

Aboriginal Land Rights (Northern Territory) Act 1976

Finniss River Land Claim

Report by the Aboriginal Land Commissioner,
Mr Justice Toohey, to the Minister for Aboriginal Affairs and to the
Administrator of the Northern Territory

AUSTRALIAN GOVERNMENT PUBLISHING SERVICE

CANBERRA 1981

© Commonwealth of Australia 1981

ISBN 0 642 06723 6

First printed in June 1981 in interim, typewritten form

Printed by Watson Ferguson & Co., Brisbane

Commonwealth of Australia copyright reproduced by permission. 1996

Office of the
ABORIGINAL LAND COMMISSIONER

Supreme Court
Darwin.
Telephone 81 9326.

22 May 1981

Senator the Hon. Peter Baume,
Minister for Aboriginal Affairs,
Parliament House,
Canberra, A.C.T.

Dear Minister,

FINNISS RIVER LAND CLAIM

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

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

Yours truly,

John Toohey
Aboriginal Land Commissioner.



Office of the
ABORIGINAL LAND COMMISSIONER
Supreme Court
Darwin.

Telephone 819326.

22 May 1981

Commodore E.E. Johnston, AM, OBE, CSTJ,
Administrator of the Northern Territory,
Government House,
Darwin, N.T.

Your Honour,

FINNISS RIVER LAND CLAIM

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

As required by the Act I have sent a copy of my report to
the Minister for Aboriginal Affairs.

Yours truly

A handwritten signature in cursive script, appearing to read 'John Toohey'.

John Toohey
Aboriginal Land Commissioner

Office of the
ABORIGINAL LAND COMMISSIONER
SUPREME COURT
Darwin.
Telephone 81 9326.
22 May 1981

Commodore E.E. Johnston, AM, OBE, CSTJ,
Administrator of the Northern Territory,
Government House,
Darwin, N.T.

Your Honour,

FINNISS RIVER LAND CLAIM

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

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

Yours truly

John Toohey
Aboriginal Land Commissioner



Office of the
ABORIGINAL LAND COMMISSIONER
Supreme Court
Darwin.

Telephone 819326.

22 May 1981

Senator the Hon. Peter Baume,
Minister for Aboriginal Affairs,
Parliament House,
Canberra, A.C.T.

Dear Minister,

FINNISS RIVER LAND CLAIM

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

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

Yours truly,

A handwritten signature in cursive script, appearing to read "John Toohey".

John Toohey
Aboriginal Land Commissioner.

CONTENTS	Page
History of the claim	1
Preliminary matters	2
Status of land grazing licences	3
Grazing licences and estoppel	6
Status of land Kangaroo Flats	6
Some general comments on the claim	8
The claim area-a glance at history	10
More history-the Kungarakany, Warai and Maranunggu	12
The claimants	14
'Aboriginality' and the Land Rights Act	16
Notion of traditional ownership	20
Principles of descent	23
Traditional Aboriginal owners the concept	25
The claim area	26
Area 1	27
Area 2	31
Area 3	35
Area 4	36
Area 5	37
Traditional owners Kungarakany, Warai and Maranunggu	39
Formal Findings	41
Functions of Commissioner-Section 50(3) and (4)	46
Strength of attachment	48
Desire to live on the land	49
Recommendations	49
Matters for comment Number of Aboriginals advantaged	50
Matters for comment Nature and extent of advantage	51
The notion of detriment	51
Detriment to Aboriginals	52
Detriment Kangaroo Flats Army Training Area extension	53
Detriment-Commonwealth Railways	54
Detriment-Snake Creek: uranium ore stockpile	55
Detriment-Snake Creek: proposed defence use	55
Detriment-Rum Jungle	56
Detriment solar energy project	57
Detriment Northern Territory Government: general comments	57
Northern Territory Government-power supply	60
Northern Territory Government-water resources	61
Northern Territory Government water resources: monitoring stations	63
Northern Territory Government roads	63
Access to land	65
Northern Territory Government-proposed solar energy project	65
Northern Territory Government-Rum Jungle-drill core and sheds	66
Northern Territory Government Snake Creek	67
Northern Territory Government-Overland Telegraph, bridlepath and historic relics	67

	Page
Northern Territory Government-Bachelor	68
Residents of Bachelor	68
Recreational use of claim areas	69
Fires	71
Mining tenures: general comments	71
Mining: R. A. Smith and R. J. Stone	72
Mining: Marathon Petroleum Australia Ltd	73
Mining: C.R.A. Services Limited and C.R.A. Exploration Pty Ltd	73
CRA Services-Brown's leases	74
CRA Services-intermediate leases	75
CRA Services Area 55	75
CRA Exploration-Brown's West	75
CRA Exploration-Mount Minza Waterhouse 2	76
CRA Exploration-Stapleton	76
Mining: Peko Wallsend Operations Limited and Electrolytic Zinc Company of Australasia Limited	76
Mining: Uranerz Australia Pty Ltd	78
Mining: J. C. Walton	81
Miscellaneous lease No. 581 -E. K. and M. J. Kerle	82
Special purposes lease No. 453-Wairia Association Inc.	82
Grazing licences	82
GL2093 W. A. Townsend	83
GL2080 Finnis River Cattle Co.	83
GL2098 D. A. Hanna	84
GL2100 E. K. and M. J. Kerle	84
GL2095 R. E. and A. Bright	84
GL2084 Meneling Station Pty Ltd	84
GL2101 G. W. McClelland	85
GL2102 D. J., L. A. and R. J. Mackay	85
Occupation licences	85
Applications pending over land claimed	85
M. Von Erwin	86
Northern Territory Cattle Producers Council	86
Summary of findings, recommendations and comments	86
Legal representatives	91
Consultants	91
List of witnesses	91
List of exhibits	92
MAPS	

*Exhibit 4: Map showing approximate location of existing and proposed powerlines 101-101A

*Exhibit 8A: Map of claim area accompanying claim book (modified to include information on status of land taken from Exhibit 13A). (In cover pocket)

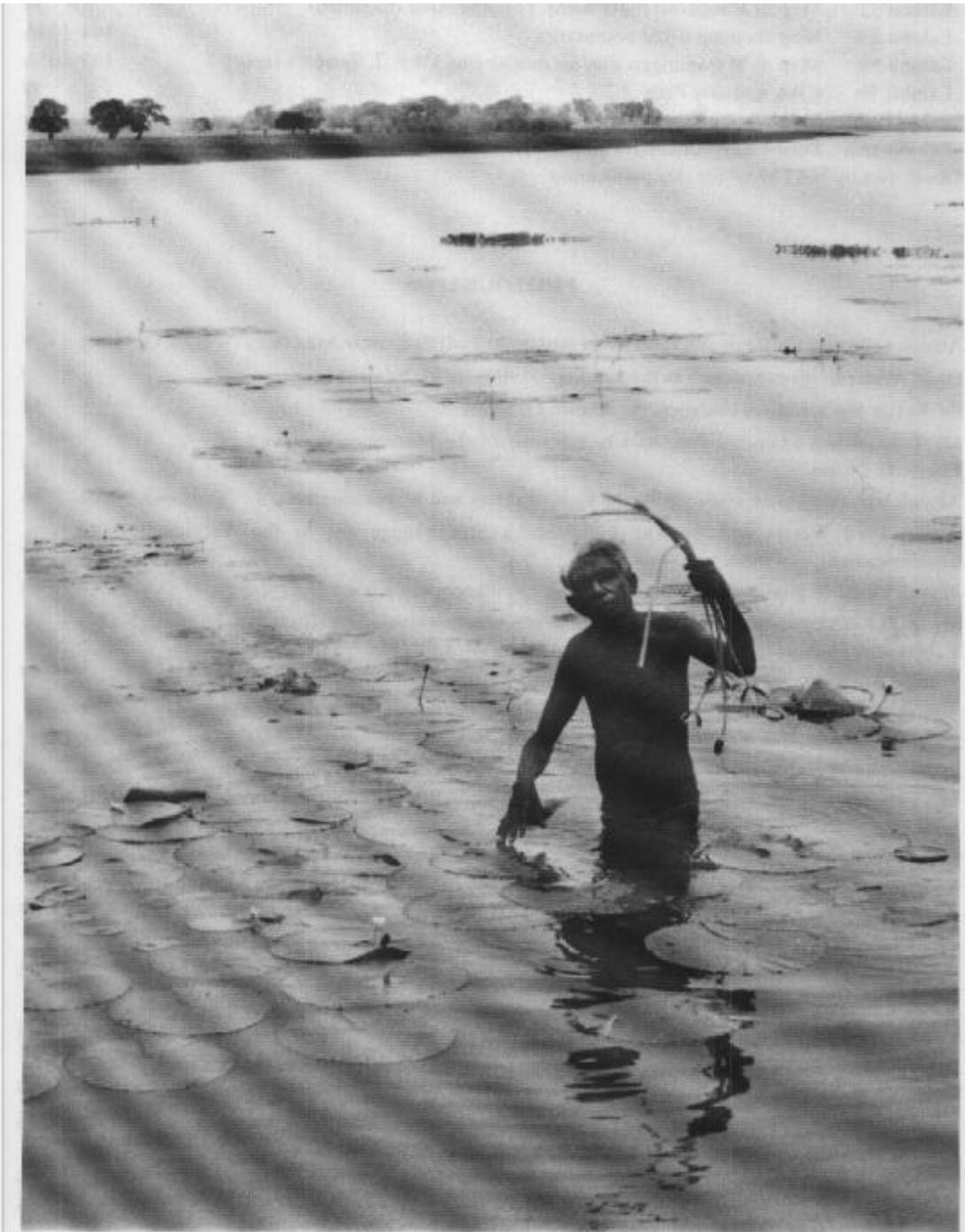
*Exhibits 9 and 33 (modified): Map of sites (In cover pocket)

*Exhibit 10: Map showing mining interests within claim area 102-102A

*Exhibits 11A and 12: Map of proposed Finnis River-Batchelor Dam catchment area and monitoring stations	103 103A
Exhibit 14: Batchelor town map	97
Exhibit 22: Map of Kangaroo Flats Army Training Area (modified)	98
Exhibit 27: Map showing tribal boundaries	104-104A
Exhibit 59: Map of Maranunggu sites accompanying Dr P. J. Sutton's report	105 105A
Exhibit 79: CRA Locality Plan	99
*Exhibit 87: Map of maintained roads within claim area	106 106A
Exhibit 152: Peko-EZ-Woodcutters map	107-107A
*Re-drawn by NATMAP for this publication	

PHOTOGRAPHS

Abalak collecting lily stems and fresh water mussels at Padj Padj (near Area 1). Photo: G. Neate	9
Dr N. Williams gives evidence at the hearing. Photo: G. Neate	9
Dr Xavier Herbert gives evidence. Photo: G. Neate	11
Mr T. Coulehan examines Pandela Clayton, one of the Maranunggu claimants. Photo: G. Neate	13
Abalak (standing) gives evidence for the Kungarakany and Warai claimants. Photo: G. Neate .	16
Waditj Fred Waters and Bilawuk point out a Maranunggu site to the Aboriginal Land Commissioner. Photo: G. Neate	17
Prof. J. Goodale gives evidence at the hearing. Photo: G. Neate	18
Mr D. Parsons examines Kungarakany and Warai witnesses including (front row, left to right) Mr V. McGinness, Abalak, Anmilil, Mr T. Calma, Mrs M. Edwards, Mrs V. Stanton. Photo: G. Neate	19
The Aboriginal Land Commissioner hears about Purundudminy (Two Sisters Hills) from Mrs Stanton and Mrs Mills. Photo: G. Neate	29
Paperbark trees Kurrindju (near Area 1). Photo: G. Neate	30
Mrs Morley shows bush tobacco to the Aboriginal Land Commissioner on a visit to Kiriliny. Photo: G. Neate	31
Part of the Lucy Mine (Area 2). Photo: G. Neate	32
Tangga described as the 'head' of the snake dreaming from Wulinggi, a site just South of Area 4. Photo: G. Neate	37
The Aboriginal Land Commissioner hearing evidence at Amungal near Adelaide River (Area 5). Photo: G. Neate	38
Mr T. Coulehan, assisted by Dr P. Sutton, cross-examines witness while Maranunggu claimants observe the proceedings. Photo: G. Neate	40
Dr R. Layton (left) is examined by Mr T. Pauling (standing) as (left to right) Mr D. Parsons, Mr P. Cameron and Dr D. Tryon listen. Photo: G. Neate	50
Rum Jungle Lake Recreation Reserve, Northern Territory. Photo: G. Neate	56
Mr N. Conway of the Australian Atomic Energy Commission speaks about proposals to rehabilitate the Rum Jungle mines area. Photo: G. Neate	66
Part of the uranium ore stockpile at Snake Creek. Photo: G. Neate	67
Dr D. Zimmerman gives evidence for Uranerz Australia Pty. Limited Photo: G. Neate	78



Abalak collecting lily stems and fresh water mussels at Padj Padj (near Area 1)

Photo: G. Neate

x

Abalak collecting lily stems and fresh water mussels at Padj Padj(near Area 1) Photo: G. Neate

x

History of the claim

1. On 20 July 1979, the Northern Land Council lodged an application under the Aboriginal Land Rights (Northern Territory) Act 1976 on behalf of Aboriginals claiming to have a traditional land claim in what was described as 'the FOGG BAY TO THE ADELAIDE RIVER area of the Northern Territory'.

Presumably it should have read Fog Bay; the claim was to a broad sweep of land from the mouth of the Finnis River in a south-easterly direction to Adelaide River and the Stuart Highway. The application was entitled 'Finniss River Vacant Crown Land Claim'.

