrust of Mr Ciaravolo's statement is nonetheless accepted.

586. Having dealt with that evidentiary issue, it remains the case that I must include in my report to the Minister comments pertaining specifically to the detriment asserted in the Peron LC. I now turn to those comments.

587. The Northern Territory, in its Northern Territory Detriment Submissions at [33]–[35], say that recreational fishing in the claim area results in general economic returns and social benefits to the Northern Territory, businesses and the general public. It follows, it is said, that a grant to the traditional owners without a suitable access agreement in place would result the loss of those benefits.

588. Mr Ian Curnow, Director of Fisheries, Department of Industry of Resources, said that the claim area hosts barramundi and king threadfin, both of which are fished recreationally. While he was not able to give statistics regarding the number of days fished by recreational anglers in the claim area specifically, Mr Curnow said that the general area was 'particularly significant… as it contains the Channel Point community, Channel Point Coastal Reserve and boat ramp' as well as 'popular coastal run-off drains that are heavily utilised by recreational anglers during the run-off period': Statement of Ian Curnow dated 17 May 2018 (Exhibit NT1) [26].

589. Mr Ciaravolo pointed to the intertidal zone adjacent to the Daly and Reynolds Rivers as places which offer 'excellent fishing for barramundi': Statement of David Ciaravolo (redacted) dated 14 May 2018 (Exhibit R1) [60]. Mr Voukolos said that Channel Point is an 'iconic' fishing destination: Statement of Ronald Voukolos dated 11 May 2018 (Exhibit R3).

590. Mr Curnow and Mr Ciaravolo also gave evidence as to the general importance of fishing to the local and wider Northern Territory economy: see, e.g., Exhibit NT1 [21]; Exhibit R1 [10]–[14].

591. As I have noted above, Fitzroy says that the recreational activities undertaken by the Channel Point Community include recreational fishing, which depends on access to the intertidal zone adjacent to NTP 4042. Boats are routinely launched from there to do so: Fitzroy Detriment Submissions [18].

592. Mr Ciaravolo, Mr Curnow and Mr Voukolos also said that cumulative detriment would result from a closure of the claim area to recreational fishing, in the sense that relocation of the fishing effort which takes place there would put pressure on other areas and so forth, as well as reducing the enjoyment of those areas. Those claims were not pressed in submissions and there is little evidence to support them. Further, Mr Curnow accepted that the ALRA is one of the key pieces of legislation underpinning government policy in relation to the sustainable management of fisheries, such as the Northern Territory Fisheries Harvest Strategy: Transcript 25 June 2018 pp 59–61.

593. The topic of permits as a method of accommodating detriment to recreational fishing was anticipated by Mr Ciaravolo, who said that permits gave rise to their own detriment, including additional financial and temporal costs. He did however accept that most fishing trips to the claim area require some degree of planning due to its remoteness, and that it is not realistically possible to make a spur of the moment decision to fish there: Transcript 26 June 2018 pp 216–18.

594. Mr Ciaravolo said that open access agreements pursuant to, for example, section 11 of the *Aboriginal Land Act 1978* (NT), were advanced as the only real solution: Statement of David Ciaravolo (redacted) (Exhibit R1) [5]. I have made clear in other contexts my hesitancy to accept these kinds of submissions: see, e.g., *Woolner LC Report* [236]. It suffices to say that I do not consider that open areas declarations would provide much benefit, if any, to the traditional owners, should the Minister be minded to grant the land to a land trust.

595. The Northern Land Council on behalf of the Bwudjut claimants say that the detriment to recreational fishers is limited because of the small numbers who access the claim area, and that the seas adjacent to the claim area are in fact more important for recreational anglers (presumably because they allow for access to other popular locations in the general area, such as the Daly River). Those seas, and consequently those other areas, would remain accessible even if the traditional owners were granted the land and closed access to the claim area to recreational fishing.

596. The Bwudjut group also contend that, in any case, the detriment identified in respect of recreational fishers can be readily accommodated by an agreement or permit system. It is said that that process is not an additional burden because the claim area is remote, and requires a degree of planning for access. A permit is already required to enter the Channel Point Reserve, as explored above.

597. I have noted above that the Northern Territory resists the Bwudjut's characterisation of the detriment as minimal due to the seemingly low numbers of people who access the general vicinity of Channel Point. I have addressed this submission above and it suffices to say that I accept the Northern Territory's argument on that point, particularly in light of the remoteness of the claim area.

598. The Northern Territory is also of the view that, because there is no evidence of the claimants' intention to enter into an agreement or institute a permit system, no comment can be made: Northern Territory Detriment Submissions [36]–[37].

599. I do not go that far. It is implicitly recognised in the Northern Territory's submission that the detriment would likely be alleviated were there to be an access agreement with the traditional owners. The Minister may consider this to be relevant in assessing the significance of the detriment when deciding, under section 11 of the ALRA, whether to recommend that a grant of the claim areas to the traditional owners should be made.

600. Were the claim to be acceded to by the Minister, the traditional owners would have the right to prevent access to the Peron LC area. That is uncontroversial. The numbers of people who access the claim area for recreational fishing are unclear, yet it is not suggested that the concerns of Mr Ciaravolo and Mr Voukoulos are not genuine. The evidence suggests that recreational anglers regard the Channel Point area in particular as a good place for fishing.

601. Yet it is also true that significant planning appears to be required to access and fish the area. On top of the permits already required for access to the Channel Point Reserve, the Minister may consider that the requirement for an additional permit to be obtained does not represent a significant detriment. Such detriment is likely to be limited to the fee to be paid (if any).

602. The Minister may therefore be of the view that, should a manageable and working fishing permit system be put in place, the concerns of recreational anglers in respect of the Peron LC area would be accommodated.

4.7. COMMERCIAL FISHING

603. The Northern Territory submits that commercial fishing in the claim area results in economic returns to the Northern Territory and businesses who operate there: Northern Territory Detriment Submissions [33]. Mr Curnow and Ms Katherine Winchester, Chief Executive Officer of the NTSC, gave helpful evidence on this topic.

604. Mr Curnow said that there is commercial fishing for barramundi and king threadfin in the claim area, as well as a mud crab fishery: Statement of Ian Curnow (Exhibit NT1) [14]–[20]. These points were supported by Ms Winchester, who provided further detail as to methods by which such stocks were caught: see generally Statement of Katherine Winchester dated 27 April 2018 (Exhibit R20). Thus, it was said that detriment would be occasioned to those commercial fishers, should the land be granted to the traditional owners and access be denied.

605. Ms Winchester also commented upon the flow on effects of the potential closure of the Peron LC area. For example, resultant pressure on fish stocks in other areas, as well as the associated loss of flexibility that is required by commercial fishers to accommodate for varying seasonal catches in different areas and market conditions, were highlighted. These would have economically detrimental consequences.

606. According to Ms Winchester, this is the case in respect of both the barramundi/king threadfin fishery and the mud crab fishery: Transcript 29 June 2018 pp 552–54.

607. Mr Curnow, in addition to the general cumulative effects which I have discussed above, also said that closure of the Peron LC area could effect 'regional level disruption' to commercial fishing, thus necessitating government buy backs of commercial fishing licenses: Statement of Ian Curnow (Exhibit NT1) [46]–[48]. There was little evidence in support of this broad contention.

608. Mr Curnow also commented upon the uncertainty surrounding any agreements with the traditional owners, and the resource intensive nature of negotiating such agreements: Statement of Ian Curnow [33]–[36]. The Minister might justifiably regard these claims as speculative in the absence of supporting evidence.

609. The Northern Territory also traversed the topic of agreements in the context of commercial fishing in its Northern Territory Detriment Submissions. I have already discussed why I am hesitant to accept those submissions, particularly as they relate to the prospect of potential agreements to alleviate asserted detriment. I do not propose to repeat them here.

610. The Northern Land Council on behalf of the Bwudjut group say that barramundi and king threadfin are in fact more commonly fished on the sea-side of the claim area. In respect of the mud crab fishery, it is said that, in light of the little evidence of commercial crab fishing in the claim area, the fact that crab licenses are not geographically restricted means that the loss of the claim area would likely have no

impact. The Northern Land Council also highlights the fact that no commercial crab operator made submissions in this Inquiry as to any detriment that might be suffered.

611. I agree with the Bwudjut group's contentions in respect of the mud-crab fishery. Mr Curnow's evidence revealed that the data relating to the mud crab catch from the claim area is incomplete and in any case, demonstrates minimal and inconsistent catch numbers at best. It does not support the assertions made by Ms Winchester regarding the detriment to the flexibility of commercial operators, who are not geographically restricted in where they may catch mud crabs. It appears from the data that commercial operators do not principally rely on the Peron LC area in any case.

612. There is evidence of commercial operations in respect of barramundi and king threadfin in the general area of the Peron LC. Yet neither Mr Curnow nor Ms Winchester were able to identify with any precision what proportion of the commercial fishing takes place landward of the low water mark, and hence within the claim area itself, rather than in the adjacent seas. While Mr Curnow suggested that commercial fishers might 'fish in close on a seven metre high tide and then remove their nets before the water drops' (which would give them a better chance of catching fish), he was not able to provide supporting data to that effect: Transcript 26 June 2018 p 97.

