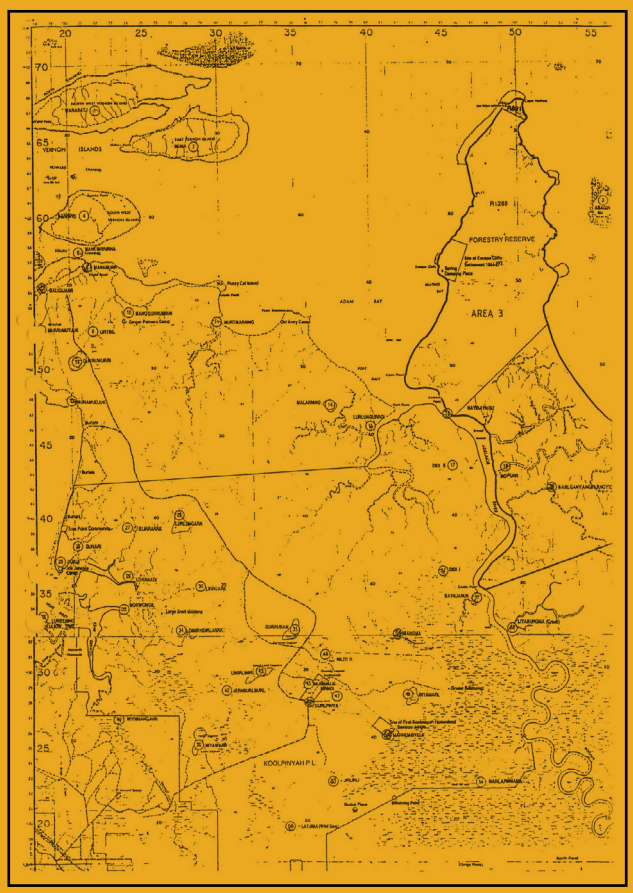
Aboriginal Land Rights (Northern Territory) Act 1976

Wulna (Northern Territory Portion 2001) Land Claim No. 155

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



Wulna (Northern Territory Portion 2001) Land Claim No. 155

Report No. 78

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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Australian Government

Office of the Aboriginal Land Commissioner

Telephone: (08) 7972 4111 Level 5, Jacana House, 39-41 Woods Street, DARWIN NT 0800
Email: AboriginalLandCommissioner@official.niaa.gov.au GPO Box 9932 DARWIN NT 0801

28 April 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: Wulna (Northern Territory Portion 2001) Land Claim (No. 155)

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 Level 5, Jacana House, 39-41 Woods Street, DARWIN NT 0800
Email: AboriginalLandCommissioner@official.niaa.gov.au GPO Box 9932 DARWIN NT 0801

28 April 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: Wulna (Northern Territory Portion 2001) Land Claim (No. 155)

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. The land claim is the Wulna (Northern Territory Portion 2001) Land Claim (Wulna LC), being the claim numbered 155 in the register of claims held by the Office of the Commissioner made by application dated 25 March 1996 and lodged on 27 March 1996. It has had a chequered history as discussed below.

3. It is useful to briefly recall the nature and purpose of the Inquiry.

4. 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.

5. In this Report, I have set out the relevant details of the claim made on behalf of the claimants, the Inquiry process, the evidence produced in support of the claim to traditional Aboriginal ownership of the claimed land, and I have made detailed findings which lead to my recommendations under section 50(1)(a) of the ALRA. It has been a relatively simple process and has not required the hearing of oral evidence, as the Northern Territory accepted that the present claimants are the traditional Aboriginal owners of the claimed area.

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

7. Section 50(3)(b) requires me to comment on the detriment to persons or communities that might result if the claim were acceded to in whole or in part. The Northern Territory and one other entity asserted some form of detriment. I have reported on those claims of detriment in accordance with section 50(3)(b), and on the matters referred to in section 50(3)(c). The claimants in response often proposed ways by which asserted detriment might be addressed. I have included in this Report when addressing the detriment claims details of those proposals and my comments upon them.

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

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

10. I 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.

11. Subject to those comments, this Report, as required, contains my findings and recommendations in respect of the land claim.

2. THE CLAIM AREA, HISTORICAL BACKGROUND AND THE INQUIRY

2.1. THE CLAIM AREA

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

13. The claim relates to an area in the 'Top End' of the Northern Territory, located to the East of Darwin at the tip of Cape Hotham. The Cape Hotham area is generally a low, swampy promontory that is for the most part barely above sea level. It is connected to the mainland by an area of mangrove swamps and tidal channels, making it accessible only by boat or helicopter. On the western side the swamps drain into the lower reaches of the Adelaide River, however, to the north of the mouth of the Adelaide River is a section of low cliffs along the shoreline. The eastern side is characterised by tidal swamps, low dunes and sandy beaches, while to the south the tidal swamps join the seasonal floodplain of the Adelaide and Mary River systems.

14. The claim area as expressed in the application is as follows:

> See the attached map delineating the area, which is more particularly described as NTP 2001, down to the low watermark.

15. A copy of the attached map is annexed to this Report as Annexure A.

16. Northern Territory Portion (NTP) 2001 comprises an area of approximately 92.6 hectares above the low water mark. The majority of the claim area is within the intertidal zone, with approximately 17 hectares of the claim area being above the high water mark. As noted above, tidal channels and swamps to the south of the claim area result in the claim area only being accessible by boat or helicopter.

17. It should be noted that although a large portion of the claim area is within the intertidal zone, it is not 'qualifying land' for the purposes of section 67A(12) of the ALRA.

18. The Cape Hotham lighthouse is located on the westernmost shoreline of the claim area and is operated by the Australian Maritime Safety Authority (AMSA).

2.2. HISTORICAL BACKGROUND TO THE WULNA (NTP 2001) LAND CLAIM

19. The historical background of the area is set out in some detail in the Anthropological Report of Mr Chris Healey of December 2005 (Healey Report) (Exhibit A2) and in the Supplementary Anthropology Report of Dr Philip Clarke of December 2022 (Clarke Report) (Exhibit A6). It was also addressed in the *Woolner / Mary River Region Land Claim (No. 192) Report No. 75* (8 December 2021) (*Woolner LC Report*), which involved areas immediately to the south and southeast of the land claim the subject of this Report. The period between the two anthropological reports calls for comment.

20. Before a lasting settlement was established at what is now Darwin, an early attempt at permanent British settlement in the Top End occurred in 1864 at Cape Hotham

in an area called Escape Cliffs, on land immediately to the south of the claim area. Resistance by the local Aboriginal population to the settlement was often met with violent reprisals. However, the Healey Report notes in Chapter 3 that relations were at times stable and that the local Aboriginal population and Europeans living at the settlement periodically enjoyed the exchange of food, materials, and labour. As discussed below in Section 3.1.2, the local Aboriginal people are descended from one of three identified apical ancestors, Finity, as the other apical ancestors do not have living descendants. The descendants of Finity, according to the traditional laws and customs pertaining at early times (and as since varied) constitute the relevant local descent group as defined in the ALRA. The claimants are all members of the Wulna language group, who jointly hold the entire estate of Wulna country.

21. In 1869 the settlement was relocated to Darwin and many Wulna people from the Cape Hotham area were moved to the new settlement. Throughout the late 19th and early 20th century, Aboriginal people lived on reserves and missions in areas surrounding Darwin and often participated in the cattle and buffalo industries. This movement, along with violence and the introduction of diseases, resulted in a large depopulation of the Darwin hinterland region and a very significant decrease in the Aboriginal population by 1920. However, the Clarke Report notes at [30] that the location of these industries allowed local Aboriginal people to maintain traditional ties and obligations to their country and to neighbouring groups.

22. From the early 20th century many traditional Aboriginal owners lived either in Darwin or on large cattle stations to the east of Darwin such as Koolpinyah, Humpty Doo, Woolner and Marrakai. Many of the present claimants still live on their country at the Wairuk Community in Humpty Doo or nearby in Darwin.

2.3. THE WULNA (NTP 2001) LAND CLAIM INQUIRY

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

24. This land claim, as with others in the region, has a protracted history, in part due to the question determined by the High Court in *Northern Territory v Arnhem Land Aboriginal Land Trust* (2008) 236 CLR 24; [2008] HCA 29 (*Blue Mud Bay case*) that a grant of land under the ALRA extends to the limits of the low water mark as constituting Aboriginal land. It is a matter of public record that, because of the potential impact of that decision upon public access to waters overlying the intertidal zone, including tidal waters in river systems, there have been prolonged negotiations between the Northern Territory and traditional Aboriginal owners regarding access arrangements to relevant Aboriginal land and land claim areas.

25. There was an earlier claim, the Limilngan-Wulna (Lower Adelaide and Mary Rivers) Land Claim (No. 10) (Limilngan-Wulna LC), over the present claim area. On 31 March 1978, the Northern Land Council made an application to the Commissioner on behalf of members of the Wulna group to several areas of land, including what is now NTP 2001 but was then included within an area designated as Reserve 891. Following legal arguments over whether the then claimed area was available for claim and to give effect to a settlement agreement over part of the claim area, the original claim was withdrawn on 14 March 1996.