2. Publication of the claim produced an instant reaction illustrated by a letter written on 7 September by the Crown Solicitor of the Northern Territory seeking an early hearing of the claim.

The Claim has caused a great amount of unrest within the community since it was lodged by the Northern Land Council. Notwithstanding its title the claim appears to contain a number of blocks of land which are 'alienated crown land' within the meaning of section 50 of the Aboriginal Land Rights (Northern Territory) Act. The land claimed contains a number of freehold and leasehold estates and mining tenements. The claim is also over the Manton Dam and its catchment area and the Darwin River Dam and its catchment area, the North Australia Railway line and other land set aside for a public purpose. I am presently proceeding with detailed searches of the area which should be available shortly. There are a large group of people in the community who feel that their economic livelihood has been threatened by the claim. There is also a substantial public interest involved and the Northern Territory Government is strongly of the view that a long delay in the hearing is against the public interest.

3. Following that letter and after discussion with representatives of the claimants and government, I fixed 22 October 1979 for the hearing of the Government's application. Submissions were made on behalf of a range of interests as a result of which I appointed 30 March 1980 as the date by which a claim book should be lodged.

4. At the hearing in October the claimants lodged an amended map and description of land (Exhibit 1) which was said to exclude all alienated land. There were some later amendments; the extent of the claim can be seen on the maps Exhibit 8A and 13.

5. A claim book was duly lodged and Monday 11 August 1980 was listed as the date for the commencement of the hearing of the claim. It was extensively advertised and notice given to all those departments, organisations and persons appearing to have some interest in its outcome.

6. The substantive hearing began in Darwin on 11 August. It had become apparent, from the number of notices of intention to be heard lodged, that the claim had implications for a wide range of interests. By then it had also become clear that, for the first time in a land claim, there were opposing groups of Aboriginals each claiming to be the traditional owners of land. This aspect formed an important part of the hearing and must form an important part of this report. To give an immediate picture of the range of interests involved, I list those by or on behalf of whom appearances were announced at the outset.

Kungarakany and Warai claimants

Maranunggu claimants

Northern Land Council

Commonwealth of Australia

Australian National Railways Commission

Attorney-General for the Northern Territory

Marathon Petroleum Australia Ltd

Uranerz Australia Pty Limited

Mines Administration Pty Ltd

A.O.G. Minerals Pty Ltd

CRA Services Limited

CRA Exploration Pty Ltd

Peko Wallsend Exploration Limited

Electrolytic Zinc Company of Australasia Limited

W. A. Townsend

Robert Edwin Bright

Clive Reborse (Finniss River Cattle Co.)

D. A. Hanna

Page 1

7. There were some who did not appear at the outset but who had lodged notice of intention to be heard.

They were:

Roland J. Leal

Northern Territory Cattle Producers Council

Northern Territory Association of Four Wheel Drive Clubs Inc.

Bernard J. Havlik on behalf of citizens of Batchelor M. Brodribb, R. Brodribb, J. Brodribb, K.

Teague, C. Teague and M. Vance

E.K. and M. J. Kerle

G.W. McClelland

Margaretta Von Erwin

Carol D. Marson

John Colin Walton

Dean Lynton Ottens

Ronald A. Smith and Ronald J. Stone

J. K. Holdings Pty Ltd

Not all gave evidence but under the umbrella of detriment and land usage I shall comment on their interests.

8. It was a lengthy hearing:

11, 13-15, 20 22, 25 29 August 1980 Darwin

8 12, 15, 17 19, 22-26, 29 30 September 1980 Darwin

1-3 October 1980 Darwin

6 8 October 1980 Batchelor

13, 23 October 1980 Darwin

15, 17 21, 24-26 November 1980 Darwin

11 May 1981 Darwin

Preliminary matters

9. At the outset several issues were raised, some of which might fairly be described as going to jurisdiction. Others although so advanced did not, in my view, answer that description.

10. Two matters touching the status of land claimed truly raise issues of jurisdiction. I shall deal with each at some length later in this report. It is enough for the present to say that one concerns the status of land under grazing licences is it unalienated or alienated Crown land? The other relates to land acquired by the Commonwealth for the purpose of defence under the Northern Territory (Self-Government) Act 1978. The issue is whether that land has been set apart for a public purpose under an Act, hence is not Crown land as that term is defined in the Land Rights Act.

11. The other matters canvassed at the outset of the hearing do not go to jurisdiction. They may well involve questions of interpretation and the proper construction of the Land Rights Act. Each concerns something that has been debated from time to time since the land claims began. The first relates to the functions of the Aboriginal Land Commissioner under s.50 of the Land Rights Act. In particular, does the Act require the Commissioner to look at matters going to traditional ownership of land and strength of attachment to it, consider questions of advantage, detriment and land usage and then make a recommendation which has taken into account and weighed all those factors? Or, should any recommendation for a grant of land derive from the ascertainment of traditional owners and a consideration of the strength of their traditional attachment and of their desire to live upon the land claimed, leaving for comment only and for the consideration of the Minister questions of advantage, detriment and land usage? To date I have taken the latter view. In view of the submissions put in this hearing I shall look at the whole question again.

12. The other matter concerns the notion of detriment under the Land Rights Act, in particular its application to mining interests. Put shortly, does the operation of the Act, especially the 'veto' provision in s.40, constitute a detriment? Or is s.50(3) concerned only with the implications a particular grant may have for those mining interests said to be affected?

13. There is another matter that should be mentioned now although it too calls for closer consideration later in the report. It concerns the efficacy and implications of action taken to grant or renew grazing licences over the claim area since the claim was lodged. It is necessary to look at the 'moratorium' upon alienation of land the subject of a claim under the Land Rights Act, granted by the Government of the Northern Territory in August 1978.

14. At the conclusion of the hearing some counsel submitted that I should hand down a decision on these 'preliminary matters' before submitting a report to the Minister and to the Administrator. The advantage of such a course is that it may enable the decision to be challenged before the High Court and a report written in the light of the judgement of that Court. That is an advantage but it has to be weighed against other considerations. While the status of land claimed goes to the jurisdiction of the Aboriginal Land Commissioner, I do not accept that issues relating to my functions and to the notion of detriment readily answer that description. Whether my assessment of those matters is capable of challenge by prerogative writ is at least doubtful. There may well be other aspects of the report that involve questions of interpretation and construction of the Act. I am concerned to avoid piecemeal challenges to the report that might lead to several hearings before the High Court and a long delay in the submission of a report.

15. There are other land claims recently completed in which some of these issues have arisen and no doubt there will be others in which they will arise. There is a risk that consideration of reports on these claims may be deferred until all avenues of appeal in the present claim appear to have been exhausted. I have given this matter anxious consideration and am of the opinion that it would be better to complete my report, dealing with all issues of law and making all necessary findings, recommendations and comments. The Minister has agreed that before making any decision he will allow a reasonable time for challenges to be made and pursued. Whatever the outcome of any challenge, the report should be adequate to enable the Minister to make a decision on any recommendation for a grant of land.

16. Let me illustrate. As appears later, I have decided that grazing licences do not constitute an estate or interest in land. If that decision is held by the High Court to be in error, none of that land is available to be claimed, at least while those grazing licences are in force. Any recommendation relating to that land will not be effective. There is an added factor to be taken into account. While all grazing licences mentioned during the hearing were then extant, they will expire on 30 June 1981. Of course they may be renewed but it is at least possible that after that date some may cease to exist so that the land will be unalienated Crown land in any event.

17. Given the complexity of this claim the course I propose, while not free from difficulty, seems more satisfactory and at a hearing on 11 May 1981 I so informed counsel.

Status of land-grazing licences

18. Within the claim area are a number of grazing licences. They virtually cover the western portion and affect substantially other sections. Their status arises in this way. Unalienated Crown land is defined in s.3(1) of the Land Rights Act to mean:

... Crown land in which no person (other than the Crown) has an estate or interest ...

In the Borrooloola Report paras 138-143 I concluded that neither a grazing licence nor an occupation licence constituted an estate or interest under the Act. In the Warlpiri Report paras 268-277 I adhered to that conclusion at least in regard to grazing licences, the only form of licence there under consideration. I added:

If that view is contrary to what Parliament intended it would be appropriate to amend the Act to put the matter beyond doubt (para. 277).

19. Parliament has not amended the Act in any relevant respect. Nevertheless, in the present hearing the matter was canvassed in greater depth than hitherto and I propose to consider it afresh.

20. A grazing licence is the creature of the Crown Lands Act 1931. Section 107(1) of that statute empowers the Minister to:

... grant licences to persons to graze stock ... on any Crown lands ... for such period, not exceeding one year, as is prescribed.

21. The holder of such a licence may apply to the Minister for permission to make specified improvements on the land. In such a case, on the expiration or determination of the licence, the licensee is entitled to be compensated for those improvements (s. 107A).

22. Regulations made pursuant to the Act require, in the case of a grazing licence, an application fee and a rental (regs 64, 73). A grazing licence may, at the discretion of the Minister, be renewed from time to time for a period not exceeding twelve months (reg. 72(1)). A consideration of reg. 72 suggests that a renewal may be effected only when application is made within one month before expiry of the licence. If an application is made thereafter, it must be for a new licence.

23. -A grazing licence may be forfeited in the event of failure to comply with a condition of the licence (reg. 71) and may be cancelled by the Minister at the expiration of three months' notice in writing (reg. 71A).

24. In the Borroloola Report, I took the view that the categories of estates in land have become well recognised and that a grazing licence did not fall into any of the accepted categories, noting that the Crown Lands Act itself drew a distinction between leases and licences. My conclusion was that the rights conferred by the Act and regulations were given to a particular individual to make use of land for a specified purpose, conferring no right to the land itself, with the personal nature of the right emphasised by the power to revoke or cancel (Borroloola Report para. 141). In the Warlpiri Report I adhered to that view, referring to *Stow v. Mineral Holdings (Aust.) Pty Ltd* (1977) 51 AUR 672 and concluding that a grazing licence was not something of a proprietary nature (Warlpiri Report paras 273-275).

25. In view of the way the argument was developed in this hearing it is helpful to refer again to remarks in *Stow v. Mineral Holdings (Aust.) Pty Ltd*. Dealing with the standing to object to the grant of a mining tenement of persons whose interest was in the preservation of the ecological and environmental aspects of the land involved, Aickin J. said:

The expression 'interest in land' is not defined in any relevant Act, nor is the compound expression estate or interest in land'. I do not consider that assistance is to be derived from an attempt to apply the statutory definition of 'estate' to the compound expression 'estate or interest in land' . . . In my opinion the ordinary meaning of the compound expression estate or interest in land' is an estate or interest of a proprietary nature in the land. This would include legal and equitable estates and interests, for example, a freehold or a leasehold estate, or incorporeal interests such as easements, profits A prendre, all such interests being held by persons in their individual capacity. (p. 679).

26. Mr Barker Q.C., senior counsel for the Northern Territory Government, who led the attack on my earlier view that a grazing licence was not an interest in land, opened his argument this way:

I must say on looking at the transcripts of the two hearings that it does not seem to me that the real argument was ever put to your Honour, the real argument being that a grazing licence is a profit A prendre, which is an ancient and well recognised form of incorporeal hereditament which clearly has been held from ancient times to be an interest in land (transcript p. 205).

27. In none of the earlier hearings was an argument advanced on the basis that a grazing licence was a profit A prendre although in the Warlpiri land claim the Northern Territory Cattle Producers Council had in a written submission referred to *Bromell v. Robertson* (1886) 12 VLR 560 as authority for the proposition that a right to pasture sheep on the land of another was an interest in land. In the present hearing the submission was made that a grazing licence was a profit A prendre hence an interest in land, having the effect of rendering land alienated.

28. A profit A prendre confers a right to take from the land of another some part of the soil of that land or some of its natural produce. The subject matter of a profit must be something which is capable of ownership. A person may be granted exclusive rights under a profit but the fact that it is not an exclusive right does not deprive it of that character for profits may be enjoyed in common with others. They may be granted for fixed terms, such as twelve months (*Mason v. Clarke* (1955) AC 778), or may be granted in perpetuity. An interest which would amount to a profit A prendre if granted in perpetuity or for a period of years does not lose its essential character because it is terminable on one month's notice (*Unimin Pty Ltd v. The Commonwealth* (1974) 22 FLR 299).

29. Profits are classified as incorporeal hereditaments and so may be assigned between contracting parties. As they concern rights in or produce of the land they can properly be described as interests in land (*Stow v. Mineral Holdings (Aust) Pty Ltd* at p. 679).

30. The right to depasture cattle or to graze sheep has been found in some cases to constitute a profit, the taking and carrying away of the produce of the soil being done by means of the mouths and stomachs of grazing animals, whether or not those animals be restricted as to their number (Megarry and Wade: The Law of Real Property 4th ed. pp. 881, 882; Halsbury's Law of England, 4th ed., vol. 14, para. 242; Gale on Easements, 14th ed. p. 4).

31. A licence enables a person to do lawfully what he could not otherwise do, except unlawfully. It is a personal privilege conferring no interest in the land. It may be incidental to a right to remove something from land, a licence coupled with a grant.

A mere licence is not transferable, not can it perpetual; it is not binding on the tenement affected, but is a personal matter between the licensor and the licensee. It is generally revocable and merely excuses a trespass until it is revoked. (Halsbury vol. 14 para. 252)

32. A legal right of exclusive possession of land for a term will generally be decisive of a lease rather than a licence (Radaich v. Smith (1959) 101 CLR 209). In that case Taylor J. said at p. 217:

I do not, of course, overlook that an interest in land for example, an easement or a profit A prendre may be created without a grant of possession.