613. It follows that it is not possible to say with any certainty that significant detriment would be occasioned to commercial fishers should the claim area be granted to a land trust in favour of the traditional owners and access for the purposes of commercial fishing be denied or an agreement on reasonable terms fail to be negotiated. This is for the principal reason that it is not clear that commercial fishing takes place in the Peron LC area itself, rather than in the adjacent seas (access to which would of course remain unimpeded).

614. Further, and for the sake of completeness, I do not go so far as to accept that a closure of the Peron LC area to commercial fishing would have general detrimental effects on the wider NT economy without further evidence in support of that claim. Similar comments may be made in respect of the likelihood of resultant pressure on fish stocks in other areas: little evidence was led to substantiate those arguments.

615. I so report. The Minister can assume that little detriment, if any, will be occasioned to commercial fishing should the claim area be granted to the traditional owners.

4.8. FISHERIES MANAGEMENT

616. Mr Curnow gave evidence on the topic of fisheries management in the Northern Territory, as he has done in previous claims: see, e.g., *Woolner LC Report* Section 4.3.3. As Director of Fisheries, his chief responsibilities include 'planning for the ecologically sustainable development of fisheries resources and promoting the optimum utilisation of aquatic resources for the benefit of all Territorians'. Mr Curnow is aware of the implications of the *Blue Mud Bay case* for his role, and for fisheries management in the Northern Territory more generally: Statement of Ian Curnow (Exhibit NT1) [2].

617. Mr Curnow also oversees the administration of the *Fisheries Act 1988* (NT) and its related policies, which includes the Harvest Strategy. In simple terms, the Harvest

Strategy 'provides a framework to ensure that fishery managers, fishers and other stakeholders have a shared understanding of the objectives of using specific resource and work together to consider and document responses that will be applied to various fishery conditions (desirable and undesirable) before they occur'. This is done by identifying 'clear objectives of how a given fishery resource is to be used to optimise benefit': Statement of Ian Curnow (Exhibit NT1) [8]–[10]. Mr Curnow says that 'it is critical that the impact of reduced or modified access is understood as it relates to overall management of fisheries as a natural resource': Statement of Ian Curnow (Exhibit NT1) [38].

618. Mr Curnow also says that, should the land be granted to the traditional owners, an 'additional management regime' will be imposed over Northern Territory waterways: Statement of Ian Curnow (Exhibit NT1) [40]. Furthermore, any displacement of effort associated with loss of access is said to be 'at odds with the overall aims and goals of the *Fisheries Act* and the Harvest Strategy, which aims to promote and enhance informed, evidence-based fisheries management decisions': Statement of Ian Curnow (Exhibit NT1) [41].

619. In response, the Bwudjut group say that, in circumstances where 78% of the Northern Territory's coastline is Aboriginal land under the ALRA, it is 'self-evident' that traditional owners are key stakeholders in fisheries management: Bwudjut Detriment Submissions [134]. It also said that legislation such as the ALRA is a core piece of legislation in the framework within which the Harvest Strategy operates. Indeed, Mr Curnow accepted this in oral evidence: Transcript 25 June 2018 pp 59–61.

620. I firstly note that there is no evidence that the traditional owners are not aware of the importance of informed or evidence-based fisheries management decisions, or the need for ecologically sustainable development of fisheries. It would be wrong, I think, to comment otherwise on the basis of the lack of evidence before me to that effect.

621. Second, I also do not consider that the evidence before me establishes that a grant of the Peron LC area would detract from the Department of Primary Industry and Resources' (DPIR) ability to actually manage the fisheries in the manner prescribed by the Harvest Strategy. Mr Curnow's statement and oral evidence demonstrate that the department has been on notice of the implications of the *Blue Mud Bay case* in respect of intertidal zones such as the Peron LC area for some time. While the Harvest Strategy does not presently account for land subject to claim, the necessary changes could be made relatively easily in the event that a grant to the traditional owners is made and access is restricted: Transcript 26 June 2018 p 80–82.

622. It is therefore difficult to accept that detriment would be occasioned to fisheries management should the Peron LC area be granted to the traditional owners.

4.9. FISHING TOUR OPERATORS AND OTHER TOURISM

623. Evidence regarding detriment to be occasioned to guided fishing tour operators and other tourism in the claim area was received from Mr Curnow, Ms Valerie Smith (General Manager, Destination Development, Department of Tourism and Culture) and Mr Dennis Sten (President, NTGFIA). Several fishing tour operators also gave evidence, including Mr Mick Hinchey (Owner, Darwin's Barra Base Fishing Safaris),

Ms Terri Barnes (Territory Guided Fishing and a member of NTGFIA) and Scott and Lorna Wauchope (owners of Humbug Fishing).

624. I have already considered in Section 4.4 the issue of public use of and visitation to Channel Point Reserve as detailed by Mr Lincoln Wilson, whose work also falls within the remit of the Department of Tourism and Culture. I do not propose to revisit those comments.

625. Ms Smith said that she was aware of 'significant fishing tour operator activity in the [Peron Islands] region': Statement of Valerie Smith dated 17 May 2018 (redacted) (Exhibit NT5) [5]. This includes the operations of Humbug Fishing and Dean Jackson, trading as Dean Jackson Guided Tours. Mr Jackson did not provide a notice of interest in the Peron LC Inquiry.

626. Ms Smith said that, during the 'run-off' period after the wet season, Humbug Fishing conduct guided tours in the claim area (particularly in the mouths of the adjacent creeks), which principally target barramundi. It is said that Mr Scott Wauchope, owner of Humbug, has developed a knowledge of the area over approximately 10 years. That knowledge is not easily transferable to other areas. Mr Wauchope said that the denial of his ability to work in the claim area will reduce his business by approximately 60%: Transcript 29 June 2018 p 572.

627. Mr Hinchey said that Darwin's Base Fishing Safaris operates in the Daly River system during the dry season. He did not identify whether that specifically includes the claim area and accordingly, it is difficult to accept his assertions of financial detriment without further evidence to that effect.

628. Ms Smith also says that, should the claim area be closed to guided fishing tours, there will be a flow on effect to land-based tourism operators, and the imposition of any extra fee for access might deter fishing tour operators from utilising the claim area: Statement of Valerie Smith (Exhibit NT5) [10]–[11]. No land-based tourism operators were identified.

629. Mr Sten's evidence canvassed several topics, including the 'world class' status of the Daly River system for fishing, the importance of the region in relation to the tourism industry and the Northern Territory economy more generally, the density of wildlife, and the loss of revenue to tour operators and other business which benefit from their activity. He was also concerned by potential financial detriment associated with the imposition of any permit system: see generally Statement of Dennis Sten dated 9 May 2018 (Exhibit R2).

630. Mr Sten did not make assertions specifically relating to the Peron LC area as contained in the application and so described above.

631. In contrast, Ms Barnes stated that Territory Guided Fishing occasionally utilises the Peron LC area in its operations. She did however accept that a permit system which allowed planning in advance on, for example, a two year basis would be satisfactory.

632. Put simply, the Northern Land Council on behalf of the Bwudjut claimants say that the above evidence largely referred to the Peron Islands and Daly River regions more generally, rather than the Peron LC area specifically. It is said to follow that little

detriment (if any) arises. To the extent that there is detriment, the Bwudjut group say that it will be alleviated by permits or agreements, which operators such as Ms Barnes are amendable to.

633. It suffices to say that I agree with the contentions of the Bwudjut. The Minister can be satisfied that, should the claim area be granted to the traditional owners without a permit system or agreement in place, it appears that little detriment will be suffered in respect of guided fishing tours or tourism more broadly. Should a workable permit system be instituted, the detriment may be limited to a fee (if any): I consider that to be a minor detriment.

634. The idea that other tourism-related businesses would suffer flow-on detriment was not sufficiently corroborated such that further comment is warranted.

635. The Minister may also note that the Usage of Vacant Group Land Policy prohibits commercial activities on Crown land without permission from the Crown. Whilst it is not appropriate for me to finally determine whether guided fishing tours are in fact impermissible pursuant to that Policy, I note that no evidence of them seeking such permission was provided in this Inquiry.

4.10. NEIGHBOURING PASTORAL LEASEHOLDERS

636. Evidence in relation to potential detriment to pastoral interests was given by Ms Luis Da Rocha, then-Executive Director of the Rangelands Division, Department of Environment and Natural Resources, Mr Hugh Killen, Managing Director and Chief Executive Officer of AACo (operators of Labelle Downs Station, which is located adjacent to the claim area on NTP 3219), and Mr Paul Burke, who was Chief Executive Officer of the NTCA at the time of giving his statement.

637. Mr Ashley Manicaros, Mr Burke's successor, gave oral evidence on behalf of the NTCA and adopted Mr Burke's Statement dated 11 May 2018 (Exhibit R21) for that purpose, although he specifically declined to adopt paragraphs [19]–[21]: Transcript 16 May 2019 pp 4–5.

638. Labelle Downs station is operated by AACo pursuant to Perpetual Pastoral Lease 1806 over NTP 3219. Its location in relation to the claim area is demonstrated on the map annexed as Annexure I to this Report. AACo acquired the Labelle Downs pastoral lease in 2010, which at its peak (after the wet season) runs a head of 22,000 cattle. Mr Killen estimated that the market value of a heard that size was, at the time of his statement, approximately $12,000,000: Statement of Hugh Killen dated 14 May 2018 (Exhibit R4) [6].