26. Consequently, the Wulna LC application for the area comprising NTP 2001 was then made on 25 March 1996.

27. On 5 May 1998, the Commonwealth of Australia (the Commonwealth) informed the Commissioner of its interest in the land claim through AMSA, which used and occupied for the purposes of the Cape Hotham Lighthouse. The Commonwealth argued that AMSA's use of NTP 2001 meant that it was not unalienated Crown Land within the meaning of section 3 of the ALRA and therefore unavailable for grant. On 16 March 1999, Commissioner Olney notified the Northern Land Council and Commonwealth of his intention to conduct an inquiry into the question of whether NTP 2001 is land which may properly be made the subject of a claim pursuant to section 50(1)(a) of the ALRA.

28. On 14 May 1999, Commissioner Olney handed down his decision that the claim area remained vested in the Commonwealth. He ruled that NTP 2001 was unalienated Crown land, and so available for claim. A copy of the reasons for ruling are annexed to this report as Annexure B.

29. The claim was then mentioned periodically at callovers between 1999 and 2006. On 5 December 2006, Commissioner Olney requested to the Northern Land Council for the claimants to provide their claim materials in respect of the claim area pursuant to section 67A(7) of the ALRA. As a result, the Northern Land Council on behalf of the claimants indicated that they would pursue the claim, and it proceeded towards a hearing by the Commissioner.

30. On 6 July 2007, Commissioner Olney gave notice of an intention to commence an inquiry into the claim in October 2007. That notice was also publicly advertised in the NT News on 11 July 2007. The hearing was proposed for 15 October 2007. It was deferred to a date in 2008 at the request of the Northern Land Council. The appropriate claim documents were lodged on 4 February 2008, pursuant to Commissioner Olney's direction.

31. On 15 April 2008, the Northern Land Council wrote to Commissioner's Office informing that the claimants had reached an in-principle agreement with the Northern Territory to settle the land claim to the high water mark and sought Commissioner Olney's view as to not pursuing the inter-tidal component of the claim until broader inter-tidal zone negotiations were held. The matter was then stood over pending the outcome of the decision of the *Blue Mud Bay case* and the following negotiations between the Northern Territory and traditional Aboriginal owners. However, as detailed in the following paragraphs, a settlement between the parties in respect of the claim area never eventuated.

32. On 15 February 2012, I wrote to the Northern Land Council, the Northern Territory and the Commonwealth seeking an update as to the progress of the claim. The Northern Territory notified by letter dated 9 March 2012 that the in-principle agreement regarding the claim area to the high water mark was subject to a lease in accordance with section 11A of the ALRA between the Northern Land Council and AMSA, but that AMSA had not yet indicated its position.

33. On 9 April 2012, the Northern Land Council advised my Office that the terms of an agreement under section 11A of the ALRA with AMSA over its use of the claim area were being finalised. The remaining issue at this point in time was in relation to detriment relating to tidal waters overlying Aboriginal land or land subject to claim under the ALRA.

34. AMSA and the Northern Land Council entered into an agreement under section 11A of the ALRA in 2013 indicating the intention of the parties to enter a lease upon granting of the location of the Cape Hotham lighthouse as Aboriginal land.

35. The claim was then once again mentioned periodically at callovers between 2012 and 2020 while negotiations between the Northern Territory and the Northern Land Council pertaining to public access to water overlying Aboriginal land following the *Blue Mud Bay case* were ongoing. Those negotiations had not, and so far as I am aware have still not, resolved that question.

36. On 20 March 2020 the Northern Land Council wrote to my Office informing that it had received instructions to settle the claim following the outcome of the Woolner LC. The *Woolner LC Report* was tabled in Parliament on 29 March 2022 by the former Minister for Indigenous Australians, the Hon Ken Wyatt AM.

37. As the foreshadowed resolution had not eventuated, a directions hearing was then held on 17 August 2022 and a timetable was determined to progress the claim to hearing.

38. The primary claim material, which included the Healey Report referred to above, as well as a Site Register and Site Map, Claimants' Personal Particulars, Genealogies (Exhibits A2 to A5) and the Submission on the Status of Land Claimed (Exhibit A1), were lodged with my Office on 14 October 2022. The Clarke Report (Exhibit A6), also referred to above, was lodged on 17 October 2022.

39. On 5 October 2022 I gave to the claimants and to the Northern Territory, and to other potentially interested persons and entities, notice of an intention to commence an inquiry into the claim. That notice was also publicly advertised in the NT News and the Australian on 1 October 2022 and in the Koori Mail on 5 October 2022.

40. Notified parties included the Limilngan-Wulna (Land Holding) Aboriginal Corporation, which holds the title to NTP 2012 immediately adjacent to the claim area, however, no response was received so I have proceeded on the basis that it did not wish to participate in the hearing. The Northern Land Council did not suggest that it had particular interests of significance which might be affected by the proposed Report.

41. Apart from the proper interest of the Northern Territory in the identification of the traditional Aboriginal owners, the only persons or entities to respond were concerned with the matter of detriment. That is referred to when addressing detriment below. A list of those who gave notice of intention to participate in the Inquiry is included in Annexure C to this Report.

42. AMSA wrote to my Office on 7 October 2022 advising that it did not intend to be heard in relation to the land claim but drawing my attention to the agreement with the Northern Land Council referred to above. There was no issue about its ongoing validity.

43. The Inquiry commenced on 28 October 2022 in Darwin, and the primary claim materials referred to above were tendered as evidence without objection. Counsel for the claimants and the Northern Territory were present.

44. On 16 November 2022, the Northern Territory wrote to my Office informing that it acknowledges that the Wulna claimant group are the traditional Aboriginal owners of the claimed land.

45. On 24 February 2023, the Northern Land Council lodged with my Office its written submissions on the issue of traditional Aboriginal ownership of the claim area, having regard to the Norther Territory's acknowledgment that the Wulna claimants are the traditional Aboriginal owners for the claim area. The brief Responsive Submissions of the Northern Territory on traditional ownership formally confirmed its position. In addition, the Northern Territory and other parties' submissions and responsive submissions on detriment were then lodged with my Office throughout February and March 2023. It was common ground that a separate hearing to receive additional evidence on the issue of detriment was not necessary, and that the detriment issues could be addressed on the basis of the respective submissions.

3. TRADITIONAL ABORIGINAL OWNERSHIP

46. Although the traditional Aboriginal ownership of the claimed areas is not in issue, it is still a requirement of the Commissioner to address the matters referred to in section 50(1)(a) and (3)(1) of the ALRA, including as to the strength of the traditional attachment of the claimants to the claimed land. The material relevant to this task in the Inquiry are the documents referred to above as Exhibits A1 to A6 and the Healey Report, and the Submissions on Behalf of the Claimants on Traditional Aboriginal Ownership (Claimants' Traditional Aboriginal Ownership Submissions) and the brief Responsive Submissions of the Northern Territory.

47. Given that the Northern Territory accepted traditional ownership, my comments on this matter are brief.

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

    (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.

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

3.1. A LOCAL DESCENT GROUP

50. It is accepted that a 'local descent group' constitutes "a collection of people related by some principles of descent, possessing ties to land who may be recruited…on a principle of descent deemed relevant by the claimants": see *Finniss River Land Claim (No. 39) Report No. 9* (22 May 1981) per Toohey J as Commissioner.

51. The above definition was adopted and expanded upon by the Court in *Re Northern Land Council; Tibby Quall and Central 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 to include the understanding that while the principle of recruitment in operation must be some form of descent, it does not need to be interpreted only in a biological sense and that it may change over time due to the circumstances of the group: [64]-[66].

52. I apply that explanation of a 'local descent group' and its accompanying descent criteria here.

3.1.1. Principles of Descent

53. It is submitted by the claimants and accepted by the Northern Territory that the Wulna are the local descent group. The principles of descent are described in the Healey Report in Chapter 4 and in the Clarke Report in Chapter 3. All members of the Wulna

language group comprise a single clan. The Healey Report details how previously strict principles of descent and a preference for patrifilial descent have relaxed over time to become in practice a cognatic model of descent, including factors such as adoption: pp 23-24. The Clarke Report maintained that position.

3.1.2. Wulna local descent group

54. The cognatic model of descent described in the Healey Report and in the Clarke Report can also be seen in the Genealogies. Although membership of the Wulna local descent group was traditionally established through the patriline, there no longer remain any members of the group who can claim descent by this model: see Healey Report p 23. The Genealogies show three deceased apical ancestors (and putative brothers): Anyulnul, Wulna and Finity. Of the three, only Finity is survived by members of the local descent group.

55. Finity was married to a Larrakia woman, Blanchie (deceased), with whom he had two daughters, Topsy Drysdale Garramanak and Hilda Gunmunga (both deceased). All members of the Wulna group now claim descent through one of these two daughters.

56. The Campbell family, descendants of Jeanie Bishop Lunbirr (deceased), are linked to Finity and claim Wulna membership through Jeanie's mother's mother, Topsy Drysdale Garramanak. Garramanak had four daughters with Larrakia man Frank (deceased). They were Mary Minmarrima, Flora Menabirrina, May, and Rosie Malamgin (all deceased). Mary Minmarrima adopted Jeanie Bishop Lunbirr, who claims Wulna this way: see Genealogies (Sheet 2).