33. It is clear enough that the effect of a grazing licence is to authorise the licensee to graze upon the land in question the number and type of stock specified in the licence. Indeed there is an express provision in reg. 68 that on receipt of a notice of approval from the Minister, the applicant is entitled to graze stock on the land. Entitlement here carries the significance ordinarily attaching to it in the case of a licence, that is to render lawful what would otherwise be unlawful, for instance as a trespass. It is an entitlement which cannot be withdrawn summarily. It may be determined for cause or otherwise at the expiration of three months' written notice.

34. Counsel submitted that the right to graze stock conferred by a licence under the Crown Lands Act was exclusive to the licensee 'in that once a licence is granted no other licence can be granted over the same land' (Exhibit 157). This must be a matter of inference since neither Act nor regulations has anything express to say. Given the purpose for which a grazing licence is granted, the inference may fairly be drawn that the right to graze stock over the land in question during the period of the licence is exclusive to the licensee. Any other situation would scarcely be workable. But that is not to say that the licence carries a right of exclusive possession, that it may not have to coexist with the subsequent grant of an occupation licence (s. 108) or of a miscellaneous licence (s. 109).

35. Both Act and regulations are silent on the assignability or transferability of a grazing licence. In my view it may not be assigned or transferred. I reach this conclusion for two reasons. The first is an inference from the fact that the Act and regulations together provide machinery for application, renewal, forfeiture and revocation of a grazing licence but say nothing about assignment. The second is also a matter of inference, from the absence of a provision comparable to s.26 which prohibits the transfer of a lease without ministerial consent. It may be said that this is equivocal and that it may equally be inferred that the Act imposes no restrictions in the case of an assignment of a grazing licence. I do not think this argument can stand. The Act is at considerable pains to control the granting of leases and to ensure that no disposition takes place without the consent of the Minister. In my view no such provision is made for licences because the licence itself is not capable of being transferred. To conclude that the Act envisages an unrestricted system of assignment of licences would be quite contrary to the obvious philosophy of the legislation and to the short-term nature of licences. It is of some interest to note too that until the repeal of s. 16 by Act No. 59 of 1980, a 'right to a Crown lease' as defined might 'devolve, pass by operation of law or, with the prior consent in writing of the Minister, be assigned or charged' (s. 16A(2)). There is a significant silence on grazing licences.

36. Summing up what has been said thus far, a right to go upon the land of another to pasture stock is a well-recognised form of profit A prendre. If the grazing licences under consideration in this hearing arose as a matter of contract between individuals they might well constitute profits A prendre and interests in land. Even as a matter of contract a different approach may be required where the Crown is the grantor (Finbow v. Air Ministry (1963) 2 A 11 ER 647). Where the right is the creature of statute, it is to the Act that one must go, at least initially, to see what the legislature has provided. In the present case the legislature has, in the Crown Lands Act, deliberately distinguished between leases and licences. It has, in a grazing

licence, created a right to go upon Crown land to pasture stock, a right which is not capable of assignment, a right personal to the licensee to go upon land for a limited time and for a limited purpose. In my opinion it is not intended to and does not confer an interest in land.

Grazing licences and estoppel

37. Mr Eames for the Northern Land Council submitted that the Northern Territory Government was estopped from arguing that grazing licences are estates or interests in land. He did so on the ground that as the Government had publicly undertaken not to utilise unalienated Crown land and as it had continued to grant grazing licences it must be taken to have accepted the views expressed in earlier reports. The Government ought not now be allowed to argue to the contrary. Alternatively the Government was acting inconsistently with its stated policy in granting grazing licences.

38. Three items of correspondence were tendered by Mr Eames, two from the Chief Minister to the Chairman of the Northern Land Council (Exhibits 18 and 19) and one from the Solicitor-General to me (Exhibit 20). Exhibit 18 spoke of-

... a freeze on the utilisation of unalienated Crown land in the Northern Territory for developmental purposes both in the areas of mining and rural activities.

The Northern Territory Government has accepted that there was a need for such a freeze if the rights of Aboriginals to make application for unalienated Crown land in accordance with the policies of government were to be meaningful.

The letter then outlined principles adopted by the Northern Territory Cabinet, one of which was:

For unalienated Crown land which is the subject of a claim before the Aboriginal Land Commissioner no action will be taken to process applications for development of that land for a period of two years ... (Exhibit 18 p. 2).

In Exhibit 20 the Solicitor-General said that the Government was in effect giving the Land Councils two years from 24 August 1978 within which to lodge claims, adding:

This policy is not intended to prevent the Government from taking action in special cases to preserve areas of land such as, for example, land required for future urban development.

39. The Land Council relied upon the decision of *Robertson v. Minister of Pensions* (1949) KB227, but in that case Denning J. pointed out that 'estoppel strictly only applied to representations of fact, not of law' (pp. 230-231). If the Northern Territory Government was saying, prior to this hearing, that grazing licences are not estates or interests in land then it cannot now be estopped from asserting that its previous representation of the legal position was incorrect.

40. In answer to the alternative ground of objection there is clear authority for the view that a government cannot be bound by an assurance as to what its executive action will be in the future as such an assurance is merely an expression of intention to act in a particular way in a certain event (*Rederiaktiebolaget Amphitrite v. The King* (1921) 3 KB 500).

41. Whatever the moral force of the argument put by Mr Eames, I am bound by the view that:

Statements of policy as a rule do not create legal obligations, though they may understandably excite human expectations as distinct from lawful expectations (*Barwick C. J. in Salemi v. Minister for Immigration and Ethnic Affairs* (No. 2) (1977) 14 ALR I at p. 9).

42. The Northern Territory Government is not estopped from putting its argument. Even if it were, that would not prevent others especially the holders of grazing licences from doing so. Because of the view I have taken of the status of grazing licences, the issue is not a live one.

Status of land-Kangaroo Flats

43. The other matter that is truly one of jurisdiction concerns the status of the Kangaroo Flats Training Area, at least that part of it falling within the claim. This Army training area comprises more than 5000 hectares; it lies west of Tumbling Waters, touching Mount Finnis Road and having Mount Peel as a central feature.

44. The purpose for which the land is used is described later in this report. I am concerned now only to discuss its availability to be claimed under the Land Rights Act. Section 2730, the north-eastern portion of the training area, lies outside the claim, see the map Exhibit 22. The balance of the training Area 1s identified on Exhibit 22 as sections 2731, 2732, 2733 and 2734 although it seemed that the surveys and

Lands Department formalities required to bring those sections into existence may not have been completed. As appears from Exhibit 22, the claim does not extend to the eastern portion of the proposed section 2733, it being within the Darwin Town boundary.

45. The submission of the Commonwealth of Australia was that the training Area 1s not Crown land within s.3 of the Land Rights Act because it is land set apart for a public purpose. 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 ... but does not include -

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

46. The Commonwealth concedes that the land has not been alienated from the Crown in terms of the definition, hence is Crown land unless it falls within para. (a). The Commonwealth does not rely upon that portion of the paragraph that relates to dedication nor upon the reference to the Lands Acquisition Act. Its argument is that the land has been set apart for a public purpose under the Northern Territory (Self-Government) Act 1978. There is no doubt that the Self-Government Act comes within the expression 'any other Act'.

47. Section 69(2) of the Self-Government Act vests, by force of the section, all interests of the Commonwealth in land in the Northern Territory in the Territory 'on the commencing date'. There are exceptions but they are not relevant.

48. Section 70 of the Self-Government Act contains machinery whereby the Minister may recommend to the Governor-General that any interest in land vested or to be vested in the Territory by s.69(2) be acquired by the Commonwealth. On the recommendation of the Minister, the Governor-General may authorise the acquisition of the interest for a public purpose approved by him (the Governor-General). The Minister may cause to be published in the Gazette notice of the authorisation by the Governor-General and in that notice declare that the interest is acquired under the section for the public purpose approved by the Governor-General. Upon publication of that notice or immediately after commencement of s.69, whichever is the later, the interest in question is by force of the section vested in the Commonwealth and freed and discharged from any restriction, dedication or reservation made by or under any enactment.

49. Section 70 of the Self-Government Act came into operation the day on which the Act received the Royal assent, 22 June 1978. Section 69 refers to 'the commencing date', an expression defined in s.56 to mean 1 July 1978. Thus there was a period of just over a week between the effective operation of s.70 and s.69, hence the reference in the former to land 'vested or to be vested' in the Territory by s.69(2).

50. On 29 June 1979 there appeared in Commonwealth of Australia Gazette No. SI 19 a notice of acquisition of interest in land by the Commonwealth. That notice recited that the Governor-General had authorised under s.70(2) of the Self-Government Act the acquisition from the Northern Territory by the Commonwealth of the fee simple interest in the land described in the schedule to the notice, with an accompanying declaration that the interest had been acquired for a public purpose approved by the Governor-General, namely defence. The land described is that identified as Sections 2731, 2732, 2733 and 2734 in Exhibit 22.

51. In the Commonwealth's submission the effect of that notice was to set apart the relevant portion of the Kangaroo Flats Training Area for a public purpose, defence, with the result that the land ceased to be Crown land and accordingly was unavailable to be claimed in these proceedings. A similar argument was advanced by the Commonwealth during the hearing of the Lander Warlpiri Anmatjirra Land Claim to Willowra Pastoral Lease and earlier during preliminary proceedings relating to the Kenbi Land Claim. In each of those proceedings I rejected the argument; I do so again and for similar reasons.

52. In essence, I am of the opinion that evidence is required that land has been set apart for a public purpose before it ceases to be Crown land under the Land Rights Act. Acquisition of land for a public purpose does not of itself achieve that purpose. I adhere to the views expressed in the Willowra Report:

40 ... Let it be assumed that the notice published in the Gazette correctly reflected an authorisation made by the Governor-General, on the recommendation of the Minister, for the acquisition of land for a public purpose

approved by the Governor-General. Let it be further assumed that no declaration of acquisition was required in the case of this particular notice because of the operation of s.70(4). Some evidence is still required that the land has been set apart for a public purpose, not merely that setting aside was in contemplation when the machinery steps provided in s.70 were put into operation. The approval of the Governor-General, required by s.70(2), is a necessary step towards acquisition but of itself it does not set the land apart for a public purpose. No further step was taken.

41 ... A proclamation under s.54 of Lands Acquisition Act 1955 operates to set land apart for a public purpose. The structure of that Act lends support to the view just expressed. Section 10 contains the machinery by which land may be compulsorily acquired by the Commonwealth for a public purpose. Upon publication of the notice required by the section, the land vests in the Commonwealth but is not expressed to be set apart for the public purpose in question. A further step is necessary.

53. In the case of the Kangaroo Flats Training Area, there was no evidence by way of proclamation under s.54 of the Lands Acquisition Act 1955 or otherwise that the land had in fact been set apart. It follows then that the land in question is Crown land and, there being no argument that it is unalienated, it is available to be claimed in these proceedings.

Some general comments on the claim

54. I propose to defer examination of the nature of the Commissioner's functions under the Land Rights Act and the notion of detriment under that Act. They are not jurisdictional issues and can best be considered when looking at recommendations to be made and the comments required by s.50(3) of the Act.

55. As finally formulated the claim was to 700 square kilometres not far south of Darwin. The claim area is broken by sections of freehold and land otherwise unable to be claimed. The result is a patchwork. For convenience the claim was presented and dealt with as if there were sections Areas 1 to 5 they we recalled. See for instance the maps Exhibit 13A and Exhibit 145. In the circumstances it was a helpful way of handling the claim but with the attendant risk of suggesting boundaries that are artificial in Aboriginal terms.

56. The claim area extends from Sweets Lookout on the Finnis River east to the Stuart Highway and from the Charlotte River south to Adelaide River. However that suggests a claim more extensive than is the case. Areas of alienated land, the Wagait Reserve and the towns of Batchelor and Adelaide River drastically fragmented and reduced the claim within those broad confines.

57. It was a claim with sweeping implications. The Commonwealth had an interest in terms of defence, the proposed Alice Springs Darwin Railway and rehabilitation of the Rum Jungle uranium mining project. The Northern Territory was concerned with roads and access to land, expansion of the Town of Batchelor, proposed power lines and substations, transmission of power from the Ord River or elsewhere, a dam and catchment area to cater for the growth of Darwin, a solar energy project, a garbage dump, the Overland Telegraph, a bridle path and historical sites. Mining interests were reflected in appearances on behalf of Uranerz Australia Pty Ltd, CRA Services Limited and CRA Exploration Pty Ltd, Peko and EZ as well as others. There was representation from residents of Batchelor, concerned with the effect a grant of land might have upon their recreation and the future of the town, from pastoralists worried about access to their land and seeking to maintain grazing licences against the claim. There was a more general representation through the Association of Four Wheel Drive Clubs of those seeking to keep open areas of recreation around the Finnis River. Merely to list them does not give a very vivid picture; it will be necessary to refer to each interest and to comment upon it as required by the Act.

58. For the first time in a land claim hearing there were two groups of Aboriginals, the Kungarakany and Warai on the one hand and the Maranunggu on the other, each asserting, to the exclusion of the other, traditional ownership of the same land. This added to the difficulties of a claim that was in other respects sufficiently complicated. It resulted in the presentation of evidence, not only from the claimants themselves, but from anthropologists propounding views as to the nature of traditional ownership. Since many of the claimants, especially the Kungarakany, were of mixed Aboriginal and European blood, I was asked to consider the whole question of Aboriginality in regard to the Land Rights Act. It meant looking again at the notion of tradition and of traditional attachment. It required a fresh examination of many concepts and issues quite basic to the Land Rights Act. I had the benefit of extensive argument and

submissions from the major interests involved; nevertheless it has proved, in its hearing and determination, a claim of great complexity.