639. The evidence of Mr Da Rocha, Mr Killen, Mr Burke and Mr Manicaros each canvassed similar concerns should the Peron LC area be granted to the traditional owners and access denied. This included the removal of public access through Labelle Downs to the adjacent seas (pursuant to section 79 of the *Pastoral Land Act 1992* (NT) (PLA)); reliance of Labelle Down's current and future tourism and recreation ventures, including fishing tours (known as 'diversification activities' in the land claims context) on the intertidal zone; control of feral animals and weeds on the pastoral lease (which is said to require access to the intertidal zone and hence the

claim area); and the inability to retrieve cattle wandering on prospective Aboriginal land. The latter two categories were said to give rise to a consequent need for fencing at significant cost and danger (due to the presence of crocodiles in the area).

640. General evidence was also given in regard to the contributions of the pastoral industry to the Northern Territory economy: see, e.g., Statement of Luis da Rocha dated 14 May 2018 (Exhibit NT3) [11]–[12]. In this regard, Mr Burke emphasised the potential for a grant of land to the traditional owners to have a significant economic impact throughout the Top End, in addition to the investor insecurity, it was said, that has already been created by the land claim: Statement of Paul Burke (Exhibit R21) [15]–[19]. I am not persuaded by this submission: no evidence was given in support of this contention and accordingly no detriment can be said to arise.

641. Mr Manicaros also accepted that ownership of land outside the pastoral lease has little bearing on investor insecurity in relation to land within the boundaries of the pastoral lease. Further, he accepted that, to the limited extent that it could be said that investor insecurity exists in relation to the Peron LC area, it would likely be resolved by an agreement with the traditional owners to access the claim area: Transcript 16 May 2019 pp 16–19.

642. Mr Killen said that Labelle Downs would suffer diminution in value should the Peron LC area be granted to the traditional owners: Statement of Hugh Killen (Exhibit R4) [7]. This assertion was predicated upon the false understanding that the claim area is included within the bounds of the pastoral lease. That understanding was corrected in cross-examination, where Mr Killen accepted that the lease only extends to the high water mark: Transcript 27 June 2018 p 276.

643. Mr Killen did not give evidence of current or future diversification plans for Labelle Downs, which in any case requires permission from the Crown under the PLA. Further, such permission would not confer rights to use of adjacent Crown land: see oral evidence of Mr Da Rocha at Transcript 26 June 2018 pp 130–32.

644. Mr Killen also accepted that weed management occurs primarily on the pastoral lease, as the intertidal zone is often submerged underwater: Transcript 27 June 2018 p 275. Additionally, he said that there is currently no method by which the public can access the intertidal zone through Labelle Downs: Transcript 27 June 2018 pp 276–77.

645. Accordingly, no detriment can be said to arise in respect of these topics.

646. The remainder of the detriment asserted to pastoral interests is limited to the prospective financial expenditure on fencing the boundary of the western edge of the pastoral lease and the intertidal zone. I make the following observations about that detriment.

647. First, the assertion that AACo would suffer detriment through an inability to access the intertidal zone to conduct feral animal control and retrieval of cattle necessitates an examination of whether any rights to do so are in fact held. This is relevant to the question of whether any detriment, in the meaning of section 50(3) of the ALRA, arises: see, e.g., *Woolner LC Report* [287]–[290]; *Warnarrwarnarr-Barranyi (Borroloola No. 2) Land Claim (No. 30) Report No. 49* (March 1996) [6.1.1]–[6.1.7]

per Gray J as Commissioner. There is force in the Bwudjut group's submissions at [162] that AACo does not currently have the requisite permissions from the Crown. Indeed, AACo did not provide any evidence to the contrary.

648. Second, to the extent that such detriment can properly be said to exist, the Minister may consider that the timing of AACo's acquisition of its interest in Labelle Downs raises questions as to whether AACo ought to bear the consequences of a grant of land to the traditional owners. I have noted above that I do not consider the timing of an acquisition of an interest in land to go to the question of whether detriment exists per se. However, notwithstanding the lack of evidence of AACo's knowledge of the land claim, the Minister may be of the view that a failure to make such inquiries that are necessary to identify the existence of a traditional land claim over adjacent intertidal zones represents a lapse in due diligence and risk assessment. That failure may be heightened in the context of a large commercial pastoral operation.

649. Finally, the Minister may consider it relevant that Mr Killen in any case accepted that an agreement with the traditional owners to allow for access to the intertidal zone would likely alleviate detriment associated with a lack of access thereto. Indeed, he agreed that an access agreement, depending on its terms, may in fact improve upon AACo's current arrangement: Transcript 27 June 2018 278–81. There is therefore no reason to think that such an agreement cannot be reached.

650. In light of the above, the Minister may consider that there is a clear path to the alleviation of the limited detriment identified in respect of pastoral interests adjacent to the Peron LC area, to the extent that such limited detriment can in fact be claimed as detriment at all.

4.11. MINING AND PETROLEUM INTERESTS

651. The detriment that might be occasioned to mining and petroleum interests in the claim area was respectively canvassed by Mr Allan Holland, former Director of Mineral Titles in the Mines Division of DPIR, and Ms Victoria Jackson, former Executive Director of Energy in the Energy Division of that Department.

652. Ms Jackson said that two Petroleum Exploration Permit Applications (EPs) enter partially into the Peron LC area, being EP 287 made by Arafura Oil Pty Ltd on 7 December 2011 and EP 218, also made by Arafura Oil Pty Ltd on 17 March 2011. Arafura Oil Pty Ltd did not give notice of an interest in the land claim.

653. Ms Jackson said that EP 287 is 'currently on hold', and that EP 218 has not yet been considered or determined by DPIR: Statement of Victoria Jackson dated 29 May 2018 (Exhibit NT2) [5].

654. Mr Holland identified one existing Exploration Licence Application (EL) which falls within the Claim Area, being EL26868. That EL made by Territory Minerals Ltd in 2008. It is not clear whether EL 26868 has been considered or granted by DPIR.

655. Ms Jackson said that detriment would be occasioned to the holders of EPs 287 and 218 in that, should the land become Aboriginal land under the ALRA, compliance with Part IV of that Act, which contemplates mining and exploration on Aboriginal

land, would be required. That regime currently does not apply. Ms Jackson also said that petroleum interest holders, who may need to use to the claim area to access to claim area to transport a petroleum resource or related infrastructure, may need to make agreements with traditional owners to ensure that access could continue, depending on their categorisation under Part IV.

656. Similar detriment was asserted in respect of pipeline interest holders. It suffices to note that Ms Jackson did not identify any pipeline interests in or partially within the claim area: no detriment therefore arises.

657. Furthermore, and as noted above, neither EP 287 nor EP 218 have been granted, and Ms Jackson accepted that the claim area was not considered to be highly prospective for petroleum: Transcript 26 June 2018 p 111. In any case, and in the unlikely event that those applications are approved, I do not consider that potential compliance with the ALRA gives rise to any detriment of real significance. Those processes were legislated for by parliament in respect of Aboriginal land, and as such are not detriment arising from a potential grant to a land trust, but a quarrel with the ALRA itself. My view is in this respect consistent with my approach in past reports: see, e.g., *Woolner LC Report* [338], and the approach of past Commissioners: see, e.g., *Cox River LC Report* [41] per Kearney J; *Finniss River LC Report* [278]–[283], [320]–[322] per Toohey J.

658. The same can be said in relation to detriment asserted to mineral titles. Mr Holland said that, while ELs provide for rights to conduct exploration and related activities within a designated area, Part IV of the ALRA imposes an additional regulatory process for current EL applicants. Further, he said that future mineral title applicants would be required to apply with those provisions: see generally Statement of Alan Holland dated 14 May 2018 (Exhibit NT7). No evidence of future mineral applications was given, and in any case I do not consider that any detriment can be said to arise from compliance with Part IV of the ALRA.

659. In light of the above discussion, I do not need to comment more than briefly upon the fact that EP applications identified by Ms Jackson were made well after the *Blue Mud Bay case*.

660. The Minister can therefore be satisfied that no detriment in respect of mining and petroleum will arise if the Peron LC area is granted to a land trust on behalf of the traditional owners. Indeed, the relevant applicant companies did not provide any notice of their interest: the Minister may be of the view that it can therefore be inferred that those companies did not consider the detriment anticipated by the Northern Territory on their behalf to be of any material significance.

4.12. EXISTING AND PROPOSED PATTERNS OF LAND USAGE

661. For the sake of completeness and as I noted earlier in this Report, pursuant to section 50(3)(c) of the ALRA I must also comment upon the topic of whether acceding to the Peron LC in respect of the land recommended for grant would have on existing or proposed patterns of land usage in the region.

662. To the extent that submissions were made specifically on that topic, I have considered them in my comments on detriment above. I see no need to comment further.

5. CONCLUSION

663. In accordance with my functions under section 50 of the ALRA, I have presented earlier in this Report my finding that the Bwudjut and Kiyuk claimants are local descent groups in the sense required by the ALRA. I have also concluded that the Bwudjut are the traditional Aboriginal owners of the Peron LC claim area from the northern side of the creek at the site *Nikmingain* to the southern extremity of the claim area, and the Kiyuk are the traditional Aboriginal owners of the northern extent, continuing south to the northern side of the creek at the site *Nikmingain*.