57. The Fejo and Rankin descendants also claim descent through daughters of Garramanak; Flora Menabirrina and Rosie Malamigin, who both had children with Nipper Rankin: see Genealogies (Sheets 3 and 4).

58. Garramanak also had one daughter with each Frank Moo and William Lee (both deceased). Their descendants are the Browne and Talbot families respectively, both of whom claim Wulna membership through their mother's mother: see Genealogies (Sheets 5 and 6).

59. The Kenyon family are also linked to Finity through their mother's mother and thus claim Wulna membership. They are the descendants of Finity's other daughter Gunmunga and her adoptive daughter Joan Kenyon (deceased): see Genealogies (Sheet 7).

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

3.2. COMMON SPIRITUAL AFFILIATION AND PRIMARY SPIRITUAL RESPONSIBILITY

61. After establishing that the claim group is the local descent group for the purposes of the ALRA, the following task of the Commissioner in respect of traditional Aboriginal ownership is to identify whether the claim group has 'common spiritual affiliations, being affiliations that place the group under a primary spiritual responsibility for that site and for the land', as per the first criterion of the definition of 'traditional Aboriginal owners' contained in section 3(1) of the ALRA. It has been accepted in a number of land claims that common spiritual affiliation and primary spiritual responsibility can be established by demonstrating a connection to sites nearby the claim area and that sites need not be directly within the claim area itself: 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) (*Fitzroy/Victoria River LC Report*) at [4.1]; *Frances Well Land Claim (No. 64) Report No. 73* (16 June 2016) at [126]–[132].

62. The material relevant to this criterion is contained in Chapter 5 of the Healey Report, Chapter 4 of the Clarke Report, and the Site Register.

63. The affiliations and responsibility of this group to the claim area and its surrounds has been acknowledged by the Northern Territory in this claim and in other contexts: see Submissions on Behalf of the Claimants on Traditional Aboriginal Ownership (Claimants' Submissions) at [13]. These include the *Woolner LC Report*, which recommends a grant of land, including the intertidal zone around Djukbinj (NTP 2012), and the resolution of the Limilngan-Wulna LC.

64. Given the small size of the claim area, it is unsurprising that sites of significance to the Wulna group do not fall within the claim area. There are a number of sites, however, located nearby the claim area and within country associated with the Wulna.

65. *Nayidanygu* (Old Man rock/The Narrows/Derriba) (Site 1) is recorded in the Site Register as a site of particular significance to Wulna people and is located at the mouth of the Adelaide River, about 20 kilometres south of the claim area. The Travelling Women Dreaming is associated with this site, who are said to have created *Nayidayngu* when they killed one of their husbands. This is regarded as a dangerous site and spiritual responsibilities in respect of *Nayidayngu* include the observance of appropriate behaviours when visiting the site, such as the throwing of tobacco. This is practised by Kenyon family members: see, e.g., Clarke Report at [55].

66. The Rainbow Serpent Dreaming is represented by the Line of Palms (Site 2) crossing the Cape Hotham Peninsula about 15 kilometres south of the claim area. In the Healey Report, claimant Graham Durrkmul Kenyon explains how his late father, and custodian of scared Wulna knowledge, Tony Kenyon described the line of palms winding across the landscape like the track of a snake: p 30.

67. Escape Cliff burials (Site 3) and Banyan tree burials (Site 4) are both believed to be the graves of Wulna ancestors. Spiritual affiliation to these sites is demonstrated by Graham Durrkmul Kenyon experiencing goosebumps upon visiting the sites, which he understood as indicating the presence of spirits: see Healey Report pp 30-31.

68. The camp site or 'Brownie's camp' (Site 5), is a popular camp site 2 kilometres south of the claim area, named after the late Robert Browne and his family who were known to camp there. This indicates an ongoing connection to and use of country proximate to the claim area.

69. The Healey Report in Chapter 5 and the Clarke Report in Chapter 4 provide further detail of the Wulna group's primary spiritual responsibility in respect of the claim area and surrounding country. This includes the sharing of cultural knowledge of sites, mythology and ritual practices between members. The right to speak for country is also seen by claimants as an essentially spiritual responsibility, which requires knowledge of country and practices relating to the land. However, this knowledge is unevenly distributed as some members of the Wulna group have had greater opportunities than others to acquire knowledge by virtue of living on or in proximity to traditional country: see Healey Report p 30. For example, the Healey Report notes Robert Browne's travel throughout Wulna country and his desire to gain knowledge appropriate to his age and gender: p 31. Claimants acknowledge their responsibility to continue to gain knowledge of country and to pass it onto younger generations.

70. Claimants have a demonstrated responsibility for maintaining the health of country, including through the practice of burning, which Graham Durrkmul Kenyon describes in the Healey Report as being used to 'clean up' the country: p 31. Efforts to maintain the health of the country include limiting unrestricted access for outsiders, particularly to hunting and camping areas, and cleaning up rubbish left by campers and fishers. In the Clarke Report, claimants Joseph Lee Browne and Graham Durrkmul Kenyon express aspirations to become more involved in environmental management of the claim area and surrounding country: at [65].

71. As is accepted by the Northern Territory and based on the evidence, I find that the Wulna group have common spiritual affiliations and primary spiritual responsibility for the relevant sites.

3.3. RIGHTS TO FORAGE

72. The second criterion for the establishment of traditional Aboriginal ownership as per the definition contained in section 3(1) of the ALRA requires a finding that the claimants 'are entitled by Aboriginal traditional to forage as of right over that land'.

73. While the small size of the claim area makes it insufficient to be a significant source of resources alone, foraging on the land and adjacent seas is an important expression of the claimants' attachment to land and is practiced throughout Wulna country. Members of the claim group have a history of hunting, fishing and camping in the Cape Hotham Area, including Joseph Lee Browne and his late brother Robert Browne who during the 1980s and 1990s regularly fished and crabbed from the mouth of the Adelaide River (to the southwest of the claim area), round the tip of Cape Hotham and into Van Diemen Gulf (on the eastern side of the claim area). Joseph Lee Browne recalls camping on the beach at the tip of Cape Hotham, within the claim area, and living off freshwater springs and food harvested from the sea: see Clarke Report at [68].

74. Graham Durrkmul Kenyon believes that only Wulna people have a right to freely access the resources of the claim area: see Clarke Report at [69]. This is recognised by other Aboriginal groups who agree that permission must be sought to travel on and harvest resources from Wulna country: see Healey Report p 32.

75. It is clear from the evidence that the Wulna possess rights to forage over the claim area, in the sense required by the definition of traditional Aboriginal owners in section 3(1) of the ALRA.

3.4. STRENGTH OF ATTACHMENT

76. The next task of the Commissioner is a consideration of the strength or otherwise of the traditional attachment by the claimants to the land claimed: section 50(3) of the ALRA.

77. As has been accepted in previous land claim reports, a strong traditional attachment is not a requirement to making a recommendation for a grant of land under the ALRA: see, e.g., *Woolner LC Report* at [136]. However, to assist the Minister in making an informed decision in relation to this land claim, I am statutorily required to consider the claimants strength of attachment to the claim area.

78. As stated in the Claimants' Submissions at [30], assessing this criterion is an essentially subjective task, however, some guiding factors have been adopted by past Commissioners including: living in or around the claim area; spiritual connections; economic benefit from the land; ceremonial life; the degree to which traditional spiritual affiliation to various sites is still meaningful to the claimants; the extent to which the claimants access the claimed lands from time to time; the nature of the use of the claimed land; and the strength of the traditional life of the claimants generally: see, e.g., *Daly River (Malak Malak) Land Claim (No. 7) Report No. 13* (12 March 1982) at [183]; *Fitzroy/Victoria River LC Report* at [5.1]–[5.7].

79. Given that no oral evidence was given by claimants during the Inquiry, the materials relied upon for this task are the Healey Report and the Clarke Report. I accept the claimants' submission at [29] that, in the absence of oral evidence, it is still clear that the Wulna group has a significant attachment to the land subject to claim. This is furthered by the finding in the *Woolner LC Report* that the Wulna have a strong attachment to country nearby the claim area and the Northern Territory's acceptance that the claimants are the traditional Aboriginal owners of the claim area.

80. The Healey Report and Clarke Report each detail the historical and ongoing association the claimants and past generations have to the claim area through residing and working in close proximity to it. The small size and remoteness of the claim area make permanent residence within the claim area impractical, however, some claimants have expressed a desire to establish residences on the Cape Hotham Peninsula: see Healey Report p 32. Claimants, and their ancestors, have lived and worked nearby the claim area on Marrakai, Humpty Doo and Koolpinyah Stations, while others have worked as park rangers in the area. Graham Durrkmul Kenyon, for example, worked for the Parks and Wildlife Commission of the Northern Territory in the Djukbinj National Park, thereby participating in the management of Wulna country and conducting activities to maintain the health of the country, such as

burning and weed removal: see, e.g., Healey Report p 32. Additionally, some of the claimants now operate their own tourism businesses in the vicinity of the claim area, for example Graham Durrkmul Kenyon's ecotourism business: see Clarke Report at [71].

81. Claimants have helped to preserve knowledge of country and have assisted in making it available to the public, such as through signage and information boards installed by the Parks and Wildlife Commission of the Northern Territory in public parks on Wulna country, demonstrating knowledge of and attachment to country: see Healey Report p 33.