59. To understand the way in which the claim emerged at the hearing it is helpful to go back to the application itself, lodged on 20 July 1979. That document set out almost 100 claimants. They were not listed in terms of any tribal, linguistic or other connection. They included persons who later appeared among the Kungarakany and Warai claimants and others who were among the Maranunggu claimants.

60. As mentioned earlier, an order was made for the lodging of a claim book by 30 March 1980. The claim book was compiled by Dr R. H. Layton and Dr N. M. Williams, both of whom gave evidence as part of the Kungarakany and Warai claim. Given the complexity of the claim, the preparation of the claim book must have been a demanding task.



Dr N. Williams gives evidence at the hearing.

Photo: G. Neate

Dr N. Williams gives evidence at the hearing.

Photo: G. Neate

61. The claim book presents the claimants as members of one of three groups, each of which is said to have a language or dialect name Kungarakany, Warai and Maranunggu. Of the claimants there mentioned, some 180 were Kungarakany, 50 Warai and 55 Maranunggu. By the end of the hearing the number, especially of Kungarakany had been increased markedly. The claim book reads:

Kungarakany and Warai people are closely linked as groups and as individuals. The nature of the links is exemplified in succeeding sections. Maranunggu claimants assert that no links between themselves and Kungarakany have ever existed (Exhibit 8 p. 9).

The claim book avoids adjudicating between the Kungarakany and Warai on the one hand and the Maranunggu on the other in regard to Area 1 and the south-west corner of Area 2 to which all groups lay claim.

62. Not long before the hearing began, it became apparent to the Northern Land Council, which until then had been acting on behalf of all claimants, that there was a conflict of interests involved. The claimants were advised that they should seek separate representation. This they did and the Maranunggu received separate anthropological advice as well. While not suggesting that anyone was to blame for the situation that arose, the lateness of the decision engendered some bitterness in the Maranunggu. They felt that they were called upon to present a separate case at short notice and that having discussed their claim with anthropologists, those anthropologists were later cast in a situation adversary to them. This feeling was I think accentuated by the fact that so many of the Kungarakany claimants were articulate in the English language and were more at ease during the hearing. These are considerations which I have tried to keep in mind when assessing the very considerable amount of oral and written material.

The claim area-a glance at history

63. In the mid-19th century the land south of Darwin began to fall under the influence of European settlement. Not much later it felt the added impact of Asia with the influx of Chinese miners. In the historical material she and Miss Coltheart prepared for this hearing, Miss A. N. McGrath, lecturer in history at Darwin Community College, described the area bounded by Southport in the north, Mount Finnis in the west, Pine Creek in the south and the Daly Ranges in the east, as 'the most densely populated part of the Northern Territory in the nineteenth Century' (Exhibit 37 p. 1).

64. The settlement at Port Essington had failed, due in part it was thought to the lack of a hinterland to provide the backup of pastoral and agricultural activities. Exploration took place down the Adelaide, Daly, Victoria and Finnis Rivers. In a burst of surveying activity around 1869, Goyder laid out township sites at Palmerston, Southport, Virginia and Daly with extensive surveys in the region of the Finnis and Adelaide Rivers. The results can be seen on a number of the maps tendered in evidence, for instance Exhibits 13B and 145.

65. The construction of the Overland Telegraph began on 5 September 1870 and was finished on 22 August 1872. It brought with it an intensive labour force with hundreds of single men, to become what Miss McGrath described as 'a major carriageway' and 'the key communication link throughout the interior' (transcript p. 680). The line ran from Palmerston to Southport then to Yam Creek, Pine Creek and on to Katherine. Its path became a thoroughfare, carrying goods and supplies for those involved in the construction of the line and for those who were moving in to take up land or to mine. Within a dramatically short space of time it opened the country in the region of the claim area to the impact of Europeans.

66. In 1870 gold was found in Neates Gully, south of Grove Hill and west of Mount Wells. Almost overnight the area of Brocks Creek, Pine Creek, Waterhouse and the country around was invaded by miners. The historical material presented by Miss McGrath in Exhibit 37 included a map of mining tenements which perhaps better than anything else demonstrated the extent of mining near the claim area towards the close of the 19th century. While little now remains, there were towns and roads opening up the country and exposing the Aboriginal population to the new arrivals.

67. The first Chinese miners arrived on the goldfields in 1874. By 1888 there were just over 6000 Chinese in the Northern Territory, dominating at least the alluvial mining. With very few exceptions they were men.

68. Among the effects of this early contact were:

'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' (Exhibit 37 p. 1).

69. Tin mining prospered in the early years of the present century, especially when tin prices went up during World War II. There were mines at East Arm, Horseshoe Creek and Mount Wells and later at Bamboo Creek. One of the Kungarakany claimants, Val McGinness, and the author, Xavier Herbert, were mining tantalite and tin in 1937 near the Lucy Mine, south-west of Southport. Minerals had been found at Rum Jungle in the 19th century but it was in 1949 that the discovery of uranium there brought about a burst of mining activity.

70. The wartime requirements of the 1940s led to the construction of aerodrome facilities, the bitumenising of the Stuart Highway and the extension of communication links.

71. Agricultural experiments in the region began as early as 1884 when coffee was planted at Rum Jungle. The early years of this century saw farming at Adelaide River, Stapleton Creek and at Batchelor. Aboriginals were employed in the growing of crops and to help generally on farms.

72. Pastoral activity in the region of the claim area was not as extensive as around Humpty Doo and the Victoria River and Barkly Tableland districts. The region tended to be one for smaller pastoralists, some supplying meat to miners in the area and to Darwin. There is little doubt that they relied upon Aboriginal labour and that there were many Aboriginals working on properties.

73. In the early years there was confrontation between Aboriginals and pastoralists. Injuries were inflicted; people were killed. Apart from the ravages of liquor and opium, Aboriginals became subject to smallpox, colds, 'flu, leprosy, tuberculosis and venereal diseases, heavily reducing their population.



Dr Xavier Herbert gives evidence. Photo G. Neate

74. When in 1911 the Commonwealth assumed control of the Northern Territory from South Australia, the results of the early contact were well in evidence. This led to a policy of protecting Aboriginals by segregating them, in part by the creation of reserves such as the Wagait Reserve, bordering the claim area to the west.

75. The presence of numbers of part-Aboriginal children was met by taking them from their mothers and placing them in institutions like the Kahlin Compound in Darwin or by sending them to isolated missions such as those on Groote and Croker Islands. A number of the Kungarakany claimants, including members of the McGinness family, experienced the effects of this policy and spoke feelingly of it during their evidence. Xavier Herbert spoke of his association with the Kahlin Compound and of the way in which the policy split Aboriginal families.

76. It is a sad story. My purpose in referring to it albeit briefly is for the light it throws upon the claimants, their histories and their lifestyles. The impact of so many Europeans and Asians must have led to some breaking down of Aboriginal traditional life although many claimants showed a remarkable resilience in their capacity to retain and revive aspects of their 'Aboriginality'. Speaking of the McGinness family, Dr Herbert commented:

They are a very happy people, the McGinnesses, because they stuck to the old people. It is only that. Like they say, if one does not he becomes a bloody nothing that is what the blacks say (transcript p. 537).

77. Inevitably people left their traditional country and took up residence elsewhere, not always to escape white contact, sometimes to gain what they saw as benefits to be obtained from it. Professor B. L. Sansom, an anthropologist and consultant to the Commissioner, put the matter this way in his written statement to the hearing:

In this case much has been made in evidence of the extent to which Aborigines were pushed about and subject to a range of vicissitudes (including accidental poisonings) during the post-contact period-i.e. from the time that white people were an active presence in the Northern Territory. To this view of a people pushed from pillar to post,

deprived of land, subject to introduced epidemic diseases, and induced disruption I must add what I shall call 'Stanner's corrective'.

In a Presidential address to ANZAAS in 1958, Professor Stanner pointed out that in the area of the Northern Territory that he knew best, there was voluntary movement of Aborigines away from home territories to centres of European occupation and activity. (Exhibit 125 p. I 1)

78. Professor Sansom quoted this passage from Professor Stanner's address:

Eventually, for every aborigine who, so to speak, had Europeans thrust upon him, at least one other had sought them out.

More history-the Kungarakany, Warai and Maranunggu

79. Tracing the historical movement of the Kungarakany, Warai and Maranunggu is not easy. Evidence and submissions were directed to this task. A useful summary may be found in Exhibit 123, the statement tendered by Dr D. T. Tryon, a linguist and consultant to the Commissioner. My debt to that summary will be apparent.

80. Such information as there is lies mainly within tribal maps prepared over the last 90 years. Foelsche, writing in 1891, referred to the Kungarakany as Ungrakin or Jeerite. In Dr Tryon's words:

The Jeerite were the Djerait, a different language group from the Kungarakany (Exhibit 123 p. 2).

Foelsche placed the Kungarakany mainly between the Finnis and Reynolds Rivers and showed the Woolwanga, of whom the Warai are part, to the east of the Kungarakany.

81. Parkhouse, writing in 1895, did not mention the Kungarakany but showed the Warai around Stapleton and Adelaide River.

82. Basedow, writing in 1907, placed the Kungarakany and Warai much where they are shown in the claim book. The map, figure 6 on p. 50 of Exhibit 8, puts the Kungarakany between Mount Finnis and the Stuart Highway and the Warai south and east of Batchelor. Basedow was the first to mention the Maranunggu who occupied 'the country around Hermit Hill'. Hermit Hill is just south of the Daly River and fairly close to Anson Bay.

83. Material prepared by Professor W. E. H. Stanner during his work at the Daly River in 1933 contains a map (Exhibit 8 p. 44) showing the Warai around Adelaide River, the Kungarakany west of the Adelaide River and between the Finnis and Daly Rivers and the Maranunggu around Hermit Hill. Professor Stanner's papers also include a map of the Daly area believed to date from 1913 and to have been prepared by a visiting medical officer. It records several Aboriginal camps along the Daly River near the present crossing. Two are identified as Maranunggu, one north and the other east of the river.

84. Spencer, writing in 1914, did not mention the Kungarakany or Maranunggu. He placed the Warai around Adelaide River.

85. Dahl, writing in 1926, spoke of the Warai as having territory extending from Mount Shoebridge to the Central Tableland. His fieldwork was done in 1894.

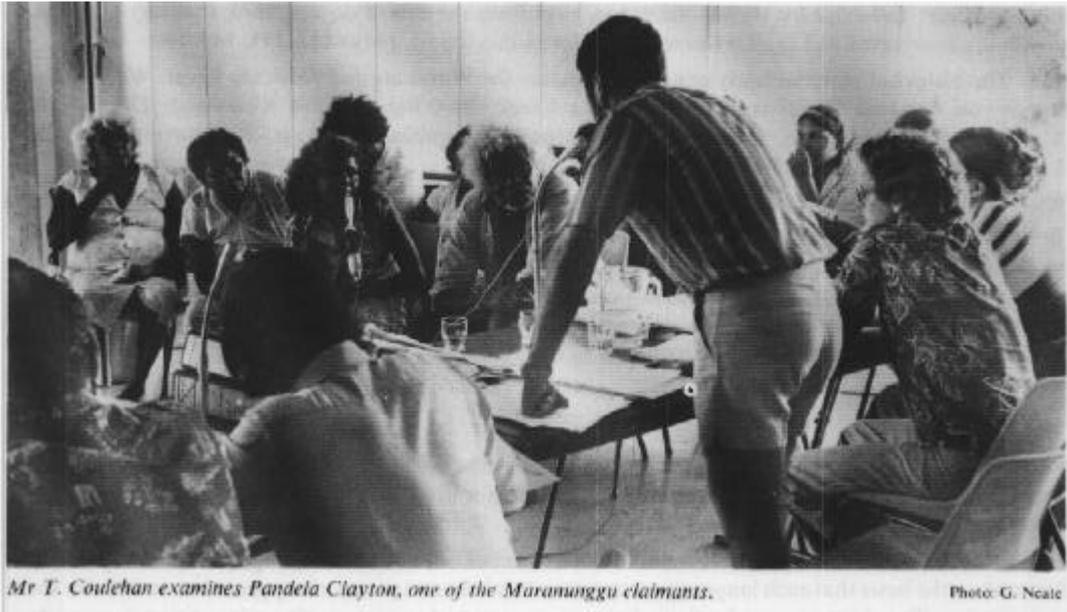
86. The tribal map of Australia published by Davidson in 1938 and the similar work by Tindale in 1940 both appear to have been based on earlier information and not derived from independent fieldwork.

87. At the time of the 1955 census a map of tribal distributions was prepared by a patrol officer, Sweeney. For the first time the Maranunggu were shown as a resident group north of the Daly River. It does not follow that there was a sudden movement of Maranunggu across the Daly River sometime between 1933 and 1955. The totality of the evidence suggests that there was a movement and that it probably began about the turn of the century.