664. I have noted that the Bwudjut, Wood/Morgan, Cubillo, Piening/Rivers and Kiyuk claimant groups are able to forage as of right over the claim areas.

665. For these reasons, I recommend that the whole of the land claimed in Peron Islands LC, as described at [28] of this Report, be granted to a Land Trust or Land Trusts, in accordance with sections 11 and 12 of the ALRA, for the benefit of the Aboriginal people entitled by Aboriginal tradition to the use or occupation of those areas of land. A list of those persons is contained at Annexure B (Group A and Group B) to this Report. It is not intended to be an exhaustive or static list: that is a matter for the Northern Land Council.

666. 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 Peron Islands LC being acceded to. On the evidence, it is beyond doubt that the attachment of each of the claim groups, having survived a difficult set of historical circumstances, remains strong. There are also a significant number of other Aboriginal persons who would be advantaged by a grant of land.

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

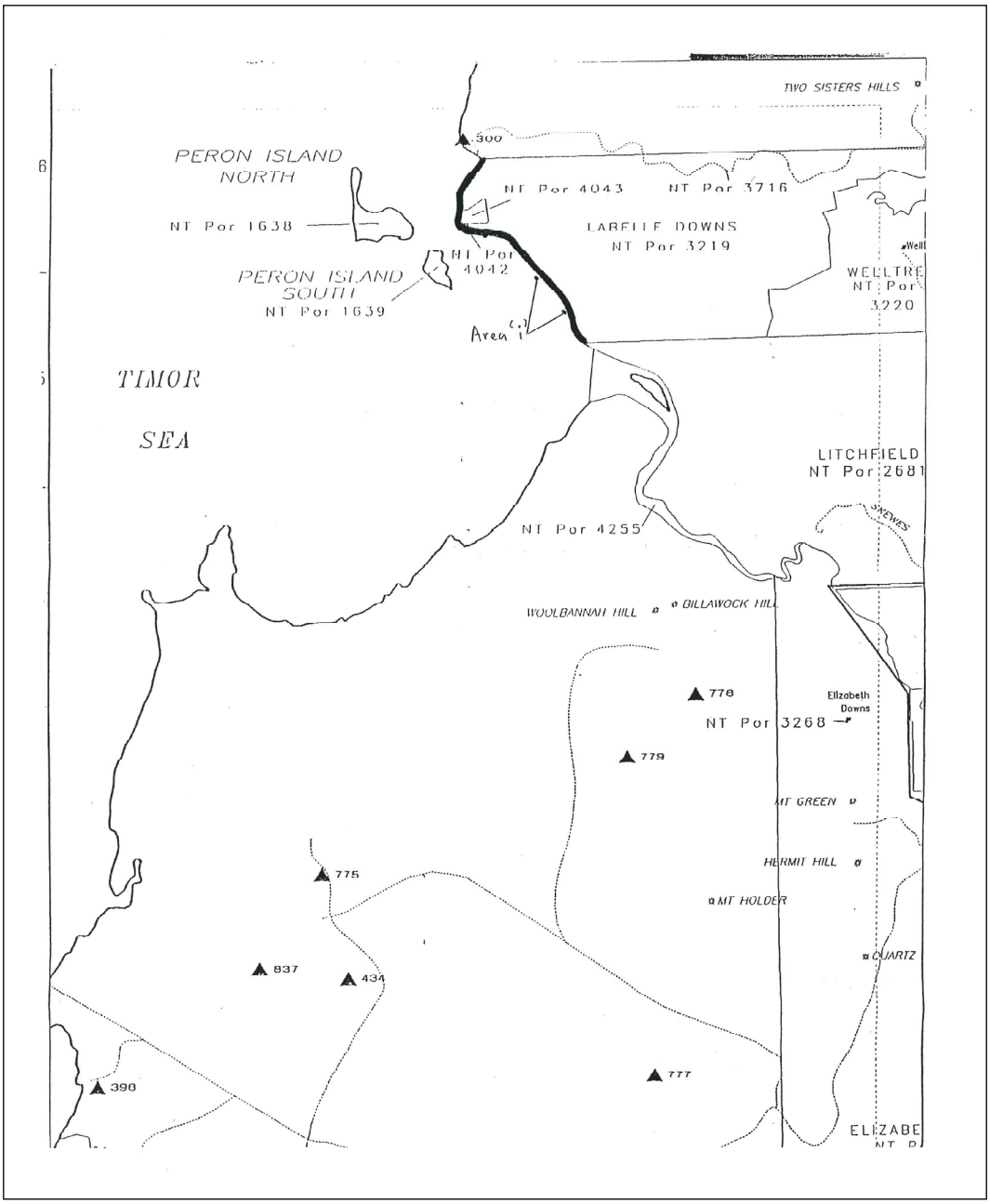
668. Detriment may result to recreational fishers and landowners accessing the intertidal zone. The claimants have offered a path to accommodate them by introducing a controlled access structure. If that is a sensible and efficient one, the Minister may consider that to be an appropriate structure which recognises the traditional owners and their interests but accommodates access to the intertidal zone in an appropriate way. The extent of commercial fishing is such that the Minister can assume that little detriment, if any, will be occasioned to commercial fishing should the claim area be granted to the traditional owners.

669. The interests of adjacent pastoralists in respect of traditional pastoral activities would be accommodated by the access arrangements proposed by the claimants.

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

671. For the sake of completeness, I note that there is no need for me to comment upon sections 50(3)(d) and 50(4) in respect of either of this claim.

ANNEXURE A: MAP A OF PERON ISLANDS LC FROM ORIGINATING APPLICATION



Source: Northern Land Council

ANNEXURE B: LIST OF CLAIMANTS

Bwudjut – Group A

Names of claimants

Djulaidji (deceased)
Mikim Daly
Jack Lambudju Maldjin (deceased)
Jasmine Daly
Apang Melan Henda (deceased)
Mariah Daly
Bobby Lambudju Lane (deceased)
Jimmy Marrimowa
Brian Henda (deceased)
Andrew Marrimowa
Andrew Henda (deceased)
Billy Lane
Elizabeth Henda (deceased)
Brit Anderson
Daniel Lane
Quantisha Anderson
Lorraine Lane
Jas Lane
Robin Lane
Kabena Lane
Sharon Lane
Timothy Lane
Daryl Lane
Randal Lane
Dennsi Lane
Ada Lane
Ricky Benmala Henda (deceased)
Cahill Lane
Elaine Henda (deceased)
Namika Henda
Andrew Jnr Henda
Tomilah Henda
Teresa Henda
Alan Henda
Eddie Henda (deceased)
Shenika Henda
Leslie Lane
Zane Henda
Tanya Lane
Rikisha Henda
Lisa Lane
Ricky Jnr (2) Henda
Paul Lane
Elizabeth Henda
Daniel Lane
Kierah Henda
Ryan Lane
Tristan Henda
Claudette Lane
Timothy Jnr Henda
Chloe Lane
Shontaya Henda
Miles Lane
Simon Pelweni Moreen
Gavin Lane
Sophie Bandawarangalgen Moreen
Ricky Lane
Terry Tjabiditj Moreen
Sherie Lane
Timothy Moreen
Tilish Lane
Bruce Jnr Potts
Serina Lane
Dorothy Potts
Tommy Henda
Asman Berredemi Rankin
Ricky Jnr Bemnala Henda
Cecily Rankin
Timothy Arrbang Henda
Gwen Dening Rankin
Vanessa Raburaba/Henda
Cameron Lane
Gabriel Raburaba/Henda
Wayne Henda
Jack Daly

Kiyuk – Group B

Names of claimants

Anthony Mungun Hammer
Raylene Mary Rankin
Ashley Hammer
Sebastien Manpurr Rankin
Audrey Hammer
Vanessa Cathy Rankin
Brayden Hammer
Yvonne Gwen Rankin
Eli Hammer
Miles Redpath
Ivy Hammer
Clifford Scrubby
John Hammer
Edwin Jnr Scrubby
Kathleen Hammer
Freddy Jnr Scrubby
Sandra Hammer
Frederick Scrubby
Shelby Hammer
Isan Scrubby
Annalisa Jensen
Jermaine Scrubby
Damian Jnr Jensen
Kira Scrubby
Lisa Jensen
Matty Scrubby
Matt Jensen
Owen Scrubby
Angela Katherine
Samuel Jnr Scrubby
Bernadette Katherine
Syvonne Scrubby
Susie Katherine
Tenalia Scrubby
David Katherine/Scrubby
Damien Scrubby/Jensen
Darren Moreen
Samuel John Scrubby/White
David Bingal Moreen
Verona Dawn Scrubby/White
David Jnr Moreen
Aidan James Sing
Duane Moreen
Alfred Lindsay Sing
Edward Moreen
Brenda Bamaiyak Sing
Frances Moreen
Brendan Sing
Grace Biyerangu Moreen
Brett Sing
Jeffrey Mituk Moreen
Cassandra Sing
John Kumamangu Moreen
Deborah Sing
June Mingelgel Moreen
Dennis Wayne Sing
Rita Ngalgenbena Moreen
Gloria Sing
Shane Moreen
Harold Djelmordog Sing
Shaun Moreen
Josephine Rankin
Nadine Vivien Rankin
Rosemary Anyurr Rankin
Penelope Sing
Rex Sing
Richard Sing
Jacoline Sing
James Sing
Jimarri Djarmuck Sing
Jimmy Anthony (Tony) Sing
Jordan Alfred Sing
Joshua Sing
Karen Kadang Sing
Kieren Jade Sing
Leonard Robert Sing
Lillian Sing
Nicole Sing
Priscilla Sing
Raymond Sing
Isabelle Sing
Rosalyn Sing
Samantha Sing
Shannon Sing
Sonya Sing
Denise Woodie/Roberts
Margaret Milkdjat Woodie/Lewis