82. The claimants have, over many years, continued to seek recognition of their traditional interests in the region, including through the lodgement of land claim applications and negotiations with the Northern Territory. Many of the claimants continue to live on Wulna country at the Wairuk Community (Humpty Doo), which was established after repeated attempts by the Wairuk Association to gain rights to land: see Healey Report p 22. Similarly, the Limilngan-Wulna Land Claim settlement agreement with the Northern Territory granted claimants title to the Cape Hotham area (excluding the claim area).

83. Additionally, claimants' spiritual connections and traditional practices are strong. Claimants continue to practice traditional rules, such as ritual smoking and calling out when approaching certain sites, and pass these practices onto younger generations: see e.g., Clarke Report at [52] and [64]. Such evidence demonstrates a strong attachment to the claim area.

84. Based on the evidence and submissions in this claim, and in accordance with the guiding factors identified by past Commissioners, I consider that there is no doubt as to the strong attachment of the claim group to the claimed area in this Inquiry. So much has been accepted by the Northern Territory.

3.5. ADVANTAGE OF A GRANT

85. 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 that advantage that would accrue to those Aboriginals, if the claims were acceded to either in whole or in part.

86. The Claimants' Submissions at [37] and the Genealogies indicate that there are approximately 140 Aboriginal persons with traditional attachments to the claim area. It is also said at [37] that there are likely to be other Aboriginal persons with traditional attachments outside of those specified in the claim group, including:

    (a) Non-claimants affiliated with the Wulna claimants by more distant genealogical connections;

    (b) Non-claimants connected to the claim area through place of birth or Dreaming affiliation;

    (c) Non-claimants whose own country neighbours or is near the claim area;

    (d) Non-claimants who are entitled to forage in the claim area pursuant to Aboriginal tradition;

(e) Non-claimants with a strong historical link to the claim area, perhaps through living or working near the claim area; and

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

87. Although the nature and extent to which the grant of the claimed land under the ALRA would advantage individuals will inevitably vary, I accept the claimants' submissions on this point. A grant would provide the claimants with formal recognition of their traditional rights and responsibilities to the area. It would also allow them the practical benefits of a higher degree of control over the area, such as enabling them to be beneficiaries of any agreements entered into with other parties for the use of the claim area.

88. Finally, a grant is recognition of the forced dispossession of Aboriginal people and of the ongoing impacts of colonisation.

3.6. OTHER MATTERS FOR COMMENT

89. As the land claims the subject of this Report do not relate to alienated Crown land, section 50(3)(d) of the ALRA is not applicable.

90. Similarly, the claimants did not make any submissions in relation to section 50(4) of the ALRA and therefore there is no need for me to comment.

3.7. FORMAL FINDINGS AND RECOMMENDATION

91. I conclude that the Wulna claimants are the local descent group in the sense required by the ALRA.

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

93. The Wulna group are entitled to forage as of right over that land.

94. I accordingly recommend to that Minister that the area of Crown land the subject of this Inquiry should be granted to a Land Trust for the benefit of the Aboriginals who I have found to be traditional Aboriginal owners of that land.

95. A complete list of the members of the Wulna claimant group is annexed to this Report as Annexure D.

4. DETRIMENT AND PATTERNS OF LAND USAGE

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

4.1. RECREATIONAL FISHING

97. Written submissions in relation to the detriment that might be occasioned to recreational fishers if a grant were to be made were received by the Northern Territory and the Amateur Fishermen's Association of the Northern Territory (AFANT). Submissions on this topic were brief and no additional evidence on detriment was filed by either party.

98. The primary issue raised was loss of access to the claim area, although it was generally accepted by both the Northern Territory and AFANT that any detriment could be dealt with through permits or access arrangements.

99. The Submissions of the Northern Territory in Relation to Detriment dated 23 February 2023 (Northern Territory Detriment Submissions) noted at [13]-[14] that the present right of access to the intertidal zone within the claim area enjoyed by the public, including the right to fish, would be abrogated if the claim area were to be granted as Aboriginal land. However, the Northern Territory stated its confidence that should the claim area be recommended for grant, it could be included in broader negotiations regarding long term access by the public: [15]. Perhaps because of the small area of land involved, the Northern Territory did not develop its submission on how to accommodate that detriment (or to minimise it) in any detail.

100. AFANT, in its Submission on Detriment dated 3 March 2023, submitted that while the claim area is relatively small and is not a primary fishing location, it is in the vicinity of boats ramps and is adjacent to popular fishing destinations: [5]. It was submitted that detriment would therefore be suffered if the claim area were to be granted as Aboriginal land, but that it could be ameliorated through access arrangements or through an easily obtainable low cost permit system: [6]

101. In the Submissions on behalf of the Claimants on Detriment and Patterns of Land Usage dated 17 March 2023 (Claimants' Detriment Submissions), it was argued that no detriment had been established as no evidence of fishing in the claim area was submitted and that the loss of a theoretical right of access does not establish detriment: at [13]-[15].

102. Despite the lack of evidence, I accept the submissions of both the Northern Territory and AFANT that the proximity to known fishing areas makes it probable that at least a low level of fishing occurs in the claim area: see, e.g., Reply Submissions of the Northern Territory of Australia in Relation to Detriment dated 29 March 2023 at [7]-[11]; AFANT Submission in Response on Detriment dated 24 March 2023 at [4]. In the overall picture of recreational fishing in the Northern Territory, the prospect

of the closure of the tidal area of the claim area from recreational fishing would have minimal effect, as this part of the claim area is very small. Nevertheless, some potential detriment is at least foreseeable.

103. However, I also accept the submissions of the claimants that conditions are good for agreement making under either section 11A or section 19 of the ALRA and that automatic issue permits could be made available for the claim area: see Claimants' Detriment Submissions at [22] and [26]. I have discussed in more detail the nature of the proposed access arrangements by permit in the *Report on the Review of Detriment: Aboriginal Land Claims Recommended For Grant But Not Yet Finalised*, provided to the Minister on 24 December 2018, at section 6.3, pp 85-96.

104. To the limited extent that recreational fishing may occur in the claim area, it can be said that loss of access would result in detriment in the sense that recreational fishers would not be able to access the claim area without permission from traditional Aboriginal owners. However, the Minister in any event may consider that any detriment would be alleviated through a manageable and working permit system. There also remains the capacity for the traditional Aboriginal owners to separately negotiate an agreement for recreational fishing to take place in the waters above the claim area from time to time under section 19 of the ALRA (or through the Northern Land Council under section 11A of the ALRA if the agreement is made before the grant of the claimed land).

4.2. CAPE HOTHAM LIGHTHOUSE

105. The Cape Hotham Lighthouse was addressed in the Northern Territory Detriment Submissions and the Claimants' Detriment Submissions, both of which stated that any possible detriment has been resolved by the section 11A agreement between AMSA and the Northern Land Council: see Northern Territory Detriment Submissions at [11]; Claimants' Detriment Submissions at [11]. The agreement is detailed above at [2.3], I do not need to repeat it here.

106. AMSA informed the Commissioner that it did not need to participate in the hearing as its interests were adequately protected by that agreement. In the circumstances, no detriment will be occasioned to AMSA if the land were to be granted.

4.3. OTHER POTENTIAL DETRIMENT

107. There was no suggestion from the Northern Territory that, in respect of the particular and limited area the subject of the claim, any other potential detriment would flow from the grant of the claim area. Nor did any other person or entity raise any such concern.

4.4. EXISTING AND PROPOSED PATTERNS OF LAND USE

108. For the sake of completeness, 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 is prescribed as a relevant topic for comment, distinct from detriment, by section 50(3)(c) of the ALRA. There was no focus on this topic in the submissions. There is no reason to think that such patterns of land use would be affected in any notable way by the grant of Aboriginal land.

5. CONCLUSION

109. In accordance with my functions under section 50 of the ALRA, I have presented earlier in this Report my finding that the Wulna claimants are the traditional Aboriginal owners of the claimed area. This is accepted by the Northern Territory.