88. Writing to Dr Layton in connection with the present hearing, Professor Stanner commented:

Maranunggu moved into Daly River settlement before any Marithiel did so. More of the Maranunggu did so and (refer to the maps of the settlement) had established themselves there before any of the Marithiel. The fact that the township planned for the Daly in 1913-14 was to be called Maranunga, although it was clearly up on Mulluk Mulluk Territory, is an enormously important clue. Its highly probable meaning is that by 1913 the Mulluk and Madngella were regarded as finished and the Maranunggu were looked upon as the most important tribe that was left (Exhibit

89. There is evidence of a movement during the 1920s of Maranunggu people northwards to the country between the Reynolds and Finnis Rivers. A number of the claimants were born at that time in that area and have conception dreamings at sites there. Nugget Major recalled seeing fights in the Reynolds-Welltree area as a young boy and walking with Maranunggu people back to the Daly where 'they stayed a couple of days and come back straight away' (transcript p. 1690). Some Maranunggu were then living at Batchelor. Bilawuk went to Mount Burton as a girl and was taken by her father to the Finnis River and to Rum Jungle. Waditj Fred Waters was born at Mount Burton and for a short period lived with his family on a farm at Batchelor together with other Maranunggu. Pandela Clayton left the Reynolds River area and went to Batchelor as a young girl when her parents were working at Batchelor Farm. In about 1927 Max Sargent's father was leasing the Lucy Mine in Area 2 and had Maranunggu working with him. These people were taken to Makanba, where a tin mine stands close to the junction of Bamboo and Walkers Creeks, then back to the Lucy Mine and to Stapleton Station.



Mr T. Coulehan examines Pandela Clayton, one of the Maranunggu claimants.

Photo: G. Neate

Photo: G. Neate

90. Mr Sargent recalled that during the 1930s there were seasonal migrations of Daly River people coming across the Reynolds River and returning south at the end of the dry season. Some he identified as Maranunggu. Between the late 1920s and early 1930s Mr Sargent accompanied his father mustering in the Finnis River area. Two Maranunggu families, those of George Jackaboi and Green Ant Paddy, camped adjacent to his father's stock camps at Annie Creek and Breakneck Pass, which lie within Area 2, and out on the Finnis Plain west of Area 1.

91. Maps showing tribal boundaries in the region have tended not to note the north-west progress of the Maranunggu. Despite Sweeney's map in 1955, Tindale's 1974 map shows the Maranunggu located well south of the Daly River. However, the 1976 map of Mr E. P. Milliken, Exhibit 67 (see N. Peterson: Tribes and Boundaries in Australia) shows the Maranunggu presence stretching from the Daly River in the south to Delissaville in the north and to Humpty Doo and Batchelor in the east. Dr Tryon explained that although the maps have become more detailed they have not attempted to delineate tribal boundaries beyond major rivers. And some of the later maps have simply repeated much earlier fieldwork.

92. Maranunggu speakers now fall into two territorial groups. One has its country south west of the Dilke Range which is south west of the Daly River. The other, the present claimants, has its land between the Finnis and Reynolds Rivers in from the coast. For the purposes of this hearing they are discrete; neither claims the other's area (Exhibit 58).

93. Dr Tryon, who has worked around the Daly River area, commented that a study of the languages does not point with any clarity to the movement of people. In his words:

Kungarakany, while mentioned in general surveys of Australian languages such as Cappell (sic) (1963), was only a name until investigated by the present writer in 1967 (Exhibit 123 p. 3)

Apart from short word lists prepared by interested persons between 1891 and 1926 and a mention by Capell in 1963, there was virtually no linguistic information until Dr Tryon began his studies in 1967.

Again borrowing from his summary:

Kungarakany and Warai, then, are practically linguistic unknowns, even though some survey writers continue to fit them into Australia-wide classifications on little or no solid evidence (Exhibit 123 p. 3)

94. In Dr Tryon's opinion, before he began his studies in 1967:

all that was known of Maranunggu were a few kinship and ethnological terms in the works of Stanner (Exhibit 123 p. 4)

95. Some of the Maranunggu claimants spoke of their people as having been always in the area of Finnis River. The evidence shows this not to have been the case. I do not think that any question of credibility is involved as I shall try to explain later in this report, paras 142-144, 148-149.

96. The historical material fairly consistently places the Warai around Adelaide River. Wawita Banjo Banderson declared Warai country as Brocks Creek, Ban Ban, Mount Ringwood, Deep Waters, McKinlay River Junction, Rum Jungle, Miniling, Gungunbi, Wulinngi, Palngarriny, Stapleton, Litchfield and Pundunrung (transcript p. 503).

97. The maps show the Kungarakany as the north-western neighbours of the Warai, with the Larrakiya to their north. To the west were the Parlamarnyin, Wadjiginy and Djeraitj.

98. I agree with the submission by Mr Pauling that:

... the totality of the evidence supports an eastward movement of the Kungarakany towards the overland telegraph, the railway, the mines and the dubious benefits of flour, sugar, tea, alcohol and opium. The focus for the Kungarakany became Adelaide River (transcript p. 3333).

The claimants

99. A special and complicating feature of this claim is the existence of more than one group claiming traditional ownership of part of the land. The explanation for this is to be found largely in history; the resolution must be found within the Land Rights Act.

100. As mentioned already, the claimants are members of one of three language groups. They were put forward on the basis that each language group was a local descent group, an approach that calls for some examination. The claim was not by three disparate groups seeking recognition of traditional ownership. Rather the Kungarakany and Warai joined in making a claim to the whole of the land, each asserting traditional ownership of a particular area or areas but both claiming ownership of some land through the sharing of sites. The Maranunggu claimed traditional ownership of land in the western section of the claim area and did so to the exclusion of the others. The Kungarakany and Warai, both as groups and as individuals, were said to be closely linked historically and in contemporary terms. No such links were asserted in regard to the Maranunggu or by the Maranunggu themselves.

101. The claimants were presented as members of families. Many of the Kungarakany belong to the McGinness or to the McGregor Verberg Calma family. They look to a common ancestor whose name is not recalled but who was the parent of Maranda and Alngindabu, brother and sister born towards the end of the last century. The McGinness family trace their relationship through Alngindabu and the McGregor-Verberg Calmas trace theirs through Maranda.

102. The Warai are said to form two single extended families who trace their relationship to common ancestors, Miniling and Ayulnyul. One of the groups, the Hazelbanes, descend from Ngatkali a daughter of Miniling and Ayulnyul. The other, having a number of surnames, look back to Ganwardak, Ngatkali's younger brother.

103. The Maranunggu regard themselves as a sort of extended family, but a larger one than the Warai. They trace their relationship to a common set of parents, Taybut and Ngulikang.

104. The relationship of the members of all these groups appears in the genealogies that were submitted (Exhibit 30). More detailed reference to the structure will be necessary but the basis of membership of the Kungarakany, Warai and Maranunggu groups was said to be patrilineal descent.

105. There were among the claimants, particularly the Kungarakany, many instances of children born to an Aboriginal woman and a European man or descended from such a union. Indeed those who were most articulate in the presentation of the Kungarakany claim fell within one or other category. In consequence serious issues were said to arise as to the existence of local descent groups, their composition and the 'Aboriginality' of many of the claimants. All these matters call for comment; I am concerned at this stage only to say something about the notion of recruitment to the local descent groups constituted by the claimants. It is a matter to which I shall return when discussing principles of descent.

106. I accept that patrilineal descent is the usual basis of membership of the three groups. But it was said:

The potential equivalence of maternal and paternal links as options for determining group membership is not a new feature of Aboriginal societies in this area (Claim Book Exhibit 8 p. 24).

Reference was made to the writings of T. A. Parkhouse, an observer of Darwin and its environs in the mid 1890s. I shall refer to Mr Parkhouse in more detail later, see paras 155-156. He described the situation of the son of a Warai woman and a Larrakeyah man and also of that of the children of a Wulna man and his two Larrakeyah wives. In my opinion rather much was sought to be drawn from those particular cases and I am not persuaded that they substantiate a general use of maternal links to determine group membership. The evidence did establish a basis for membership in the case of children of mixed blood. But it was not a maternal link in the sense just described. Rather the absence of an Aboriginal father might result in a child assuming the group identity of the Aboriginal husband of his mother or perhaps, in the event of there being no Aboriginal husband, that of his mother.

107. The claim book refers also to procedures of naturalisation and adoption for determining membership in a land-owning group. Particular instances of adoption have occurred in several of the land claims and there is nothing surprising in the notion of a child, particularly one whose parents have died, being brought up by another family and attributed membership of the local descent group to which that family belongs. It seems however that the Maranunggu have not permitted the adoption of a non-Maranunggu person.

108. As already mentioned the Kungarakany claimants include two families, the McGinness and the McGregor Verberg-Calmas. Alngindabu, the mother of some of the claimants including Margaret McGinness Edwards, was the senior Kungarakany woman, exercising authority and being respected as such. She seems to have been active in teaching her children and other members of her family about Kungarakany land and the stories of ancestral spirits. Her brother, Maranda, was called 'King Frank' by Europeans and the claim book suggests that Alngindabu fulfilled a role comparable to that of queen. In whatever sense and for whatever purpose those terms were used, it is enough to recognise the authority accorded to Maranda and his sister Alngindabu by the Kungarakany people.

109. There are two branches of the McGregor-Verberg-Calma family, both looking back to Walwalkiny and Tjalinmara, a Kungarakany man and woman, as their antecedents. Tjalinmara was Maranda's daughter. The McGregor branch traces descent through Mundang Edwin McGregor who died in 1979 and the Verberg-Calma branch through Anmilil Magdaline Verberg, now Magdaline England. Mundang and Anmilil were brother and sister, the only children of Walwalkiny and Tjalinmara.

110. In an interesting transmission of authority, the succession of Mrs Edwards to the role of her mother was confirmed at Alngindabu's shade-laying or mortuary ceremony. Mrs Edwards lives in Melbourne and has named Violet McGinness Stanton as her deputy. The claim book asserts:

Mrs Edwards would have followed the usual Kungarakany rule of female primogeniture but for the fact that her daughter lives in Canberra and Violet Stanton's elder sister ... has for some time not enjoyed good health (Exhibit 8 p. 27).

I do not think it is necessary to consider the precise basis of this authority or of the way in which it is handed on. Mrs Edwards clearly is a woman of authority and knowledge among the Kungarakany people as is Mrs Stanton. I accept that both are active in the transmission of knowledge to the McGinness family and in seeking to instill and perpetuate among members of that family knowledge of the traditions and beliefs of the Kungarakany. I also accept that they have succeeded in this task to a considerable degree.

111. Of the Warai, one extended family including the children of Ganwardak and Naday Marakai Polly, lives in Humpty Doo. Another family, the Hazelbanes, lives in Darwin. Some live at Adelaide River.

112. Reference will be made to Abalak George Havelock, a Malak Malak man, who occupies a position of authority among the Kungarakany and Warai. The genealogical basis for this seems to lie in the fact that Abalak and Ganwardak, the father of the senior members of the Humpty Doo Warai, called each other 'mate' or brother-in-law.



Abalak (standing) gives evidence for the Kungarakany and Warai claimants. Photo: G. Neate

113. The presentation of the Kungarakany and Warai as essentially joint claimants tended to offer a picture of deceptive simplicity. The historical and genealogical associations are there without doubt but in terms of land ownership and especially traditional ownership as defined in the Act, some independent analysis is required.

114. The Maranunggu relate to Taybut and Ngulikang, parents three generations earlier than the senior claimants in this hearing for instance Bilawuk, Waditj Fred Waters, Pandela Clayton, Nancy Dayi and Peter Melyen. The Maranunggu are in a special position in regard to the land claimed. They have for some time occupied the eastern part of the Wagait Reserve and have moved around not only that land but country to the north, east and to the south of the Reserve. This takes in Area 1 of the claim. Their present physical connection with the land they claim is undoubtedly closer than that of the Kungarakany and Warai. The implications of this in terms of traditional ownership, especially of Area 1 for which the Kungarakany are also claimants, needs consideration.

115. The heavy impact of European settlement upon the claimant groups must be looked at when examining the question of traditional ownership, strength of attachment and desire to live on land.

'Aboriginality' and the Land Rights Act

116. As various submissions brought into question the notion of Aboriginality and the requirements of the Land Rights Act in this regard, it is necessary to say something about these matters.

117. The Land Rights Act is concerned with tradition all and claims made by or on behalf of Aboriginals. Section 3(1) defines 'Aboriginal' to mean:

a person who is a member of the Aboriginal race of Australia.

There may be a degree of circularity in this definition but argument as to the meaning only arises when persons who have a non-Aboriginal parent or other ancestor are put forward as claimants.



Waditj Fred Waters and Bilawuk point out a Maranunggu site to the Aboriginal Land Commissioner.

Waditj Fred Waters and Bilawuk point out a Maranunggu site to the Aboriginal Land Commissioner.

Photo: G. Neate

118. Although the Act is imprecise on this point, I take the expression 'Aboriginal race of Australia' to include the descendants of those people who inhabited Australia at and before the time Europeans arrived. The Oxford English Dictionary uses expressions such as:

a group of persons ... connected by common descent or origin

and

a group or class of persons ... having some common feature or features

to define race.

119. As I said in the Uluru Report, the definition of the Act is 'genetic rather than social'(para. 115). The dictionary definitions are framed in such a way that people having mixed racial origins are not excluded from a race with which they are genetically linked. Despite Submissions made to the contrary (see Exhibit 140 pp. 6-8), there is nothing in the Act to compel the view that a person who is descended from both Aboriginal and non-Aboriginal ancestors cannot be considered an Aboriginal. References to Aboriginal tradition and sacred sites and the elements of traditional Aboriginal ownership do not operate to narrow the scope of the definition. They are directed at the beliefs, roles and responsibilities of Aboriginal people, not at who is an Aboriginal.

120. Membership of a race is something which is determined at birth and cannot, in a sense, be relinquished, nor can it be entered into by someone lacking the necessary racial origin. It is unnecessary and unwise to lay down rigid criteria in advance. As situations arise in which the Aboriginality of claimants is put in issue, those situations can be looked at. In saying this I adopt the comments of Mr Justice Woodward in his Second Report on Land Rights:

Differences between Aborigines should be allowed for, but any artificial barriers in particular those based on degrees of Aboriginal blood, must be avoided (para. 62).