Wood/Morgan – Group C

Names of claimants

Bruce Morgan (deceased)
Imelda Malmurrk Wood (nee Morgan)
Marjorie Terrikil Morgan
Leah Warrawu McCarthy (nee Morgan, deceased)
Agatha Ngakmik Morgan
Nancy Bamayak Armstrong (nee Morgan)
Herman Morgan (deceased)
Rosemary Parrabatj Morgan
Bernadette Morgan (deceased)
David Yarrawin Morgan
Gerard Tembi Morgan
Angela Alanga Wood
Caroline Yingni Olsen (nee Wood)
Joanne Mumbilh Wood
Peter Bumapiyin Morgan
Regina Banagaya McCarthy
Helen Tyalmuty McCarthy
Kerry Meminy McCarthy
Marisa Nawula Hylands (nee McCarthy)
Maree Warrawu Yoelu (nee McCarthy)
Wayne Binityun Armstrong
Brendan Balgal Armstrong
Adriana Nayalaty Armstrong
Philip Bikul Morgan
Glen Marrutj Morgan (deceased)
Sabrina Morgan

Piening/Rivers – Group D

Names of claimants

Rose Piening (deceased)
Susan Piening
John Piening
Sean Piening
Sharon Maley
Lorna Gibson
Barry Gibson
Mark Gibson
Ricky Rivers
Shane River
Julie River
Danny River
Andrea Rivers
John Rivers
Troy Rivers
Paul River
Norma Rivers
Dee Newman (deceased)
Jenny Newman
Karen Newman
Kathy Chui
Derek Chui (deceased)
Cassandra Chui

ANNEXURE C: PROCEDURAL MATTERS

1. Legal representatives

Party	Name/s
For the Bwudjut group	Mr Justin Edwards, counsel, Ms Siobhan Kelly, counsel, with Mr David Avery, Ms Tamara Cole, Ms Matilda Hunt, and Mr Tom Weston (Northern Land Council)
For the Kiyuk group	Mr Greg McIntyre SC, counsel, with Mr Brett Midena (Midena Lawyers)
For the Wood/Morgan group	Mr Colin Macdonald KC, counsel, Ms Jaye Alderson, counsel, with Ms Maria Savvas (Savvas Legal) and Mr James Burke (Bowden McCormack)
For the Piening/Rivers group	Mr Jon Tippet KC, counsel, with Mr Gerard Maley, Mr Errol Chua and Mr Shane McMaster (Maleys Legal)
For the Cubillo family	Mr Patrick McIntyre, counsel, with Mr Nick Testro (King & Wood Mallesons)
For the Northern Territory	Ms Raelene Webb KC, counsel, Mr Tom Anderson, counsel, Ms Coby Taggart, counsel, with Ms Elizabeth Furlonger, Ms Kalliopi Gatis, Ms Kristy Edlund and Mr Stewart Bryson (Solicitor for the Northern Territory)
For Fitzroy	Mr Ron Levy, counsel, with Mr Ryan Sanders (HWL Ebsworth)
For the Australian Agricultural Company (AACo)	Ms Tracy Turley (AACo)
For the Amateur Fishermen's Association of the Northern Territory (AFANT)	Mr Bradly Torgan (Ward Keller)
For the Northern Territory Cattlemen's Association (NTCA)	Mr Bradly Torgan (Ward Keller)
The Block Owners	Mr Bradly Torgan (Ward Keller)

2. Expert Anthropologists

Party	Name
For the Bwudjut group	Mr Robert Graham
For the Kiyuk group	Mr Gareth Lewis
For the Wood/Morgan group	Mr Kim Barber
For the Piening/Rivers group	N/A
For the Cubillo family	Dr Stephen Bennetts
For the Northern Territory	Professor Basil Sansom

3. Notices of Interest

Group or Entity	Date Received
Northern Territory Government	20 February 2018
Fitzroy	21 February 2018
AACo	22 February 2018
NTCA	23 February 2018
The Block Owners	26 February 2018
AFANT	26 February 2018
NTSC	26 February 2018

4. List of witnesses – Traditional Aboriginal Ownership

Party	Name
Bwudjut group	Ms Lorraine Lane
	Ms Theresa Henda
	Mr Tommy Henda
	Mr Timmy Henda
	Mr Andrew Henda
	Ms Robin Lane
	Mr Darryl Lane
	Ms Sharon Lane
	Mr Wayne Henda
	Mr Rex Edmunds
	Ms Seri Lippo
	Ms Maria Lippo
	Mr Trevor Bianamu
	Ms Teresa Henda
	Ms Venessa Henda
	Mr Robert Graham (expert anthropologist)
Kiyuk group	Mr James Sing
	Mr Tony Sing
	Mr Claude Holtze
	Mr Freddy Scrubby
	Mr Simon Moreen
	Mr John Hammer
	Mr Gareth Lewis (expert anthropologist)
Wood/Morgan group	Ms Imelda Wood
	Ms Agatha Morgan
	Ms Marjorie Morgan
	Ms Rosemary Morgan
	Ms Joanne Wood

Party	Name
	Ms Helen McCarthy
	Ms Caroline Olsen
	Mr Kim Barber (expert anthropologist)
Piening/Rivers group	Ms Sue Piening
	Mr John Piening
	Ms Cassie Chui
	Mr Shane Rivers
Cubillo family	Ms Nicole Hucks
	Mr Ben Cubillo Snr
	Ms Penny Hill
	Mr Ricardo (Ricky) Cubillo
	Mr Victor Cubillo
	Mr Ben Cubillo Jnr
	Ms Cherry Cubillo
	Ms Rose Schmidt
	Ms Sacha Madrill
	Ms Veronica Cubillo
	Mr Matthew Cubillo
	Ms Bernadette Schmidt
	Dr Stephen Bennetts (expert anthropologist)
Northern Territory Government	Professor Basil Sansom (expert anthropologist)

5. List of witnesses – Detriment

Party	Name (Position, Organisation)
Northern Land Council	Mr Kane Bowden (Permits Manager)
Northern Territory Government	Mr Ian Arthur Curnow (Director of Fisheries, Department of Primary Industries and Resources)
	Ms Victoria Jackson (Executive Director, Energy Division, Department of Primary Industries and Resources)
	Mr Luis Jose Casimiro Da Rocha (Acting Executive Director, Rangelands Division, Department of Environment and Natural Resources)
	Ms Valerie Smith (General Manager, Destination Development and Executive Director of the Convention Bureau, Department of Tourism and Culture)
	Mr Lincoln Paul Radcliffe Wilson (Director of Australian Parks)
AACo	Mr Hugh Killen (Managing Director/Chief Executive Officer)
AFANT	Mr David Ciaravolo (Chief Executive Officer)
	Mr Ronald James Voukolos (Owner, Fishing and Outdoor World)
The Block Owners	Mr Alan Charles Garraway
	Mr Robert Charles Wilson

Party	Name (Position, Organisation)
	Dr Katherine Campbell
Fitzroy	Mr Duncan McConnell (Director)
	Mr Don Jackson
	Mr Patrick Coleman
	Ms Patricia Mary Clarke
	Mr Michael Paul Rasmussen
	Mr Terry Flowers
	Mr Bill Linkson (Territory Property Consultants Pty Ltd)
Humbug Fishing	Mr Scott Wauchope
NTCA	Mr Ashley Manicaros (Chief Executive Officer, adopting statement of Mr Paul Burke)
NTGFIA	Mr Dennis Sten (President, adopting statement of Mr Mick Hinchey)
	Ms Terri Barnes
NTSC	Ms Katherine Winchester (Chief Executive Officer)

6. Exhibits

Exhibit Ref.	Tendering party
A	Tendered on behalf of the Bwudjut group of claimants
AK	Tendered on behalf of the Kiyuk group of claimants
AM	Tendered on behalf of the Wood/Morgan group of claimants
AP	Tendered on behalf of the Piening/Rivers group of claimants
AC	Tendered on behalf of the Cubillo family claimants
NT	Tendered on behalf of the Northern Territory Government
R	Tendered on behalf of persons or entities claiming detriment

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

Exhibit No.	Restricted	Title of exhibit
A1		Submission on the Status of Land
A2	R	Anthropologist's Report (including claimants' particulars, site register and site map) by Carol Christopherson, Samantha Ebsworth, Jeff Stead and Robert Graham dated October 2017
A3	R	Genealogy prepared on behalf of the claimants by Robert Graham dated 23 January 2018
A3(A)	R	Substituted Peron Islands Area Land Claim No. 190 Map
A3(B)	R	Revised genealogy prepared on behalf of the claimants by Robert Graham dated 5 November 2018
A3(C)		Photo: When the Dogs Talked
A4		The Northern Territory Fisheries Harvest Strategy Policy December 2016