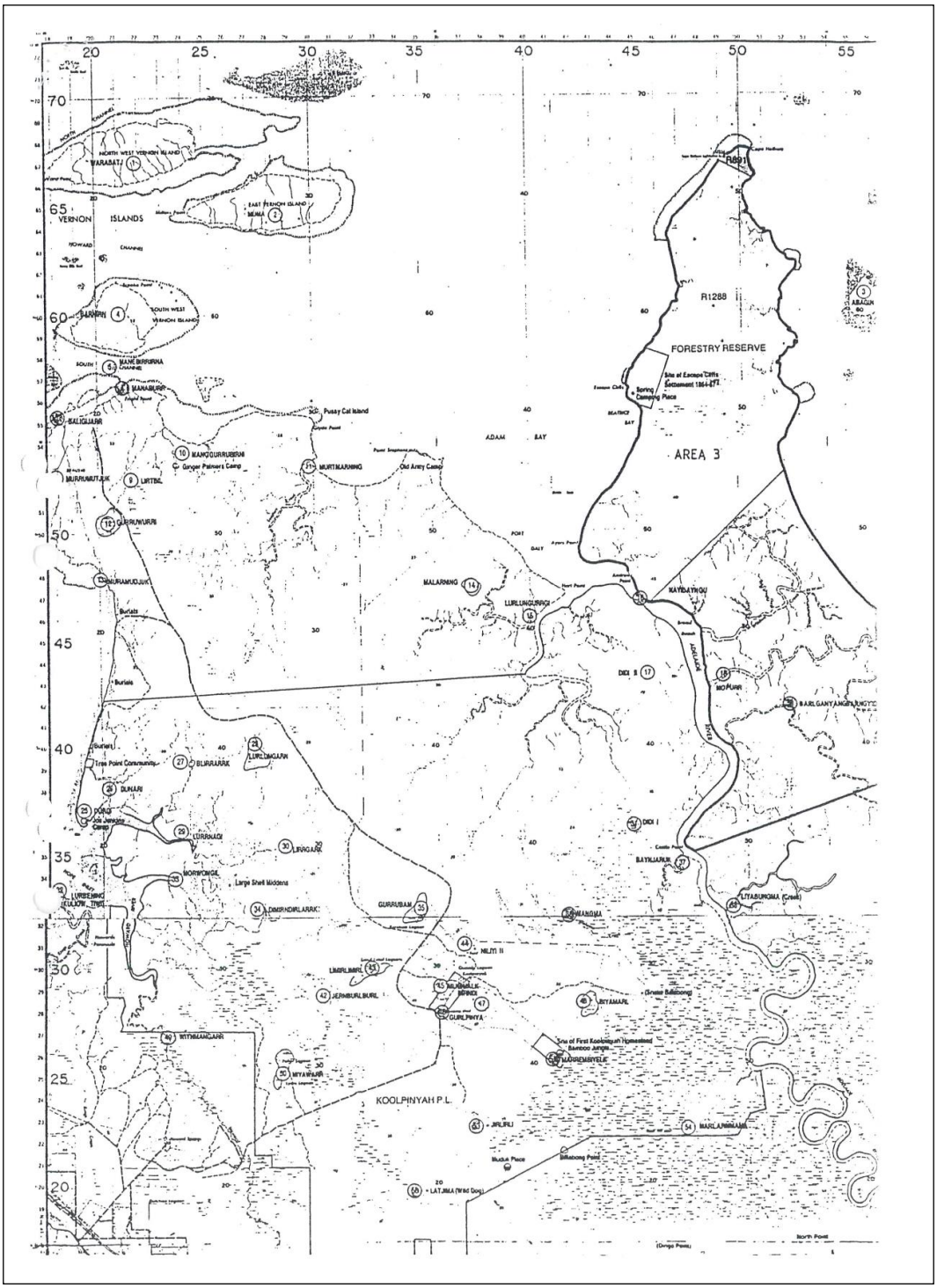
110. For the reasons given above, I recommend that the whole of the land comprising NTP 2001 be granted to a single land trust for the benefit of Aboriginal people entitled by Aboriginal tradition to the use or occupation of that land as the traditional Aboriginal owners of that land. A list of those persons is contained at Annexure D to this Report. It is not a comprehensive or static list and will inevitably change over time: that is a matter for the Northern Land Council.

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

112. I have also commented upon submissions relating to section 50(3)(b) of the ALRA, that is, matters of detriment. As discussed above, the concerns of those asserting detriment can be properly dealt with through a controlled access structure.

113. The balance of the asserted detriment 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, the capacity for access under an appropriate permit system for recreational fishing or agreement-making between the traditional Aboriginal owners and the persons who might make use of the claimed areas might be seen by the Minister as providing a satisfactory basis for accommodating such detriment.

ANNEXURE A: MAP OF WULNA (NTP 2001) LC



Source: Northern Land Council

ANNEXURE B: RULING OF COMMISSIONER OLNEY ON THE AVAILABILITY OF NTP 2001 FOR CLAIM

BEFORE THE ABORIGINAL LAND COMMISSIONER
THE HONOURABLE JUSTICE OLNEY

IN THE MATTER of the *Aboriginal Land Rights (Northern Territory) Act* 1976

AND:

IN THE MATTER of the Wulna Land Claim (No. 155)

REASONS FOR DECISION

Section 50(1) of the *Aboriginal Land Rights (Northern Territory) Act* 1976 (*the Land Rights Act*) provides:

> **50. (1)** The functions of a Commissioner are:
> (a) on an application being made to the Commissioner by or on behalf of Aboriginals claiming to have a traditional land claim to an area of land, being unalienated Crown land or alienated Crown land in which all estates and interests not held by the Crown are held by, or on behalf of, Aboriginals:
> (i) to ascertain whether those Aborignals or any other Aboriginals are the traditional Aboriginal owners of the land; and
> (ii) to report his findings to the Minister and to the Administrator of the Northern Territory, and, where he finds that there are Aboriginals who are the traditional Aboriginal owners of the land, to make recommendations to the Minister for the granting of the land or any part of the land in accordance with sections 11 and 12.

The functions of the Commissioner to ascertain who are the traditional Aboriginal owners of land and to report his findings and make recommendations are dependent upon the making of an application which meets all of the criteria expressed in paragraph 50(1)(a); and in particular the land in respect of which the claim is made must be either unalienated Crown land or alienated Crown land in which all interests not held by the Crown are held by or on behalf of Aboriginals. If the status of the land does not fall within the scope of land described in the subsection, the application cannot properly be regarded as an application "referred to in paragraph 50(1)(a)" (a

term used in s 67A of the Act) nor will the Commissioner have any function to perform in relation to it.

On 27 March 1996 the Northern Land Council (NLC) made application to the Aboriginal Land Commissioner pursuant to paragraph 50(1)(a) of the *Land Rights Act* on behalf of 102 named Aboriginals claiming to have a traditional land claim to an area of land in the Northern Territory described as "Northern Territory Portion 2001 down to the low water mark" (the claimed land). In the application the claimed land is said to be unalienated Crown land. The application is known, and referred to herein, as the Wulna Land Claim (No 155).

The Commonwealth of Australia (the Commonwealth) and the Australian Maritime Safety Authority (AMSA) assert that the claimed land is not, and at the time the application was made was not, "Crown land" within the meaning of that term as defined in the *Land Rights Act* and accordingly was not "unalienated Crown land". If this be so the application is not one in respect of which the Aboriginal Land Commissioner is authorised to perform any function under paragraph 50(1)(a).

In s 3(1) of the *Land Rights Act* "Crown land" is defined to mean:

> land in the Northern Territory that has not been alienated from the Crown by a grant of an estate in fee simple in the land, or land that has been so alienated but has been resumed by, or has reverted to or been acquired by, the Crown, but does not include:
> (a) land set apart for, or dedicated to, a public purpose under an Act; or
> (b) land the subject of a deed of grant held in escrow by a land Council.

Paragraph (a) of the definition was substituted by the *Lands Acquisition (Repeal and Consequential Provisions) Act 1989.* Prior to that paragraph (a) was in the following form:

> (a) land set apart for, or dedicated to, a public purpose under the Lands Acquisition Act 1955, or under any other Act.

The alteration has no bearing upon the matter presently under consideration and for the purposes of these reasons reference is hereafter made to the amended form.

Unalienated Crown land is Crown land in which no person (other than the Crown) has an estate or interests, but does not include land in a town. (*Land Rights Act*, s 3(1)).

The primary submission made on behalf of the Commonwealth and the AMSA is that at all relevant times the claimed land was "set apart for, or dedicated to, a public purpose", namely for the purpose of a lighthouse. As this question concerns the status of the claimed land it goes to the Commissioner's jurisdiction to exercise any function in relation to the application. In order to deal with the issue I gave directions for the exchange of written submissions and provided an opportunity for the parties to make oral submissions in support of their respective cases. Both the Australian Government Solicitor (on behalf of the Commonwealth and the AMSA) and the NLC (on behalf of the claimants) made written submissions but neither wished to be otherwise heard. The parties agree that there is no dispute as to the relevant facts, and the matter is being dealt with on the basis of the written submissions.

It will be convenient to first establish the context in which the dispute has arisen by setting out, in chronological order, the relevant events.

1. By a proclamation dated 23 February 1931 which was published in the Commonwealth of Australia Gazette on 26 February 1931, an area of Crown land in the Northern Territory (which the parties agree is the same land as is now described as NTP 2001) was reserved for lighthouse purposes pursuant to s 102 of the *Crown Lands Ordinance 1927*. The land was designated as Reserve 891.

2. The *Crown Lands Ordinance 1927* was repealed upon the commencement of the *Crown Lands Ordinance 1931* on 12 June 1931. Although the 1931 Ordinance contained a provision corresponding to s 102 of the 1927 Ordinance, it did not contain any transitional or saving provision having the effect of preserving reservations made under the repealed law.

3. In 1976 the Legislative Assembly of the Northern Territory passed the *Crown Lands (Validation of Proclamations) Ordinance* (the *Validation Ordinance*) which commended on 7 January 1977. Section 2(1) of the *Validation Ordinance* provided:

> 2.(1) Notwithstanding the repeal of a law that was in force in the Northern Territory under which a proclamation described in the Schedule was made, a county, hundred or town constituted by such a proclamation or lands set apart or reserved as town lands or reserved lands by such a proclamation shall, to the extent indicated in the third column of the Schedule, be deemed to have been, and, subject to sub-section (2), to be, so constituted, set apart or reserved, as the case may be, according to the tenor of the proclamation as if the proclamation were made under the Crown Lands Ordinance and that Ordinance was in force on the date of the proclamation.