121. This is not to say that persons whose predecessors were predominantly non-Aboriginal will necessarily qualify as Aborigines within the Act. As the High Court said in *Ofu-Koloi v. The Queen* (1956) 96 CLR 172:

If and when persons are in question who are, so to speak, on or near the boundaries of the racial classification as ordinarily understood, there will, of course, be a question of denotation and it may depend on the establishment by the courts of a more exact connotation of the expression than is customary in its use in vernacular speech. But that kind of difficulty is familiar in courts when inexact terms from common speech are employed in legislation. But courts may well be content to go on applying the legislation without anticipating the day when, if ever, the difficulty will arise (Dixon C.J., Fullagar and Taylor J.J. at pp. 175 176).

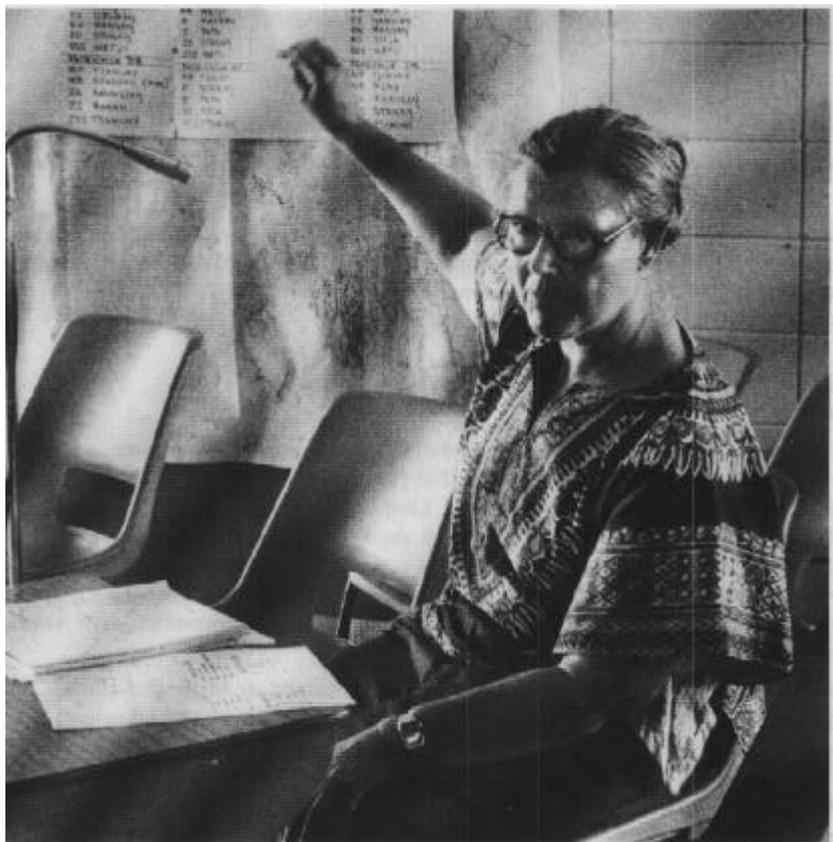
122. Whatever 'Aboriginal' may mean as a matter of law, the Kungarakany and Warai claimants laid some stress upon the broad concept of Aboriginality. They sought to show through their own evidence and through the testimony of others, that the admixture of Aboriginal and European blood and the contemporary lifestyle of the claimants had not destroyed their Aboriginality.

123. Professor J. C. Goodale spoke of Aboriginality as:

a declaration of an ethnic identity, and by that I mean identity with a group of people, an identity that is derived from some genetic basis, and which one will assert when it is necessary or convenient or important to do so, and which is generally accepted by others of that group to which one is asserting membership as being an appropriate identity for the person to assume (transcript p. 380).

As there expressed the concept has a genetic basis and requires assertion by an individual and the acceptance of that assertion by other members of the group. Professor Goodale added:

... that in order for one's claim to be validated it must not only be accepted by members of the group to which one seeks admission but by others from outside the group who identify members within that group (transcript p. 381).



Prof. J. Goodale gives evidence at the hearing.

Photo: G. Neate

Prof. J. Goodale gives evidence at the hearing.

Photo: G. Neate

124. During the hearing I expressed a concern that this approach involved some circularity, since the only constraint placed upon the external group was familiarity with the members of the group to which admission was sought. In the end Professor Goodale spoke of sub-groups within a larger ethnic group, the members of the former being in a position to accord recognition or withhold it from someone claiming membership of a particular sub-group.

125. The discussion was useful in emphasising that a person of mixed blood may be accorded recognition as an Aboriginal and as a member of a tribal, linguistic or other group. To take one example, Mrs Violet



Mr D. Parsons examines Kungarakany and Warai witnesses including (front row left to right) Mr V. McGinness, Abalak, Anmilil, Mr T. Calma, Mrs M. Edwards, Mrs V. Stanton.

Photo: G. Neate

Mr D. Parsons examines Kungarakany and Warai witnesses including (front row, left to right) Photo G. Neate Mr V. McGinness, Abalak, Anmilil, Mr T. Calma, Mrs M. Edwards, Mrs V. Stanton.

Stanton, whose mother was Aboriginal and whose father was European, was a prominent witness for the Kungarakany claimants of whom she is one. Dr Williams described how in 1969, long before there was any question of a land claim, she had met Mrs Stanton in Darwin and she had identified herself 'as a Kungarakany person' (transcript p. 1367). Many witnesses of mixed blood were at pains to stress their Aboriginality, the importance of Aboriginal tradition and customs to them. It may be said that in the context of a land claim there are considerable material advantages to be gained by stressing one's Aboriginality. No doubt that is true but in the end it is a matter of the conclusions properly to be drawn from the material presented, noting for instance whether the assertion of Aboriginality is a recent one or whether it predates the Land Rights Act.

126. Professor Goodale had no particular association with the Kungarakany and Warai claimants before the hearing but in the light of the evidence given by them and discussions outside the framework of the hearing she later prepared a diagram of the Kungarakany and Warai kinship systems, Exhibit 53. The aim was to show a kinship structure and pattern of marriage rules comparable to the patrimoieties and matrimoieties found in other Aboriginal societies. In particular she found strong similarities with the kinship system of the Tiwi with whom she has worked over a number of years.

127. Professor Goodale drew out the comparison with the Tiwi by referring to evidence that had been given of shade-laying ceremonies, of the conferring of names related to country, of the ngirrwat the ceremony at which a woman hands on a name to another woman or a man to a man. All had their counterparts among the Tiwi, pointing in Professor Goodale's opinion to what might fairly be described as a society Aboriginal in its structure. There is a good deal of force in this approach although it is necessary to consider just what happens as opposed to what may be an idealised picture.

128. I am satisfied that among the claimants who gave evidence there was a general desire to maintain Aboriginal traditions, at least to the extent that it is possible within the lifestyles they now lead. It was reflected in various ways—an interest in language, the use of Aboriginal names, the recording of stories, some ceremonial life and, in the case of the Kungarakany, an active participation in Aboriginal organisations. See Exhibit 149 p. 3 for example.

129. In the case of claimants who did not give evidence, especially those living out of the Territory about whom little was said (see Exhibit 126), such a conclusion cannot be reached so readily. That is not to question that they are Aboriginals as defined in the Land Rights Act; it is to point up the difficulty of assessing their status as traditional owners and of measuring the strength of their traditional attachment. By way of illustration, April Bright, the daughter of Pandela Clayton, a Maranunggu claimant, and of Ronald Clayton, an Englishman now deceased, supported the Maranunggu claim but was not herself a claimant.

I do not consider myself to be eligible to be a claimant for the simple reason that I do not class myself as a traditional Aboriginal: I do not class myself as an Aboriginal. I am just me, what I am, from the life that I have led (transcript p. 2588).

Notion of traditional ownership

130. The opposing claims made by the Kungarakany and the Maranunggu to Area 1 and to the south western portion of Area 2 produced an issue both novel and complex. It requires a consideration of historical and contemporary material. As well, it calls for an examination of some basic principles of anthropology, particularly in regard to traditional ownership of land. In this respect I had the benefit of a helpful discussion by several anthropologists; I mention them in the order in which they gave evidence- Dr R. H. Layton, Dr N. M. Williams, Professor J. C. Goodale, Dr P. J. Sutton and Professor B. L. Sansom.

131. Historically, as has been noted, there has been a movement of the Maranunggu from south of the Daly River to country between the Finnis and Reynolds Rivers including Area 1 and that part of Area 2 claimed by them. And the Kungarakany moved eastwards from those parts of the claim area. I use the term 'historically' in a European sense and shall say something later about the way in which the process may have been seen through Aboriginal eyes. In the report they prepared on traditional ownership of the Wagait Reserve, Messrs W. Ivory and A. F. Tapsell commented:

Soloman Gumbana and Jimmy Tudmuk said they remembered a battle that took place at 'Wulman' about 70 years ago (from occurrences that took place at that time e.g. World War 1) between the Kungarakan, Mulluk-Mulluk and Brinkin groups against the Maranunggu group. The Kungarakan group on whose land everyone was fighting were successful in driving the Maranunggu group back. A similar battle also took place at 'Butjul' (in this case at the northern part of Murrenj Hill) between the same groups. The Kungarakan were once again successful ... The Kungarakan group we were told won these fights, however shifted (whether voluntarily or forcefully we could not work out for sure possibly both) towards Adelaide River round about the 2nd World War (Exhibit 35 p. 7).

132. With a view to resolving these mutually exclusive claims, two theses were propounded. Put broadly and oversimplified, one was that the traditional ownership of Aboriginal land can never be lost. The land is incapable of alienation and will remain that of the traditional owners. One can immediately see a difficulty in this thesis. It assumes that the Kungarakany were always the traditional owners of the land in question. That difficulty is met by saying that there is evidence that in the past the Kungarakany were the traditional owners. We can go back no earlier in time and so the thesis leads inevitably to the conclusion that the Kungarakany are still the traditional owners.

133. The other view is that traditional ownership of Aboriginal land is not necessarily a static thing. It is something that must be activated and maintained, which is capable of being lost, not just through absence from the land but because of the extinguishment of any responsibility for it. This view requires a consideration of all relevant material to determine whether it is the Kungarakany or the Maranunggu who, in traditional terms, maintain the land and are responsible for it. It is a view that recognises the historical movement of the Maranunggu and Kungarakany and accepts that such a movement is capable of producing a change in traditional ownership.

134. In the course of the hearing these theses became the subject of considerable questioning and debate. I wish to make it as clear as I can that, although forced to express some opinion on them, I do so only for the purposes of understanding and implementing the provisions of the Land Rights Act. The anthropological debate will continue. The resolution of these claims lies within the framework of a particular piece of legislation and I am concerned to range no more widely than is necessary to carry out

my functions under the Act. It may be that the answer demanded by the Act is not that demanded by anthropology, if indeed anthropology is able to insist on one answer.

135. Professor Goodale was at some pains to distinguish between ownership of land and the right to use land. The traditional owners of land may give to others the right to use it temporarily or permanently without necessarily surrendering their own rights of ownership. She thought that tacit consent to occupation and use would not result in loss of traditional ownership, emphasising that the right to exploit land is not the same as ownership.

Ownership of the land gives one the right to control the exploitation through the requests of people who wish to exploit it, requests which in actual fact are rarely, rarely turned down (transcript p. 401).

She used alienation in two senses, alienation of land and alienation from land, saying:

... it is almost impossible for Aboriginal people to alienate themselves from land and remain Aboriginal people (transcript p. 402).

136. Professor Goodale referred to evidence given at the hearing of the Kungarakany 'taking over' Parlamarnyin land on the coast. She understood that to be 'vacant land', taken over without objection hence distinguishable from the present proceedings. The very concept of 'vacant land' presents some problems. There are those who assert that in traditional Aboriginal terms there is no such thing as unowned land. All land must belong to someone. Why this should be so, I am not sure. It suggests a static Aboriginal society in which groups are not extinguished by death, moved forcibly or just shift away from country.

137. Professor Goodale did point out that there are mechanisms in Aboriginal law for seeing that land does not become vacant, one of which is:

...the alternative membership rule of children of female members when children of male members cannot give that membership to an Aboriginal group (transcript p. 1334).

However effective these mechanisms may be, must they always ensure a continuity of ownership? History itself suggests a movement of Aboriginal people into and then dispersal throughout the continent with at least the likelihood of ownership changes from time to time. In saying that, I am not losing sight of Professor Goodale's distinction between ownership and use; I merely suggest that use over a long period may possibly give rise to ownership and conversely lack of use may extinguish it.

138. Various illustrations were put to Professor Goodale and other witnesses, some from the writing of Dr Tindale, some from the writing of Dr Meggitt. Most witnesses disclaimed any detailed knowledge of these examples and for the purposes of this hearing I do not think it necessary to refer to them.

139. Dr Layton's approach was somewhat different. While laying stress upon prior rights of ownership, he regarded as relevant whether the 'original owners' were still exercising rights and responsibilities, adding:

... one would want to know whether or not they have admitted other people into their number; whether they have extended the range of people to include outsiders or newcomers (transcript p. 1457).

Asked whether he would take as his major premise the principle that traditional ownership of land is not capable of being lost, at least where the traditional owners are still extant, he answered:

Where the owners are still extant and still exercising their responsibilities and rights, yes (transcript p. 1476).

140. Dr Layton's assessment (p. 1462 of the transcript) was that the Kungarakany have not incorporated the Maranunggu into the body of landowners and that it is in no way clear that the Maranunggu have attempted to secure such an incorporation. Each claims independently to the exclusion of the other.