Exhibit No.	Restricted	Title of exhibit
A5		The Guidelines For Implementing Northern Territory Harvest Strategy Policy December 2016
A6		Statement of Tania Moloney dated 28 September 2017
A7		Settlement Deed Between Northern Territory, Daly River/Port Keats Aboriginal Land Trust and Northern Land Council dated 7 August 2014
A8		Transcript of Evidence of Kane Bowden given in the Fitzmaurice River Land Claim on 25 June 2018
A9		Statement of Kane Bowden dated 29 May 2018 tendered in the Fitzmaurice Land Claim as Exhibit A33 on 25 June 2018
A10		Screenshot from website of Humbug Fishing
A11		Pages from Wagait Committee Inquiry referred to by Mr Edwards
A12	R	Supplementary Report on the Peron Islands Land Area Land Claim No. 190 by Robert Graham dated 6 August 2021
AK1	R	Kiyuk Site Map used for the helicopter site viewing on 15 June 2021
AK2	R	Kiyuk personal particulars with genealogy references – Name order
AK3	R	Kiyuk personal particulars with genealogy references – Gene Reference order
AK4	R	Kiyuk genealogy prepared by Gareth Lewis
AK5	R	Anthropologist's Report for the Kiyuk people in the Peron Islands Land Claim No. 190 prepared by Gareth Lewis dated July 2019 [page 30 of that report has been supplemented with additional numbering]
AK6	R	Statement of James Sing titled 'Kiyuk Rituals' dated 21 June 2021
AK7		Record of Bulgul 1979 National Archives Census 18 and 19 July 1979
AK8		Page from the Finniss River Report headed 'Maranunggu sites information map'
AK9	R	Supplementary Anthropologist's Report for the Kiyuk People by Gareth Lewis dated August 2021
AK10	R	Updated Kiyuk site map dated July 2021
AM1		Language book by Imelda Wood
AM2		Book containing plants and animals descriptions
AM3		Painting by Rosemary Morgan (2 copies – one with sites marked)
AM4		Painting by Imelda Wood
AM5	R	Genealogy prepared by Mr Kim Barber 2019 Woods Morgan
AM6	R	Anthropology Report by Mr Kim Barber dated June 2019

Exhibit No.	Restricted	Title of exhibit
AM7		Memorandum to the Acting Director of welfare from Acting District Welfare Officer dated 15 Jan 1959 with a handwritten note
AM8		Index of photos and bundle of photos with descriptions
AP1		Four photos of first camp as described by Sue Piening
AP2		Copy of A3A as marked by Sue Piening
AP3		Two photos of Margaret Rivers taken in early 1980s
AP4		Photograph of Margaret Rivers with boat
AC1		MFI AC1 Belyuen Genealogy for Descendants of Mary (Margaret) Kudang 2 Nyarranyi (MFI 17 June 2021), supplemented by two further pages of genealogy
AC2		MFI AC2 Page with two photographs of Cubillos at Bulgul beach (MFI 17 June 2021)
AC3		Page from Records of the Northern Territory Stolen Generation Corporation
AC4		Page 195 of Book titled 'History of the Cubillo Family 1788 to 1996' by Inez Cubillo published in 2000
AC5		Photo of Maggie Rivers and Mary Kudang dated 1979
AC6		Newspaper article relating to bombing Aboriginal Land, Quail Island
AC7		Preliminary anthropological report of Dr Stephen Bennetts dated August 2021
AC8		Document headed 'Kenbi Cox Peninsula Land Claim Genealogies Restricted Exhibit NLC 28' dated January 1990
AC9		Copy correspondence from Nicole Hucks to ALC Office of 11 June 2021, Maleys to ALC Office of 11 June 2021, from Medina Lawyers to ALC Office and the other parties of 14 June 2021 and from Bowden McCormack to ALC Office of 1 September 2021
AC10		*The Kiuk people: the traditional ownership and use of the Peron Islands Northern Territory – A report* prepared for the Northern Land Council by Maggie Brady, anthropological research assistant
AC11		Front page and pages 201 and 203 of a document entitled 'Kenbi Land Claim Northern Land Council' [part of a 1979 anthropological report comprising part of the original Kenbi Land Claim Claim Book]
AC14		Wagait Committee Report 1995
AC15		Legible copy of genealogy of Margaret Rivers, page 44 of Kenbi Land Claim book (Brandl, Haritos and Walsh, for Northern Land Council, 1979).
AC16		Hand drawn genealogy for the Cubillo family prepared by Dr Stephen Bennetts (which forms part of Dr Bennetts expert report).
AC17		Submissions to Wagait Committee, prepared by Paul Hayes of Buckley and Stone Lawyers on behalf of Wadjigan/Kiyuk.

Exhibit No.	Restricted	Title of exhibit
AC18		Extract of the 'Genealogies_Belyuen Side Kenbi Land Claim Exhibit 1989'.
AC19		Recording of interview by Adrienne Haritos of Maggie Rivers in 1978 (3 x mp3 files).
AC20		Article of Elizabeth Povinelli, 'Finding Bwudjut: Common Land, Private Profit, Divergent Objects', Chapter 9 in Moving Anthropology, E. Kowal and G. Cowlishaw (eds, 2006).
AC21		Elizbeth Povinelli, *Report to Aboriginal Areas Protection Authority Concerning Sites in Cox Peninsula/ Port Patterson/ Fogg Bay/ Anson Bay area*, 31 July 1990
AC22		National Native Title Tribunal extract of schedule of applications for dismissed La Belle Downs native title claim (NTD6029/2002).
AC23		Wadjigan and Kiuk sea country plan, 2010.
AC24		W Ivory and AF Tapsell, *A Report on the Traditional Ownership of the Wagait Reserve and North and South Peron Islands*, 1978.
AC25		Walsh, *The Wagaitj in relation to the Kenbi Land Claim Area*, 1989.
AC26		Walsh, *Ten Years On: A supplement to the 1979 Kenbi Land Claim Book*, 1989
AC27		Elizabeth Povinelli, Lower Daly Land Claim anthropological and supplementary anthropological reports, 2001 and 2002
AC28		Michael Pickering, *Wagait Traditional Owner Dispute, Wadjigan/Kiuk Claim Book: Anthropologists Report*, 1993
AC29		Report by T.J Beckett on visit made to Anson Bay, 1916
NT1		Statement of Ian Arthur Curnow and attachments dated 17 May 2018
NT2		Statement of Victoria Jackson dated 29 May 2018 together with annexure
NT3		Statement of Luis Da Rocha dated 14 May 2018
NT4		Register Book Volume 199 Folio 29 Pastoral Lease no. 986
NT5		Statement of Valerie Smith with attachment dated 17 May 2018 together with annexure
NT6		Statement of Lincoln Wilson dated 14 May 2018
NT7		Statement of Allan Holland dated 14 May 2018
NT8		Media Release Entitled Blue Mud Bay Waiver Extension Dated 15 November 2018
NT9		Media Release Entitled Intertidal Zone Permit Waiver Extended for Six Months Dated 4 December 2018
NT10		Provisional Anthropological Report of Professor Basil Sansom dated 18 February 2020

Exhibit No.	Restricted	Title of exhibit
NT11		Supplementary Anthropological Report of Prof Basil Sansom dated 26 August 2021
R1		Letter and statement of David Ciaravolo dated 14 May 2018 excluding paragraphs based upon the contents of the survey
R2		Statement of Dennis Sten dated 9 May 2018 together with the attached Economic Contribution of Fishing Tour Operators In The Northern Territory July 2012 prepared by the Northern Territory Government
R3		Statement of Ronald Voukolos dated 11 May 2018
R4		Statement of Hugh Killen dated 14 May 2018
R5		Statement of Alan Charles Garraway dated 11 May 2018 together with six annexures
R6		Statement of Robert and Sharon Wilson and annexures dated 11 May 2018
R7		Statement Dr Katherine Campbell dated 12 May 2018
R8		Statement of Mick Hinchey, signed by Dennis Sten, dated 9 May 2018
R9		Statutory Declaration of Duncan McConnel (as director) dated 14 May 2018 with attachments
R10		Statutory Declaration of Duncan McConnel (as block owner) dated 14 May 2018
R11		Market Valuation, NT Portion 4042, Channel Point NT, by Bill Linkson, Territory Property Consultants Pty Ltd
R12		Statutory Declaration of Don Jackson dated 24 April 2018
R13		Statutory Declaration of Patrick Coleman dated 1 June 2018
R14		Statutory Declaration of Patricia Mary Clarke dated 14 May 2018
R15		Statutory Declaration of Michael Rasmussen dated 12 April 2018
R16		Statutory Declaration of Elsbeth Hannon dated 30 April 2018
R17		Statement of Chrissy McConnell dated 14 May 2018
R18		Statutory Declaration of Terry Flowers dated 23 April 2018
R19		Statement of Brad McDougall dated 9 May 2018
R20		Statement of Katherine Winchester dated 27 April 2018
R21		Statement of Paul Burke dated 11 May 2018
R22		Letter from Ward Keller on behalf of Excess Pty Ltd to the Commissioner dated 14 May 2018
R23		Written Statement of Scott Wauchope and Lorna Wauchope together with Annexures
R24		Letter from Mr Ryan Sanders dated 27 May 2019 regarding corrections to assertions of claimants' counsel in cross examination and three enclosures.