The relevant item in the Schedule refers to a proclamation made on 23 February 1931 published in the Commonwealth of Australia Gazette No. 16 on 26 February 1931 relating "proclaiming lighthouse reserve, Adam Bay/Chambers Bay (Cape Hotham)". It is common cause that this is a reference to claimed land.

4. The *Land Rights Act* commenced on 26 January 1977.

5. On 31 March 1978, the NLC made an application to the Aboriginal Land Commissioner pursuant to paragraph 50(1)(a) of the *Land Rights Act* on behalf of Aboriginals described as numbers of the Wulna linguistic group claiming to have a traditional land claim to several areas of land including the claimed land which was described therein as Reserve 891. This application was

originally known as the Woolner Land Claim (No 10) and is referred to hereafter by that name.

6. On 1 July 1978 the *Northern Territory (Self-Government) Act* 1978 (the *Self-Government Act*) commenced and by virtue of s 69(2) of that Act, the land claimed in the Woolner Land Claim (No 10) vested in the Northern Territory.

7. On 29 June 1979, pursuant to s 70(2) of the *Self-Government Act,* the land which had been proclaimed as Reserve 891 in 1931 was acquired by the Commonwealth from the Northern Territory for the public purpose of "providing for the operational and administrative requirements of the Department of Transport".

8. On 5 June 1987 the *Land Rights Act* was amended, inter alia, by the addition of s 67A. The effect of this section is discussed below.

9. The *Australian Maritime Safety Authority Act 1990* (the *AMSA Act*) commenced on 22 October 1990. Section 31 of that Act provides:

> 31.(1) In this section:
> "interest" includes any estate, right or title, whether legal or equitable;
> "land" includes buildings and fixed structures.
>
> (2) Where the Minister, by notice published in the Gazette for the purposes of this section:
> (a) describes any land in which the Commonwealth holds an interest; and
> (b) describes that interest;
> the following provisions have effect.
>
> (3) The interest is transferred to the Authority on the day specified in the notice, not being earlier than the day of publication of the notice.
>
> (4) Where the interest of the Commonwealth is of such a kind that it is not held from another person, the transfer has effect as a grant to the Authority of an estate in fee simple.

(5) The Minister must cause to be lodged with the Registrar-General, Registrar of Titles or other appropriate officer of the relevant State or Territory a copy of the notice, certified in writing signed by an officer of the Department authorised by the Minister for the purpose.

(6) The officer with whom a copy is lodged may register the transfer as nearly as possible as if it were a dealing in land and may deal with and give effect to the copy as if it were a grant or conveyance duly executed under the laws in force in the relevant State or Territory.

(7) A notice must not be published under this section after one year from the commencement of this section.

10. On 16 October 1991 a delegate of the Minister for Shipping and Aviation Support published in the Gazette a notice under s 31 of the *AMSA Act* purporting to transfer land described in the notice as "Northern Territory Portion 2001 (Cape Hotham Lighthouse)" to the AMSA. The notice specifies the day of publication of the notice as the day on which the interest of the Commonwealth was transferred to the AMSA. On 21 October 1991 a duly authorised officer of the Department of Transport and Communications signed a certificate for the purposes of s 70(5). There is no evidence as to whether the certificate was lodged with the Registrar-General but it may be assumed for present purposes that this was done.

11. On 18 March 1996 the Woolner Land Claim (No 10) was withdrawn.

12. On 27 March 1996 application in the Wulna Land Claim (No 155) was made to the Aboriginal Land Commissioner.

The question as to whether or not the original reservation in 1931 was effected "under an Act" does not have to be finally determined. In 1931 the authority to make the proclamation was derived through delegated legislation (the *Crown Lands Ordinance 1927)* made pursuant to powers conferred by two Commonwealth statutes, the *Northern Territory Acceptance Act* 1910-1919 and the *Northern Australia Act* 1926.

It would seem to be a reasonable conclusion that the reservation was made under those two Acts. However, the repeal of the 1927 Ordinance in the circumstances which have been described avoids the need to consider that issue further. It is beyond doubt that the status of the claimed land as a reserve after 7 January 1977 was derived from the *Crown Lands (Validation of Proclamations) Ordinance 1976*.

It is unnecessary to trace in detail the evolutionary process whereby the power to make Ordinances "for the peace order and good government of the Territory", formerly exercised by the Governor-General, devolved initially upon a Northern Territory Legislative Council which at first was appointed and later was partly appointed and partly elected and subsequently, in 1974 pursuant to the *Northern Territory (Administration) Act 1974*, upon an elected Legislative Assembly. The process was taken a step further in 1978 when the *Self-Government Act* came into force but for the moment it is unnecessary to move beyond the situation which prevailed when the *Validation Ordinance* was passed.

The *Land Rights Act* is an Act of the Commonwealth Parliament passed in 1976. It commenced on 26 January 1977. At the time of its passage through the Parliament the legislative powers of the Legislative Assembly were well established. Self-government was obviously under contemplation but had not been achieved. In this context Parliament chose to pass a law (the *Land Rights Act*) which in numerous places refers specifically to provisions applying under a "law of the Northern Territory", a term defined (in the Act as passed in 1976) as

> a law made under, or having effect in the Northern Territory by virtue of, the *Northern Territory (Administration) Act* 1910.

Section 3(1) defines terms such as "miner's right", "mining interest", "sacred site" and "town" by reference to the corresponding meaning of those terms under laws of the Northern Territory and a clear distinction is made between a law of the

Commonwealth and a law of the Northern Territory in the definition of the term "Authority" which means

> an authority established by or under a law of the Commonwealth or a law of the Northern Territory.

Other provisions of the *Land Rights Act* which specifically refer to laws of the Northern Territory include s 50(2) (which authorises the Aboriginal Land Commissioner to exercise functions conferred by a law o f the Northern Territory); s 67 (which prohibits the resumption, compulsory acquisition or forfeiture of Aboriginal land under any law of the Northern Territory); s 69(1) (which relates to the entry of persons on land that is a sacred site); s 70 (which relates to the entry of persons on Aboriginal land); and s 74 (which preserves the application of Northern Territory laws in relation to Aboriginal land).

As a matter of statutory construction, it would be inconsistent with the scheme of the *Lands Rights Act* to treat a reservation of land made by an Ordinance of the Legislative Assembly in 1977 as having been made under an Act of the Commonwealth Parliament. No doubt the authority to legislate had its origin in a Commonwealth statute but the reservation was made by a law of the Northern Territory.

In *R v Kearney; ex parte Japanangka* 158 CLR 395 the High Court had occasion to consider this precise question. The following extracts from the judgments in *Japanangka* leave no room for doubt as to the Court's view.

per Gibbs CJ at pp 403-4:

> It is unnecessary to consider whether any of the action taken in relation to any of the areas had the result that they were "set apart" within the meaning of the definition. If they were set apart, in my opinion, they were not set apart "under any other Act". The word "Act" itself clearly means an Act of the Commonwealth: s 38(1) of the *Acts Interpretation Act* 1901 (Cth), as amended. The question then is whether the words "land set apart ... under the *Lands Acquisition Act* 1955 or under any other Act" refer to land set apart under a law

> of the Northern Territory which derives its legal efficacy from an Act of Parliament. The words "under any other Act" might in some contexts be wide enough to include something done under a law which is given legal effect by an Act. However, the association of those words with the earlier reference to the *Lands Acquisition Act* suggests at first impression that the intention of the Parliament is to refer to a setting apart done under the direct authority of another Act of the Parliament itself. This view is strengthened by the circumstance that in a number of places in the Land Rights Act the Parliament has specifically referred to a "law of the Northern Territory" (which is defined in s 3(1) of the Act) and in some provisions had drawn an express contrast between "any other Act" and "a law of the Northern Territory"; ... In the light of these indications of the intention of the draftsman, I find it impossible to understand the words "under any other Act" as including the meaning "under a law of the Northern Territory".

per Murphy J at p 405-6:

> The definition of Crown land in (the Land Rights) Act excludes "land set apart for, or dedicated to, a public purpose under the *Lands Acquisition Act* 1955 or under any other Act". The Attorney-General for the Northern Territory and the Northern Territory Minister for Lands and Housing contended that the lands had been set apart for, or dedicated to, a public purpose under various Ordinances or Acts of the Northern Territory. The answer is that the Land Rights Act in referring to "any other Act" is referring to Acts of the Parliament. The *Acts Interpretation Act* 1901 provides "An Act passed by the Parliament of the Commonwealth may be referred to by the word 'Act' alone" (s 38(1)). The Land Rights Act in many places discloses an intention to distinguish between Acts and Northern Territory Acts.

per Wilson J at p 412:

> ... in my opinion, a review of the Land Rights Act makes it plain that when the Parliament uses the phrase "any other Act" it is referring only to Acts of the Commonwealth Parliament. The Act consistently draws a distinction between Commonwealth Acts and those of the Northern Territory.

per Brennan J at p 423:

> The Land Rights Act draws a clear distinction between what is done under a law of the Northern Territory and what is done under a Commonwealth Act. ... The term "law of the Northern Territory" is frequently employed in the definition section (s 3), wherein the term is itself defined, as well as in the general provisions of the Act. What is done under a law of the Northern Territory is not treated as having been done under a Commonwealth Act which supports the law of the Northern Territory: see, e.g., the definition of "Authority" in s 3(1). Areas of land which have been set apart de facto or which have been set apart or dedicated under a law of the Northern Territory no doubt require special comment by the Land Commissioner when he makes his report and comments pursuant to s 50(3), but those areas of land do not fall outside the category of Crown land merely by reason of their having been set apart or dedicated under an authority other than a Commonwealth Act.