141. Dr Sutton began by speaking of ways, licit and illicit under Aboriginal law, of moving in to an area. He then posed the question. What is the position of the children and later descendants of people who had moved illicitly into land? They had done nothing wrong and, in Dr Sutton's view:

... through conception and birth in the country, through being taught about the country both ritually and economically and in other ways, these children growing up ... with a highly edited version of the historical facts being handed to them by their elders, I think as long as they truly believe that they do take this responsibility and have this spiritual affiliation to the land then in any real and enactable sense, yes, they do have it (transcript p. 2051).

142. If I understand his views correctly, Dr Sutton recognised that disputes may arise concerning the ownership of land and that in some circumstances:

... inter-group politicking may be most intense, and there may be a long period before the matter is settled (Exhibit 66A p. 3).

This view may not appeal, especially to those who think of traditional Aboriginal society as something static. But should one assume that Aboriginal society is unique in this respect? Dr Sutton's thesis continued by postulating that once a dispute has been resolved, Aboriginal people will quickly accept that the resolution has always been the case. The process has Orwellian overtones since according to Dr Sutton:

Sometimes only very old people may be found who know of the changes that have taken place, and in my experience these people have frequently exercised a policy of withholding such historical information from their juniors (Exhibit 66A p. 3).

The motivation is a concern for the peace and stability of the community. A revival of the issue or even drawing attention to it may damage that peace and harmony, hence Dr Sutton's reluctance to speak at length in public about the matter.

143. It is not a novel thesis. As Dr Sutton pointed out, other anthropologists have spoken of the shallowness of Aboriginal genealogies (Exhibit 66 p. 3), something to which I referred fleetingly in the Utopia Report para. 24.

144. Writing of his earlier fieldwork, Professor Stanner commented:

Like other aborigines, the Murinbata believed that their tradition was old, continuous and true. On the evidence, I had to conclude that, historically speaking, it was shallow, selective, and neither true nor false; ... If one could speak of a Murinbata tradition at all it had to be as the product of a continuous art of making the past consistent with an idealised present ... It is a painful wrench for a European mind to have to have to deal with so shallow a perspective on time, and with mentalities that are ahistorical in outlook while asserting the contrary (On Aboriginal Religion, Oceania Monograph No. 11, 1966, pp. 139 148).

145. Dr Sutton did accept the distinction drawn by Professor Goodale between ownership and residence or occupation. But he thought that the latter may give rise to the former. In his words:

Conflict over land among Aboriginal people appears to proceed in one of two basic directions. Either there is a disagreement over ownership, which, upon resolution, establishes rights of both ownership and residence. Or there is a conflict over residence rights which, upon resolution, may lead to a change of ownership (Exhibit 66A p. 5).

146. It was part of Dr Sutton's thesis that once an Aboriginal group has been conceded rights of occupation and use, they are 'at least well on the way' to becoming traditional owners of that land. It will take time before the normal associations of conception, birth, burial, ritual and ceremony result in their becoming its primary custodians. It seems to me logical that this may happen and conversely that title may be lost by extinction of the traditional owners or by their departure from the land and the disappearance of any recognition of responsibility for it.

147. Questioned about the indicia of ownership, Dr Sutton referred to 'a battery of individual features' (transcript p. 2115) within which he included conception, birth, conception sites, burial grounds and assertions regarding country.

In Dr Sutton's opinion, the evidence presented a picture of Area 1 and part of Area 2 different from the rest of the claim. That was based on his assessment that in respect of those areas the Kungarakany and Warai no longer performed ritual or songs, no longer visited and no longer passed on knowledge. He attributed this to the presence of the Maranunggu which:

... must have had some effect on everybody's movements in that area and everybody's relationships to that area, including Europeans, especially in the Wagait Reserve but also in other areas (transcript p. 2188).

Whether the Kungarakany and Warai no longer perform ritual or songs, no longer visit and no longer pass on knowledge in regard to this country is something that will need consideration.

148. Professor Sansom's views may be found in his written statement Exhibit 125, and in his oral evidence, He drew a distinction between de facto occupancy and use of land and traditional ownership as of right, recognising that the former may be converted into the latter.

... a principle is clear: for as long as there is living memory of traditional ownership of land, the 'fact and claim of estate' is not extinguished. For claims to be wholly extinguished, consciousness of them must die. And the death of memory in an oral culture is closely associated with the dying out of representatives of preceding generations with

particular clan affiliations ... What is required is a lapse of about two generations together with the absence of surviving counter-claimants. With the efflux of time, uncomfortable facts concerning the prior and original rights of now defunct groups can finally become irretrievable (Exhibit 125 p. 3).

149. Picking up Dr Suttons' concern that the land claim, by confronting younger Maranunggu with the assertion of 'immigrant status' has interrupted the normal process of obscuring their origins, Professor Sansom commented:

I would put the matter more strongly. The 'normal process' to which Dr Sutton refers has not so much been interrupted as wholly subverted by this hearing and the investigations that preceded it ... For the younger Maranunggu people concerned the consequence is an irretrievable resurrection of the past. They can never return to an innocent unawareness of the alleged immigrant status of their group (Exhibit 125 p. 4).

150. The views propounded by Dr Sutton and Professor Sansom are not, I think incompatible with Professor Goodale's thesis on alienation, at any rate in the sense that neither suggested the conscious alienation of land. What they sought to point out was the historical process by which traditional ownership may be lost and by which it may be acquired. The process may begin with conflict, it may not. Evidence that ownership has been lost lies in the absence of traditional associations with land, as Dr Layton recognised, and the loss of awareness of those associations. It may be found when a belief in ownership and the presence of traditional associations have sufficiently crystallised. That process may be interrupted or subverted: the extent and implications require an analysis of the evidence.

151. In my opinion that approach is not only persuasive anthropologically but sits more comfortably with the notion of traditional Aboriginal ownership in the Land Rights Act. The requirements of common spiritual affiliations and primary spiritual responsibility point to the possession of beliefs and the performance of obligations. Coupled with an assessment of the strength of attachment of the claimants, they look to situations that are not necessarily static or ordained for all time.

Principles of descent

152. The claim book contains this statement:

Membership in the Kungarakany, Warai, and Maranunggu groups is normally determined by patrilineal descent. In cases of children born to a female member and a European man, however, the children have been assigned regular membership in their mother's group, since it is through their mother that they acquire their Aboriginality. Entailed in this membership is the spiritual affiliation to sites that joins all members of the land-owning group (Exhibit 8 p. 24).

153. The existence of local descent groups and the manner of their composition were canvassed at great length in the evidence of the anthropologists. Several questions arise. Is there among the claimants one or more local descent groups? Is there a principle of recruitment that accords with the Act? Who make up the membership of the local descent groups? Assuming there are local descent groups, do they possess common spiritual affiliations to sites on the land claimed that place the groups under a primary spiritual responsibility for those sites and for the land'?

154. Dr Layton, a co-author of the claim book, commented:

... that in conferring membership of the descent group patrilineal descent is the presumptive principle in other words, other factors being equal membership will be conferred by patrilineal descent (transcript p. 33 1).

The substantial admixture of European blood among the claimants, particularly among the Kungarakany, led Dr Layton and other anthropologists to consider just how presumptive patrilineal descent is and what other principles and rules may be at work. In Dr Layton's view the presumption applied to the children of a married Aboriginal couple if the genitor is a white man:

... in other words, the child will belong to the group of his mother's Aboriginal husband (transcript p. 331).

He explained that there are reasons why patrification may not operate in a particular case, in which event other links are used to confer membership of the local descent group. He instanced the children of women who were widowed who then joined their mother's descent group and also the children of Aboriginal women married to white men. On a broader plane there are company relationships, the alliance of two language groups through marriage, foraging or the performance of ceremonies. A member of one such group may through marriage, the acquisition of language and customs and participation in ceremonies become a member of a neighbouring group and in turn pass on the membership of that group to his children.

155. The claim book cites an article 'Native Tribes of Port Darwin and Its Neighbourhood' written by Mr T. A. Parkhouse and published in the proceedings of the Australian and New Zealand Association for the Advancement of Science, Sixth Meeting 1895 (Exhibit 56). Mr Parkhouse is described as formerly accountant and paymaster, South Australian Government Railways, Port Darwin. There is nothing to suggest that he had any formal anthropological training, but clearly he was interested in the customs and behaviour of Aboriginal people. Parkhouse's observations are referred to in the claim book to support the proposition that people used maternal links in determining group membership. The paragraph relied upon reads:

A widow and orphans are kept alternately by her own and by her deceased husband's family, and in some instances I know the time of relief is eagerly looked for. This rule also obtains when the parents belong to different tribes; the children, however, are of their mother's tribe. Keddell, the son of an Awarra woman whom the Larraki'a had stolen for wife, is an Awarra. His parents both died in his infancy, and until puberty he was brought up principally by his father's family; he now lives with the Awarra, but in the Larraki'a camp when he visits his father's people he takes his place of right in their circle. A Wulnar by his first wife had two sons and two daughters, and later by his second wife, a Larraki'a dwelling on the Elizabeth, two sons Berber and Lemallagwa. He and his first wife are dead, and his issue from both marriages have resided with the brother of the second wife, who remains a widow. I cannot say whether the first wife was a Larraki'a, but all the issue are Larraki'a; one of the daughters has some knowledge of the Wulnar tongue, the others have forgotten it. The widow's brother has now taken to wife a Wulnar, a girl of thirteen, named Minn-gari, unable to speak in Larraki'a. L'uerdwoa, a Wulnar previously mentioned, and Lemallagwa are tribal brothers, but in fact their parents were not brothers or sisters (Exhibit 6 p. 640).

156. Dr Layton was questioned about the article by counsel to the point where these observations assumed an unduly important role. Accepting everything that he observed and reported upon, I have difficulty in concluding that Mr Parkhouse intended to depict some general principle by which fatherless children assumed membership of their mother's group nor am I able to draw such a sweeping conclusion from the article. That is not to say that matrifiliation may not play an important part among the Kungarakany and Warai. It is simply to suggest that the evidence must be found in other places as well. For instance Dr Layton noted that some of the Warai claimants (Barbara, Ronnie and Queenie Yates) had a Kuwama father and were later adopted by their mother's brother to become Warai.

157. There was frequent reference to patrilineal descent, matrilineal descent, patrification and matrifiliation. As I understood Dr Layton, he asserted patrilineal descent as the presumptive principle while recognising that at particular generation levels matrifiliation would operate so that a person took the country of his or her mother. He did not suggest that, so far as the Kungarakany or Warai are concerned, matrifiliation occurred with sufficient regularity to create a matrilineal descent.

I am saying that the principle of matrifiliation may be the mechanism by which a person becomes a member of the group (transcript p. 352).

158. The alternative of matrifiliation has existed according to Dr Layton's research since Alngindabu and her brothers and sisters were alive, she being legally married to a white man (transcript pp. 1547-1548). At the time of the death of Frank Pamari Maranda and his generation, the transmission of land-owning rights through the patriline was possible and rights had in fact been passed from Maranda to his daughter Tjalinmara. Mr Pauling suggested to Dr Layton that Tjalinmara's husband, Walwalkiny, a Kamu man, was 'naturalised' as Kungarakany so that land ownership could be transmitted from him. Dr Layton questioned this theory on several grounds, one being that there was a suggestion that Walwalkiny had always been Kungarakany, another that it was not known when, in relation to his marriage, he had been naturalised (transcript pp. 1553 1554). In Dr Layton's view the children of Alngindabu have rights as Kungarakany according to the principles he had already enunciated, that is through matrifiliation.

159. While accepting 'a presumptive rule of patrification, which in a cumulative sense over a number of generations of course results in a patrilineally defined group' (transcript p. 1379), Dr Williams saw the matter rather more broadly. In her view linkages both through men and women exist but not one to the entire exclusion of the other. She stressed that the harshness of the environment and indeed the harshness of history might result in a greater use of the matrifilial principle than would otherwise have been the case. Accepting that there was no evidence of matrifiliation predating the European impact in and around the claim area, she regarded it as a valid principle although one that had not frequently been called upon.

It is primarily because of the effects of European settlement in this area that its frequency has increased to the extent it has (transcript p. 1 380).

Dr Williams had in mind the extent of intermarriage between Aboriginal women and European men among the Kungarakany. At the same time it was her conclusion that links through the mother were explicable on grounds other than intermarriage. She found this in the responsibility that women have to land.

160. She thought that about 50 percent of the Kungarakany claimed through matrification and 50 per cent through patrification. She stressed that she was speaking of matrification and patrification rather than of lineal descent and that her percentages estimate held good in terms of my one generation (transcript p. 141 5).

161. The object of Mr Pauling's questions to Dr Layton was, I think, to determine whether there was truly a descent principle operating within the Kungarakany or whether the idea of patrilineal descent as a presumptive principle was just a convenient way of rationalising a situation that had developed over the years. The answer to that depends upon what is meant by 'local descent group' in the Land Rights Act. This has been discussed in earlier reports, the Utopia Report paras 109-121 and Willowra Report paras 85 89 for example. In essence my view was and is that a local descent group is a collection of people related by some principle of descent, possessing ties to land, who may be recruited, to use Professor Sansom's expression, on a principle of descent deemed relevant by the claimants. That description is apt to include the instances of patrilineal descent, patrification and matrification among the Kungarakany claimants.

162. Counsel put to Dr Sutton a definition of local descent group offered in the Uluru land claim.

... a group of people united by ties with a specified locality in which membership is normally transmitted from parent to child.

Without necessarily accepting the definition, Dr Sutton thought it covered the case of the Maranunggu. They are a group of people united by ties with a specified locality. They do not form a single patrilineal descent group in a classic sense but that is not required by the definition. 'Parent' allows transmission from mother or father. In Dr Sutton's opinion the definition did not require the establishment of lineages, a single filiation link being an adequate illustration of descent (transcript p. 2179).