ANNEXURE D: KIYUK EMAIL

Brett Midena 6 December 2018 at 4:37 pm

Kiyuk_181206_ALC / Request for direction

To: Gilfillan, Anna,

Cc: rsanders@hwle.com.au, kristy.edlund@nt.gov.au, David Avery, Colin McDonald QC, maria.savvas@msplegal.com.au, James Sing

Dear Ms Gilfillan,

Further to our earlier communications with the Commissioner and you, we are now able to advise that, now that funding is available to our clients, we are able to assume formal responsibility for the representation of the Kiyuk People in the Peron Islands Area Land Claim.

Accordingly, we now write to that the Commissioner consider making a direction, in terms comparable to paragraph 1d. of the Directions dated 5 November 2018, permitting a copy of exhibits A2, A3(A) and A3(B) to be provided to each of Brett Midena of Midena Lawyers and Greg McIntyre SC of counsel and Gareth Lewis, Consultant Anthropologist, for the Kiyuk people (as defined in paragraph 2.A) of eh Directions dated 7 November 2018), who may discuss the contents with those they represent or for whom claim materials are being prepared in accordance with Practice Direction 10 but may not provide copies of them to those persons.

We are hopeful that such a direction might by made, with the consent of the other parties and without the need for a further directions hearing to be convened. We would be grateful if the representatives of the other parties would respond to this email accordingly.

Yours sincerely,
Brett Midena
Midena Lawyers
0417 271 977
53 Cahill Crescent, Nakara, NT, 0810
Confidential

From: Brett Midena <brett@midena.co>
Reply: Brett Midena <brett@midena.co>
Date: 14 November 2018 at 1:51:38 pm
To: anna.gilfillan@network.pmc.gov.au <anna.gilfillan@network.pmc.gov.au>
Cc: James Sing <jameswsing@gmail.com>, David Avery <david.avery@nlc.org.au>, kristy.edlund@nt.gov.au <kristy.edlund@nt.gov.au>, rsanders@hwle.com.au <rsanders@hwle.com.au>, Colin McDonald QC <crmcdonald23@gmail.com>, maria.savvas@msplegal.com.au <maria.savvas@msplegal.com.au>
Subject: Kiyuk_181114_ALC / Letter attached - comments on Directions 7/11/18

> Dear Ms Gilfillan,
> Attached for the Commissioner's attention, is our letter dated 14 November 2018.
> Regards
> Brett Midena
> Midena Lawyers
> 0417 271 977
> Confidential

ANNEXURE E: FITZROY LETTER

HWL EBSWORTH
LAWYERS

Our Ref: 870185

14 December 2018

Anna Gilfillan
Executive Officer to the Aboriginal Land Commissioner
Level 5, Jacana House
39–41 Woods Street
Darwin NT 0800

Email: AboriginalLandCommissioner@network.pmc.gov.au; anna.gilfillan@network.pmc.gov.au

Dear Ms Gilfillan

Peron Islands Land Claim No 190

In accordance with direction 1 of the Commissioner's directions dated 7 November 2018, Fitzroy Pty Ltd seeks leave to further participate in the hearing of the Peron Islands Land Claim on the topic of traditional ownership in the limited manner identified below.

The basis for seeking leave is that Fitzroy's interests (and those of its members) are directly affected by the question of whether traditional Aboriginal owners exist in relation to the land claim, in circumstances where the claim group identified by the Northern Land Council (NLC) failed to satisfy a former Commissioner that its members have primary spiritual responsibility for sites on proximate land in the Lower Daly Land Claim.

We have perused the confidential documents provided by the NLC, public documents, and the transcript of hearing to date, and – on the evidence so far– anticipate Fitzroy will likewise submit that primary spiritual responsibility for sites is not demonstrated by that claim group for the Peron Islands Land Claim.

Fitzroy is unable to comment in relation to the evidence, and formulation, which may alternatively be put by the Kiyuk group and the Wood/Morgan family who have recently been granted or sought leave to participate in the hearing. Those claimants have not yet filed, or given, evidence.

Fitzroy presently apprehends that, in the public interest, the traditional evidence of the claim group identified by the NLC, and the other claimants, will be tested through cross examination by the Territory. This is the traditional role performed by the Territory, and States, in land and native title claims.

Fitzroy does not wish to duplicate that role, but wishes to retain the capacity to protect its interests by being apprised of the evidence.

Adelaide
Brisbane
Canberra
Darwin
Hobart
Melbourne
Norwest
Perth
Sydney

ABN 37 246 549 189

This would enable Fitzroy, at first instance, to contribute indirectly through liaison with the Territory's representatives (and those of other parties), and also to make submissions after completion of the traditional evidence as appropriate.

It is submitted that this limited participation would appropriately protect Fitzroy's interests, in a manner which accords with the importance that there be no delay in the timely completion of the hearing of the claim.

To facilitate this outcome Fitzroy seeks a variation of the current orders, as follows.

- First, Fitzroy's legal representatives and any anthropologist or expert that Fitzroy may engage would be authorised to each possess a copy of all restricted evidence filed by any claimant group or party in the land claim.
- Secondly, a director of Fitzroy, Duncan McConnel, would be authorised to view restricted material in the presence of Fitzroy's legal representatives, on the same basis as ordered to date.
- Thirdly, Fitzroy would be authorised to make submissions about the traditional evidence, after that evidence is heard.
- Fourthly, Fitzroy would have liberty to apply should any variation of the above orders be sought.

As foreshadowed by the current directions, Fitzroy would be happy to support its submission at a directions hearing to be listed by the Commissioner.

A copy of this letter has been forwarded to David Avery of the NLC, the Solicitor for the Northern Territory, Midena Lawyers, and Maria Savvas of MSP Legal.

Yours sincerely

Tony Morgan
Partner
HWL Ebsworth Lawyers

+61 8 8943 0478
tmorgan@hwle.com.au

Ryan Sanders
Senior Associate
HWL Ebsworth Lawyers

+61 8 8943 0452
rsanders@hwle.com.au

ANNEXURE F: WOOD/MORGAN LETTER

OUR REF: MS:19004
YOUR REF:

MARIA SAVVAS
LAWYER

19 February 2019

Justice JR Mansfield AM QC
Aboriginal Land Commissioner
Jacana House
39-41 Woods street
DARWIN NT 0800

By email: anna.gilfillan@network.pmc.gov.au

Dear Commissioner,

Peron Islands Area Land Claim No. 190

We have now taken further instructions, as to the Wood/Morgan family claimants. Having taken those instructions we advise that the claimants are as attached to this correspondence.

In respect of the directions made on 7 November 2018, specifically direction 2 B(b), due to a delay in funding approval by the NLC, we have been unable to engage anthropological expert advice. Accordingly, we are still awaiting a determination by the NLC as to whether we can engage anthropologist Kim Barber. Unfortunately, as a result of the NLC delay in funding approval, we will not be in a position to comply with the time frames set out in direction 2 B(b).

Aside from the outstanding funding issues, we have been advised by Mr Barber that if instructed, he will only be in a position to commence research work after 31 March 2019. He estimates that his work and preparation of the report will take approximately 7 weeks.

The Wood/Morgan family are not in a position to fund Mr Barber and we are seeking to have the NLC expedite its decision as to funding for anthropological advice.

We request that a further directions hearing be listed before you at your earliest convenience to make submissions with respect to an alternative time-table.

MARIA SAVVAS [ABN 87 842 883 737] | 20/56 Marina Boulevard, Cullen Bay NT | PO Box 2397 Darwin NT 0801

We look forward to hearing from you.

Yours faithfully,

MARIA SAVVAS
Lawyer

E maria.savvas@savvaslegal.com
T 08 8981 7371
M 0418 810 491

cc.

David Avery
Solicitor for Bwudjut Group
david.avery@nlc.org.au

Kristy Edlund
Solicitor for NTA
Kristy.edlund@nt.gov.au

Ryan Sanders
Solicitor for Fitzroy Pty Ltd
rsanders@hwle.com.au

Midena Lawyers
Solicitor for the Kiyuk People
brett@midena.co

List of Claimants

Bruce Morgan (dec)

- Bernadette Morgan (dec)
- David Yarrawin Morgan
- Gerard Tembi Morgan

Imelda Malamurrk Wood (nee Morgan)

- Angela Alanga Wood
- Caroline Yilngi Olsen (nee Wood)
- Joanne Mumbilh Wood

Marjorie Terrikil Morgan

- Peter Bumapiyin Morgan

Leah Warrawu McCarthy (nee Morgan) (dec)

- Regina Banagaya McCarthy
- Helen Tyalmuty McCarthy
- Kerry Meminy McCarthy
- Marisa Nawula Hylands (nee McCarthy)
- Maree Warrawu Yoelu (nee McCarthy)

Agatha Ngakmik Morgan

Nancy Bamayak Armstrong (nee Morgan)

- Wayne Binityun Armstrong
- Brendan Balgal Armstrong
- Adriana Nayalaty Armstrong

Herman Morgan (dec)

- Phillip Bikul Morgan
- Glen Marrutj Morgan (dec)
- Sabrina Morgan

Rosemary Parrabatj Morgan

ANNEXURE G: PIENING/RIVERS LETTER

MALEYS
BARRISTERS & SOLICITORS

Principal:
Peter Maley

Solicitors:
Gerard Maley
Anastasia Koulianos
Shane McMaster
Sephyr Crook

Our Ref: GM:016658

18 April 2019

Anna Gilfillan
Department of the Prime Minister and Cabinet
GPO Box 9932
DARWIN NT 0801

Via email: anna.gilfillan@network.pmc.gov.au

Dear Ms Gilfillan

Re: Peron Island Land Claim no. 190

We act for the Piening (Rivers) family in relation to the above-mentioned matter.