The remaining Judge, Deane J (at p 424), expressed his agreement with the reasons given by Brennan J.

It must follow that in March 1978 when the Woolner Land Claim (No 10) was lodged, the land which had formerly been designated as Reserve 891 was not then set apart for, or dedicated to, a public purpose under a Commonwealth Act; rather it was land reserved under a law of the Northern Territory. Accordingly, it was not land which was excluded from the definition of "Crown land" and could properly be the subject of an application made under paragraph 50(1)(a) of the *Land Rights Act*.

Section 70 of the *Self Government Act* authorised the acquisition by the Commonwealth for a public purpose approved by the Governor-General of land otherwise vested in the Northern Territory by virtue of s 69(2). For present purposes, the relevant provisions of s 70 are:

> 70.(1) The Minister may, from time to time, recommend to the Governor-General that any interest in land vested or to be vested in the Territory by sub-section 69(2) (including an interest less than, or subsidiary to, such an interest) be acquired from the Territory by the Commonwealth under this section.
>
> (2) The Governor-General may, on the recommendation of the Minister under sub-section (1), authorize the acquisition of the interest for a public purpose approved by the Governor-General.
>
> (3) The Minister may cause to be published in the Gazette notice of the authorization by the Governor-General and, in the notice, declare that the interest is acquired under this section for the public purpose approved by the Governor-General.
>
> (4) Upon publication of the notice in the Gazette or immediately after the commencement of section 69, whichever is the later, the interest to which the notice relates is, by force of this section –
>
> (a) vested in the Commonwealth; and
>
> (b) freed and discharged from any restriction, dedication or reservation made by or under any enactment (not being an interest to which sub-section (6) applies),
>
> to the intent that the legal estate in the interest, and all rights and powers incident to that estate or conferred by the *Lands Acquisition Act* 1955 in relation to that estate, are vested in the Commonwealth.
>
> ...

> (10) A notice shall not be published under this section after the expiration of one year after the commencing date.

In this case the public purpose expressed in the notice published pursuant to s70(3) was

> providing for the operational and administrative requirements of the Department of Transport.

This then raises a question as to whether, by virtue of the acquisition of the land for the stated public purpose, the land should be regarded as having been, for the purposes of the definition of Crown land in the *Land Rights Act* -

> set apart for, or dedicated to, a public purpose under an Act.

In reasons for decision published on 27 June 1980 in relation to the Kenbi Land Claim a former Aboriginal Land Commissioner (Justice Toohey) had occasion to consider whether the acquisition of Quail Island by the Commonwealth pursuant to s 70(2) of the *Self Government Act* amounted to the setting aside or dedication of the land for the public purpose for which it was acquired. His Honour's view as then expressed was:

> Quail Island however was the subject of a notice of acquisition dated 28 June 1979, virtually at the end of the 12 month period during which the Commonwealth was empowered to acquire land for a public purpose. The terms of s 70 have already been mentioned. The reference in s 70(4) to land being vested in the Commonwealth and 'freed and discharged from any restriction, dedication or reservation made by or under any enactment …' is a reference to laws made by the Legislative Assembly following the Self-Government Act and to ordinances made under the *Northern Territory (Administration) Act 1910* and continued in force by the Self-Government Act. The intention is to remove any fetters from the land if acquired by the Commonwealth.
>
> If the Commonwealth acquired land in exercise of its powers under s 70, there is nothing to suggest that any setting apart for a public purpose would survive merely by force of that acquisition.
>
> However the real question here is whether the notice of acquisition published in regard to Quail Island had itself the effect of setting it apart for a public purpose, namely defence.
>
> For reasons already given I am satisfied that if land is set apart for defence, it is set apart for a public purpose.

My decision on the Uluru (Ayers Rock) National Park and Lake Amadeus Luritja Land Claim was concerned with the status of the Uluru National Park. In the course of reasons I said:

> Assuming that the notice ... was a valid exercise of the power in s 70 of the Self-Government Act, it went no further than to bring about an acquisition of land so that title passed from the Territory to the Commonwealth. In my view it did not set apart for or dedicate to a public purpose the land concerned. Section 70 confers a power of acquisition, although for a public purpose; the effect of a notice is simply to vest land in the Commonwealth. Before the land may be said to have been set aside or dedicated, some further step is necessary such as the proclamations mentioned in s 54 of the *Lands Acquisition Act* 1955 and in s 7(2) of the National Parks Act. No such step was taken; at least there was no evidence of any.

I am not persuaded that this view was wrong. In the present case the effect of the notice of acquisition was certainly to vest Quail Island in the Commonwealth. The authority for that vesting was the notice of acquisition which itself depended upon an authorisation by the Governor-General, on the recommendation of the Minister.

It is quite true that acquisition for a public purpose is essential before s 70 may operate. Nevertheless I am of the opinion that the effect of the section is to do no more than vest land in the Commonwealth and that some further step is essential before the land can be said to be set apart for a public purpose under an Act.

(Reasons for Decisions on procedural and jurisdictional matters; Volume 16 of Reports of the Aboriginal Land Commissioner pp 28-29).

With respect, I am of the same opinion.

Paragraph (a) of the *Land Rights Act* definition of "Crown land" adopts the wording of s 54 of the *Lands Acquisition Act 1955* which provided:

> 54. (1) The Governor-General may, by Proclamation –
> (a) set apart for, or dedicate to, a public purpose land which is vested in the Commonwealth, or in an officer or person on behalf of the Commonwealth; and
> (b) revoke or alter the setting apart or dedication for or to a public purpose of land so vested, whether set apart or dedicated in pursuance of this section or otherwise.
>
> (2) Land set apart for or dedicated to a public purpose in pursuance of the lst preceding sub-section may be vested in trustees upon trust to carry out the purpose for which the land is so set apart or dedicated.
>
> (3) If the setting apart or dedication of land is revoked or altered, the grant, conveyance or transfer of the land to trustees is deemed to be revoked or altered in the like manner, as the case may be, and the trustees shall, when required by

> the Attorney-General so to do, deliver to him, or to a person specified by him, all documents of title relating to the land for cancellation or amendment accordingly.

The *Lands Acquisition Act 1955* was replaced by the *Lands Acquisition Act 1989* which commenced on 9 June 1989. Section 122 of the 1989 Act repeats the text of s 54 of the 1955 Act but has an additional subsection (4) which provides:

> (4) The powers conferred by this section are in addition to, and not in derogation of, the powers conferred by any other law of the Commonwealth or of a Territory.

The 1989 Act contemplates the possibility that land may be set aside for, or dedicated to, a public purpose otherwise than under that Act, but so did the definition of "Crown land" in the *Land Rights Act* from its inception.

The successive *Lands Acquisition Acts* have served multiple purposes. In each case their primary purpose has related to the acquisition of land for public purposes (1955 Act s 7(1); s 10(2); 1989 Act s 22(1),(2)) but both have also dealt with the setting apart, or dedication of land for public purposes.

Section 70 of the *Self Government Act* is also a law relating to the acquisition of land for public purposes but it says nothing about the setting apart or dedication of land so acquired for a public purpose. There is nothing in the *Self Government Act* which in any way limits the powers of the Commonwealth in relation to the acquired land nor places any restriction upon its use or its disposal. Section 70 deals only with the acquisition of land. The fact that the right to acquire was conditional by the land being required for a public purpose does not amount to the setting aside or dedication of the land for that purpose. The claimed land was vested in the Commonwealth on 29 June 1979 "freed and discharged from any restriction, dedication or reservation made by or under any enactment". In more precise terms, the land vested in the

Commonwealth freed from the reservations effected by the *Validation Act* in 1997, but it nevertheless remained Crown land within the meaning of the *Land Rights Act*, .

Section 67A was inserted in the *Land Rights Act* in 1987. So far as it is presently relevant the section provides:

> 67A. (1) Where an application referred to in paragraph 50(1)(a) in respect of an area of land was made before the day of commencement of this section:
>
> (a) any grant of an estate or interest in that area of land, or in a part of that area of land, that was purportedly effected on a day before that traditional land claim, in so far as it related to the area of land to which the grant relates, was finally disposed of, being a day after 28 May 1986 and before the day of commencement of this section, shall be taken to be, and at all times to have been, of no effect; and
>
> (b) any grant of an estate or interest in that area of land, or in a part of that area of land, that was purportedly effected on a day before that traditional land claim, in so far as it relates to the area of land to which the grant relates, is finally disposed of, being the day of commencement of this section or a later day, shall be of no effect.
>
> ...
>
> (5) A traditional land claim shall be taken not to have been finally disposed of in so far as it relates to a particular area of land until:
>
> (a) the claim, or the claim, in so far as it relates to the area of land, is withdrawn;
>
> ...

Section 67A had application in relation to the Woolner Land Claim (No 10) which was made before 28 May 1986 and was not "finally disposed of" until 18 March 1996; accordingly, any grant of an estate or interest in the claimed land purportedly effected after 28 May 1986 and before 18 March 1996 was of no effect.

The provisions of the *Self-Government Act* relating to the vesting of land in the Northern Territory and the subsequent acquisition of that land by the Commonwealth were clearly intended to have effect notwithstanding the currency of an application under paragraph 50(1)(a) of the *Land Rights Act* in relation to the land. One of the important changes effected by the *Self Government Act* was to establish the Northern Territory of Australia as a body politic under the Crown and in those circumstances it was appropriate that provision be made for Crown land which had theretofore been

regarded as held by the Crown in the right of the Commonwealth be vested in the new polity. This was effected by s 69(2). The *Land Rights Act* was amended with effect from 1 July 1978 (the same day as the *Self Government Act* commenced) by the addition of subsection 3(6) and section 3A which provide:

> 3 (6) A reference in this Act to the Crown shall be read as a reference to the Crown in right of the Commonwealth or the Crown in right of the Northern Territory or both, as the case requires.
>
> 3A (1) Notwithstanding any law of the Northern Territory, the application of this Act in relation to Crown land extends to Crown land that is vested in the Northern Territory.
> ...

There can be no question that during the limited period that it had effect, s 31 of the *AMSA Act* authorised the transfer to the AMSA of land in which the Commonwealth held an interest and that in a case in which the Commonwealth's interest was not held from another person, the transfer had effect as a grant to the AMSA of an estate in fee simple. Despite the marginal note to s 31 which states "Statutory transfer of land etc to Authority", the section does not in fact effect the transfer of land, and in particular did not transfer NTP 2001 to the AMSA. If the Act had in terms specifically referred to the subject land and vested it in the Authority it may be difficult to argue that s 67A of the *Land Rights Act* applied to the statutory vesting so as to make it a nullity. But that was not the case. The scheme of s 70 was in fact quite different as an examination of subsections (5) and (6) demonstrates.

In the circumstances which prevailed as at 16 October 1991 (the date of publication of the notice under s 31) and at 21 October 1991 when an officer of the Department of Transport and Communications signed a certificate for the purposes of s 70(5), a grant or conveyance duly executed under the laws in force in the Northern Territory would, by operation of s 69A of the *Land Rights Act*, have been "of no effect". In the absence of any specific provision in the *AMSA Act* to override s 67A of the *Land*

Rights Act, the purported transfer of NTP 2001 to the AMSA pursuant to s 31 of the AMSA Act was of no effect. The land therefore remains vested in the Commonwealth and as it has not been "set aside for, or dedicated to, a public purpose under an Act", it is land which may properly be the subject of an application made pursuant to paragraph 50(1)(a) of the *Land Rights Act.*

In my opinion I am able to exercise the functions referred to in paragraph 50(1)(a) of the *Land Rights Act* in relation to the Wulna Land Claim (No 155).

H.W. OLNEY
Aboriginal Land Commissioner
14 May 1999

ANNEXURE C: PROCEDURAL MATTERS

1. Legal representatives

Party	Name
For the claimants:	Ms M Hunt (Northern Land Council)
For the Northern Territory:	Ms K Gatis (Solicitor for the Northern Territory)

2. Anthropologists

Party	Name
For the claimants:	Mr Chris Healey
	Dr Philip Clarke

3. Notices of Interest

Individual, Group or Entity	Date Received
Northern Territory Government	18 October 2022
Amateur Fishermen's Association of the Northern Territory	31 October 2022

4. Exhibits

Exhibit Ref.	Tendering party
A	Tendered on behalf of the claimants

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 Claimed
A2	R	Anthropological Report prepared on behalf of the Claimants by Chris Healey, December 2005
A3	R	Claimants' Personal Particulars prepared on behalf of the Claimants by Dr Philip Clarke, October 2022
A4	R	Site Register and site Map prepared on behalf of the Claimants by Chris Healey, January 2008
A5	R	Claimants' Genealogies prepared by Dr Philip Clarke, October 2022
A6	R	Supplementary Anthropology Report prepared by Dr Philip Clarke, October 2022

ANNEXURE D: LIST OF CLAIMANTS

Names of claimants

Anyulnyul (deceased)
Stephen Kenyon/Gaden (deceased)
Wulna (deceased)
Henry Jigudj Yates
Finity (deceased)
Derek Yates
Robert Wulna (deceased)
Denise Kenyon
Old Roger Adiyit (deceased)
Neville Jnr Morton
Jack Wandi (deceased)
Linda Campbell
Topsy Garramnak Drysdale (deceased)
Victor Campbell (deceased)
Chooky Gulukboy (deceased)
Samantha Campbell
Fred Wulna O'Brien (deceased)
Linda Fejo
Hilda Gunmunga (deceased)
Gregory John Fejo (deceased)
Mary Minmarrima (deceased)
Sammy John Fejo
Flora Menabirrina (deceased)
Sheila Rankin
May (deceased)
David Jackson
Rosie Malamgiin (deceased)
Donna Marie Jackson
Moo Nancy (deceased)
Robert 'Jodie' Jenkins
Lorna Lee Talbot (deceased)
Amy Browne
Earnst Jim Dulunarki (deceased)
Robert Jnr Browne
Joan Meniyen Kenyon (deceased)
Bryan Browne
Jeanie Lunbirr Bishop (deceased)
Vanessa Browne
Johnny Fejo (deceased)
Natalie Browne
Raymond Rankin (deceased)
Emily Browne
Richard Rankin (deceased)
Sarah Jane Browne
Robert Browne (deceased)
Emily Browne
John Browne
Leanne Browne
Edward 'Teddy' Browne (deceased)
Kelly Browne
William 'Willy' Browne
Amanda Browne
Patricia 'Paddy' Browne
Theresa Browne
Dorothy 'Dotty' Browne
Nigel Browne
Rodney Browne (deceased)
Peter Jnr Browne
Douglas Browne (deceased)
Sheldon Browne
Peter Browne
Jade Browne
Phillip Browne (deceased)
Hayden Browne
Joseph Lee Browne
Lisa Anne Browne
Albert Browne
Jared Lucas Browne
Christine Browne/Jenner
Jackson Browne
Emmanuel Eugene Jnr Talbot
Carmel Anne Browne
Philip Gary Talbot (deceased)
Maximillan Browne
Edward Eugene Talbot
Crystal Browne
Daphne Talbot
Jade Browne
Trevor John Talbot (deceased)
Kristen Browne (deceased)
James Francis Talbot (deceased)
Albert Coonan

Robert Charles Talbot (deceased)
Saven Browne
Daniel Talbot
James Vincent Browne (deceased)
Pamela Talbot
Nelson Douglas Browne
Jennifer Jean Talbot
Philip Jnr Talbot
Caroline Kenyon/Wandi
Brian Jnr Talbot
Brian Kenyon (deceased)
Ian Joe Talbot
David Wanirr Kenyon
Irene Talbot
Graham Durrkmul Kenyon
Leanne Talbot
Teresa Henda/Kenyon
Yvette Talbot
Nicole Talbot
Dereanne Yates
Alana Talbot
Dale Yates
James Talbot
Dwight Yates
Justin Talbot
Ronnie Yates
Dale Talbot
Nathan Yates
Dallas Talbot
Aran Yates
Riana Talbot
Kaela Yates
Lorna Talbot
Derek Jnr Yates
Rebecca Talbot
Natasha Yates
Carly Talbot
Marcia Humbert (deceased)
Peter Talbot
Mark Humbert
Daphne Talbot
Cedella Humbert
Kyle Talbot
Shane Humbert

Robert Jnr Talbot
Noel Campbell
Natasha Grant
Shaun Campbell
Matthew Grant
Thomas Campbell
Manuel Talbot
Fiona Campbell
Ian Thomas
Ann Marie Campbell
Shaun Thomas
Charlton Campbell
Dennis Thomas
Neville Campbell
Richard Nowell/Kenyon
Monique Campbell
Brian Jnr Kenyon
Patricia Talbot
Bronwyn Kenyon
Cheyanne Minscin
Barbara Kenyon/Thompson
Jake Kenyon
Leroy Kenyon
Brian Jnr Kenyon
Brianna Kenyon
Davina Kenyon
Ester Kenyon
Helen Joan Kenyon/Wright
David Jnr Darrnarlpi Kenyon
Rodney Kenyon
Tony Jnr Luwanbi Kenyon
Travis Kenyon
Kathy Nedey Kenyon (deceased)
Natasha Kenyon/Yates
Preston Kenyon
Grace Kenyon
Terizma Jade Muggabuddy Kenyon
Deanne Goonarre Kenyon
Selina Quollwalnee Kenyon
Tianna Kenyon
Jack Daly
Mikim Daly (deceased)
Jasmine Daly
Mariah Daly

Stephen Jnr Kenyon
Leanne Kenyon
Jamesie Kenyon
Telanna Kenyon
Kristy Kenyon
Lane Luwanbi Yates
Ronnie Jaranadjbi Yates
Francianna Amalakidj Yates