Our clients were recently advised that the Peron Island Land Claim No 190 was on foot.

Our clients are recognised traditional owners of the Delissaville/Wagait Land trust Area (Bulgul). That land trust is directly above the Peron Islands Land Claim.

The purpose of this correspondence is to put you on notice that we have applied for funding with the NLC to joint the Peron Island land Claim.

If you have any further queries, please do not hesitate to contact our Gerard Maley.

Yours sincerely

GERARD MALEY
SOLICITOR
Email: gerard.maley@maleyslegal.com

ANNEXURE H: NORTHERN LAND COUNCIL AND NORTHERN TERRITORY LETTER

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

Solicitor for the Northern Territory

Level 1 Old Admiralty Tower
68 The Esplanade, Darwin, NT, 0800

Postal address
GPO Box 1722
Darwin NT 0801
E Stewart.bryson@nt.gov.au

T 08 8935 7424

6 October 2021

Hon. Justice John Mansfield AM QC
Aboriginal Land Commissioner

Via email only:
AboriginalLandCommissioner@official.niaa.gov.au

cc: thomas.dews@official.niaa.gov.au

Our Ref: **20210288**

Dear Commissioner

PERON ISLANDS AREA LAND CLAIM (NO. 190)

We refer to that part of your letter to the parties dated 8 September 2021, wherein you requested an explanation of the status of the Labelle Downs native title claim, including the time and terms of any orders of dismissal.[1]

The Northern Land Council and the Territory offer the following explanation of the status of the Labelle Downs native title claim:

1. Parts of Labelle Downs Pastoral Lease were the subject of three separate native title determination applications, which together covered the whole station as depicted on the enclosed map.
2. The three relevant applications included:
   (a) Application for determination of native title NTD 6060 of 2001 (Lower Reynolds River) filed on 11 October 2001;
   (b) Application for determination of native title NTD 6004 of 2002 (Welltree) filed on 12 March 2002; and
   (c) Application for determination of native title NTD 6029 of 2002 (LaBelle Downs) filed on 12 September 2002.

[1] We note the request in the letter followed the exchange in the Transcript at pp639-640.

3. The applications were known as "polygon" claims because they were made following notifications under s 29 of the *Native Title Act 1993* (Cth) and the fact that the areas to which the applications related conformed to the irregular boundaries of mining tenures granted or proposed to be granted by the Northern Territory Government pursuant to mining and petroleum legislation. The boundaries have no correlation with the areas over which native title rights and interests may exist, nor do they correlate with the boundaries of pastoral leases granted under the *Pastoral Land Act 1992* (NT).
4. On 5 May 2017 the Federal Court dismissed all three applications because of the applicants' failure to prosecute them with reasonable diligence: see *Bulabul on behalf of the Kewulyi, Gunduburun and Barnubarnu Groups v Northern Territory of Australia* [2017] FCA 461.[2]
5. At paragraph 60 of his decision, White J observed:

> The dismissal of the claims on the basis that they have not been prosecuted with reasonable diligence is not a decision on the merits of the claim and will not give rise to an estoppel in any subsequent proceedings brought by the applicants which are properly prosecuted: Western Australia v Faze/dean (on behalf of Thalanyji People) (No 2) [2013] FCAFC 58; (2013) 211 FCR 150 at [27]-[28], Atkinson v The Minister at [26] and Foster v Northern Territory of Australia [2015] FCA 38 at [17].

We trust the above is of assistance. If you require any further information please let us know.

Yours faithfully

Matilda Hunt
Lawyer
Northern Land Council

Stewart Bryson
Lawyer
Solicitor for the Northern Territory

[2] An appeal from that judgment was unsuccessful but was not concerned with the merits of those claims and is not further dealt with here.

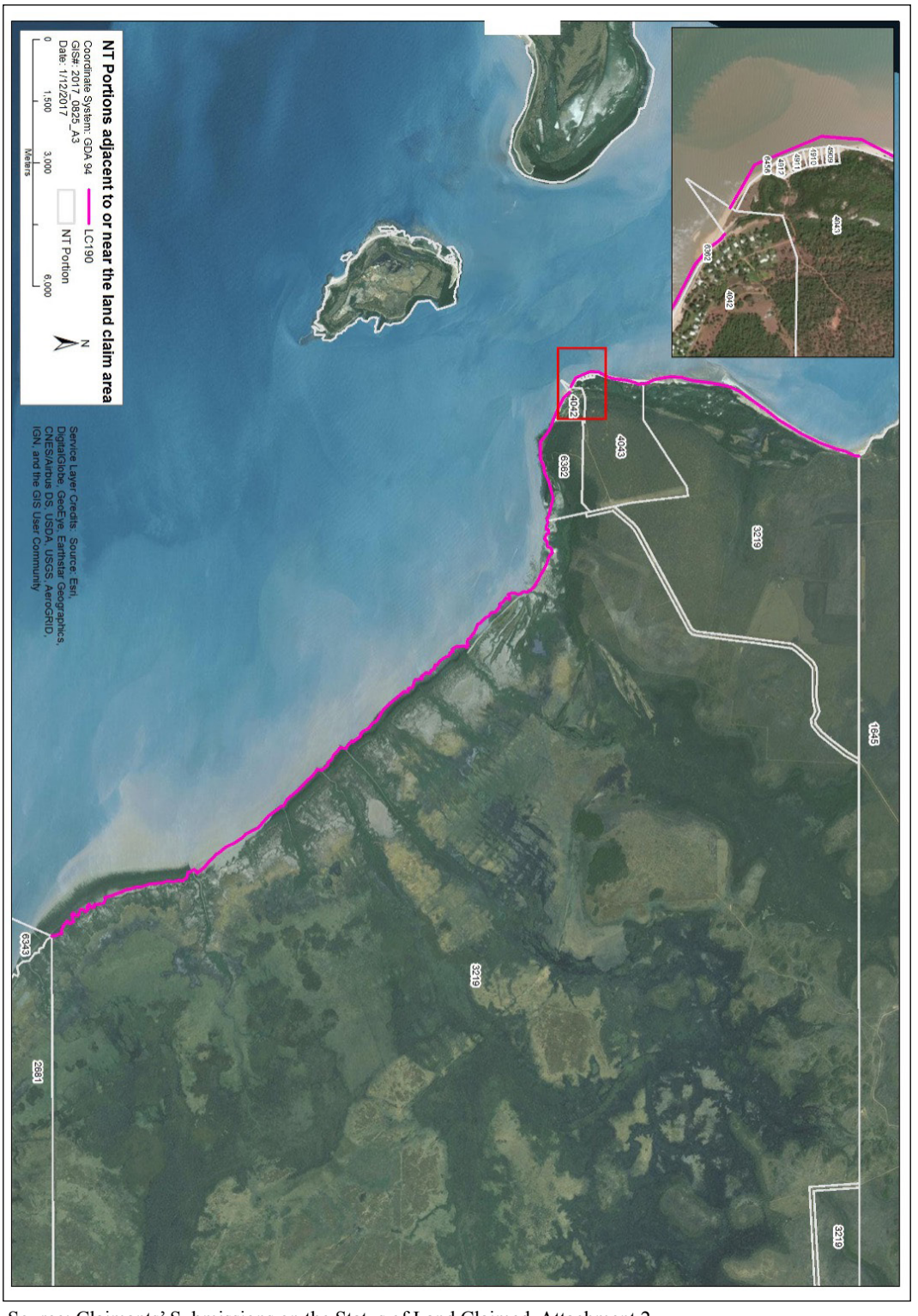
Copied to:

Mr Brett Midena Lawyer Midena Lawyers	Mr James Burke Senior Associate Bowden McCormack	Mr Errol Chua Barrister & Solicitor Maleys Legal	Mr Nick Testro Special Counsel Kind & Wood Mallesons
brett@midena.co	james@bowden-mccormack.com.au	errol.chua@maleyslegal.com	nick.testro@au.kwm.com

ANNEXURE I: ATTACHMENT C TO WILSON STATEMENT

Source: Statement of Lincoln Wilson dated 14 May 2018, Attachment C

ANNEXURE J: ATTACHMENT 2 TO THE SUBMISSION ON STATUS OF LAND



Source: Claimants' Submissions on the Status of Land Claimed, Attachment 2

ANNEXURE K: ATTACHMENT 15 TO THE SUBMISSION ON STATUS OF LAND

Source: Claimants' Submission on the Status of Land Claimed, Attachment 15

ANNEXURE L: ATTACHMENT 10 TO THE SUBMISSION ON STATUS OF LAND

Source: Claimants' Submission on the Status of Land Claimed, Attachment 10