163. Asked about Kungarakany, Dr Sutton saw no difficulty in the fact that, except perhaps through Walwalkiny who on one view of the evidence might be a Kamu man, it was not possible to show patrilineage but it was possible to show matrification. As to the Warai, he thought that was: clearly a case where the claimants have deemed a certain principle to be relevant (transcript p. 2214).

164. I am satisfied that among the Kungarakany, Warai and Maranunggu are to be found local descent groups. The precise scope of each group is something to which I shall return when seeking to identify traditional owners.

Traditional Aboriginal owners-the concept

165. Following the approach adopted by the claim book and in the presentation of material, I propose to look at each of the areas claimed. I do so for the purpose of determining whether, in terms of the Land Rights Act, there are traditional Aboriginal owners. That requires a consideration of whether, in relation to each area, there is a local descent group with common spiritual affiliations to sites on the land that place the group under a primary spiritual responsibility for those sites and for the land and further whether the members of the group are entitled by Aboriginal tradition to forage as of right over the land. These of course are the ingredients spelt out in the definition of 'traditional Aboriginal owners' in s.3(1) of the Land Rights Act.

166. These concepts have been discussed at length in the earlier reports. The relevant extracts have been conveniently collected in Exhibit 140 and to some extent in Exhibit 147. It is not necessary to repeat what is said there; the present task is to apply the principles I have adopted to the material in hand. That is not to say that in several respects the particular features of this claim do not make that application even more difficult than is often the case.

167. It is only in respect of the notion of a local descent group that some further exploration of principle is required. The reason for this is that the presentation of the claimants in terms of linguistic connections led to the existence of local descent groups being called in question. In his statement to the hearing Dr Tryon contrasted the notion of group with that of category:

I suggest that the defining characteristic of the group is that they perform some common act or function, or that they come together for a given purpose or purposes (Exhibit 123 p. 7).

Dr Tryon laid stress on the functional character of a group, reflected in such ways as meetings and ceremonies. On that approach, it would not be enough for the purposes of a group simply to point to people having a common language, still less sufficient if the common language was historical and not contemporary.

168. Some counsel took up Dr Tryon's distinction, emphasising the breadth of the groups, particularly in the case of the Kungarakany, a number of whom no longer reside in the Northern Territory and have expressed no particular interest in this claim.

169. I accept the distinction drawn by Dr Tryon and others but it seems to me that its materiality arises not so much in identifying the local descent group as in deciding whether that group possesses the characteristics demanded by the Act. In other words, the definition of traditional Aboriginal owners does not isolate the notion of a group. If it did it would be necessary to define and refine what that means and how far those whose only connection may be the possession of a common language may fairly be said to constitute a group. But what the Act speaks of is a local descent group. In para. 161 I spoke of a principle of descent deemed relevant by the claimants. It is not any principle that may be deemed relevant, only a principle of descent. The group may be constituted by a patriline or a matriline or be one in which both patriline and matriline play some part. It may, in particular cases, permit the incorporation of individuals who would not qualify in terms of any of the principles just mentioned. Where the group/category distinction becomes important is at the point where one inquires whether the members of the group have common spiritual affiliations to a site on the land that place the group under a primary spiritual responsibility. One then looks to the functional nature of the group to see whether it truly possesses those characteristics or whether the most that can be said is that there are some individuals appearing to have a close connection with the land, albeit of a spiritual nature.

170. This approach is not free from problems. If inquiry reveals that there are truly no group affiliations and responsibilities for the land, is a finding of traditional ownership nevertheless appropriate because there may be some individuals who appear to qualify? I think the answer must be no. Claimants who fail to demonstrate that as a group they meet the requirements of the Act must, I think, fail to establish that there are traditional Aboriginal owners. Even if they do not fail on that score, they will probably do so when the strength of traditional attachment is assessed. It is not a matter about which it is possible to be too precise; much will depend upon the relationship, numerically and otherwise, of the core of traditional owners (in a non-Act sense) to the entirety of the claimants.

171. In saying this I wish to make it clear that I do not think and have not thought it necessary that all or even the majority of claimants be heard in evidence. Inevitably there will be those who by reason of age, health or address are unable to speak. It will often be clear that a witness purports to speak not only for himself or herself but for members of a family or for a wider category of people and that he or she has the authority so to speak. When a small percentage of claimants is heard and there is nothing in the evidence to justify an inference that they speak other than for themselves, the position may well be different.

The claim area

172. I turn now to a consideration of the five areas claimed. In Aboriginal eyes they create artificial boundaries although Dr Layton and Dr Williams commented:

... we have found historical and cultural grounds for regarding these areas in certain ways as distinct (Exhibit 8 p. 37).

There is another sense in which this demarcation is artificial. It tends to suggest a relationship between sites and country which was not always borne out by the evidence. I shall try to make clearer what I mean when examining each area.

173. In making an assessment of traditional ownership, I have relied primarily upon the evidence of the claimants themselves in the light of the field inspections carried out. As well, I have considered the views of the anthropologists called and the other material, oral and written, historical and contemporary.

Area 1

174. This segment of about 42 square kilometres is bounded to the north by the Finnis River and to the south by the Wagait Reserve. It runs east from Sweets Lookout. Both Kungarakany and Maranunggu claim traditional ownership, each to the exclusion of the other.

175. In assessing traditional ownership, the Act dictates that regard must be had to sites on the land claimed. That does not mean that sites off the claim area, particularly those nearby, should be ignored. The overall picture may be one of a pattern or cluster of sites with the presence of only one or two on the claim area itself explained by the nature of the country or by some other circumstance. Within the claim area there may be only scattered sites but it may be reasonable to infer that there is a local descent group with responsibility for the general area. Conversely the picture presented may be one in which sites are absent or so few that it is not reasonable to find traditional ownership of the land claimed. There is some discussion of these matters and of the way in which they arise in the Uluru Report paras 71, 71 74, 92-94, 108 and 110.

176. Although the Land Rights Act does not define 'site', it does define 'sacred site' to mean:

... a site that is sacred to Aboriginals or is otherwise of significance according to Aboriginal tradition ... Within the definition of 'traditional Aboriginal owners' the word 'site' takes some of its character from the words that follow and I have no doubt that it speaks of a place of some spiritual significance as opposed to one to which people resorted simply to hunt or for some other secular activity. I do not suggest that a sharp distinction can always be drawn between secular and spiritual; I am simply pointing out that there are places which Aboriginal people speak of in a way to suggest that they have no particular spiritual significance.

177. Some light is thrown upon the ownership of Area 1 by the evidence of Mr A. F. Tapsell and by the report he compiled with Mr W. Ivory in regard to traditional ownership of the Wagait Reserve and the North and South Peron Islands (Exhibit 35). Both were government employees at the time. Mr Tapsell's contact with the Wagait Reserve goes back to 1974 but during 1977 he and Mr Ivory made several field trips into the Reserve with a view to determining traditional ownership so that funding might be made available to develop it. The Reserve is in two sections, the western portion lying south of and adjacent to the western half of Area 1.

178. When Mr Tapsell first made contact with the Reserve in 1974, there were Maranunggu people living at Finnis River station.

There was Nugget and his family -that includes Bilawuk and all the daughters; there was Fred Waters (transcript p. 619).

Mr Tapsell also mentioned as visitors Leo Jackaboi, Nancy Dayi, Peter Melyen, Henry Moreen and 'Pam Claydon'(Pandela Clayton perhaps). It was the Maranunggu at Finnis River station who in 1978 moved to McCallum Creek where they now live.

179. There were no Kungarakany people in the area at the time but Mr Tapsell was told that the McGregor family at Adelaide River were Kungarakany. He said that this was told to him by Waditj Fred Waters who, while they were at Bulkany in the Reserve in April 1977, said that the country around was Kungarakany land (transcript pp. 570, 627).

180. In 1977 Mr Tapsell and Mr Ivory made three trips through the Wagait Reserve, taking a number of Aboriginal people with them on each occasion. On the third trip, made between 31 October and 4 November 1977, they took Mr Waters and Mr Peter Melyen who 'were able to give us names which they told us had been passed down to them by Kungarakany people' (transcript p. 585). Edwin McGregor had not been able to furnish any information about places during the trip he made with Tapsell and Ivory earlier that year.

181. I accept Mr Tapsell's evidence of what Mr Waters said at Bulkany; it is borne out by the contact he made shortly afterwards with the McGregors at Adelaide River. Mr Waters was not speaking about Area

1 but, that apart, it is hard to know what weight to attach to the statement without knowing the exact words used and the context in which they were spoken. After several years Mr Tapsell did not purport to be able to speak of either with precision. And, of course, the country was Kungarakany historically; the difficulty I have is to apply the requirements of the Land Rights Act to a contemporary situation.

182. In the same way, several witnesses who were neither Kungarakany nor Warai spoke generally of the country around the Wagait Reserve, that is the eastern portion of the western section of the Reserve, as Kungarakany. These included Harry Wilson from Peppimenarti, Jimmy Tapnguk, Roy Yarrowin and Banjo Banderson. Naturally they were speaking in a general way, not directing their attention particularly to Area 1, and not seeking to do more than pass on their general understanding.

183. As part of his inquiries about traditional ownership of the Wagait Reserve Mr Tapsell held meetings at Delissaville. On 3 August 1978 there was a meeting of Kungarakany and Maranunggu people and others at Bamboo Creek, a meeting organised by the Northern Land Council. About a month later the Council organised another meeting, this time at Flagon Creek or McCallum Creek. Again Kungarakany and Maranunggu people were present. Several witnesses spoke of what was said at those meetings and there was tendered in evidence a transcript of two tapes covering part of the Bamboo Creek meeting (Exhibit 64). I do not attach any significance to these meetings in resolving the issue of traditional ownership. To some extent they reflect the numbers present from a particular linguistic group; there was some confusion as argument and counter-argument took place and the question of traditional ownership became obscured to some extent in discussions about the possibility of leasing part of the Reserve. What is clear is that at those meetings the Maranunggu were asserting traditional ownership of part of the Wagait Reserve.

184. There was a great deal of evidence, from Kungarakany and Maranunggu claimants, as well as others, about places on and around Area 1, particularly in the Wagait Reserve to the south. Various documents sought to collate that material, see for instance Exhibits 127, 129, 144, 144A (Restricted), 150 and 151. I use the term 'places' rather than 'sites' because a number of witnesses spoke of locations as if they had no particular significance other than they had been told of or had visited them. Some people, Mrs Violet Stanton for instance, spoke with a great deal of knowledge of various places but it was not at all clear that this was a knowledge generally held by the claimants. This is particularly true of Area 1 where the Kungarakany no longer live or visit with any regularity and where it is clear that some of the claimants who gave evidence had only seen the country recently and in connection with the hearing.

185. Kungarakany witnesses identified Kalngarriny, Kurrindju, Kuwarr, Patj-Patj (Padj-Padj), Panawulk, Purundudminya (Poorundutminya) Two Sisters Hills, Pulandjarpudj (Pulandjarrputj)-Sweets Lookout, and Wulman. These and other places I shall mention are marked on the maps, Exhibits 9 and 33. Leaving aside Kuwarr and Pulandjarpudj, none of these places is within Area 1. Kurrindju lies south west in the Wagait Reserve, Panawulk is close to Kurrindju, Patj-Patj lies south of Purundudminya which itself is south of Area 1, Kalngarriny is in the Wagait Reserve and so is Wulman. Kuwarr is a plain lying astride the eastern boundary of Area 1 and Pulandjarpudj is some 3 kilometres to the west of Area 1. There was no suggestion that Kuwarr was a place of any spiritual or traditional significance. Evidence was given in closed session that Pulandjarpudj was a dreaming site.

186. Several Kungarakany claimants, amongst them Mrs Stanton, Mrs Edwards, Mrs Bishop and Anmilil spoke of Kurrindju as a place of great importance for the Kungarakany. I accept that traditionally it was and that it is still significant to those who spoke about it. Lying just south of the present Finnis River homestead, it used to be a camp to which people resorted during the wet season. It was a source of fish and turtles; there were wallabies on the surrounding plains and Leichhardt trees bearing edible fruit. Mrs Stanton stated:

Kurrindju is always called the head of Kungarakany country (Transcript p. 784).

The claim book attributes a similar expression to Abalak who was said to have described Kurrindju as the 'head' of Kungarakany country with Kiriling and Wundindi near Adelaide River as the 'foot' or 'tail' (Exhibit 8 p. 79). At least as used by Abalak, the expression seems to place Kurrindju as about the northern extremity of Kungarakany country in that area. Pangar, just south of Kurrindju, was a ceremonial ground and the site of ritual executions in the early years of this century.



The Aboriginal Land Commissioner hears about Purundudminya (Two Sisters Hills) from Mrs Stanton and Mrs Mills.

Photo: G. Neate

The Aboriginal Land Commissioner hears about Purundudminya (Two Sisters Hills) Photo: G. Neate from Mrs Stanton and Mrs Mills.

187. There is a substantial community of Maranunggu people at Guyurpanggany (McCallum Creek) south of Area 1 on the Wagait Reserve. For many years the Maranunggu have camped at Bamboo Creek which is between Area 2 and the main Wagait Reserve. And as mentioned earlier, there were Maranunggu claimants living on Finnis River station in 1974. Mankanba or Bamboo Creek tin mine is close to the junction of Bamboo and Walkers Creeks, taking its Aboriginal name from the adjacent hill. Maranunggu lived in the area and worked on the mine. Pandela Clayton and Bilawuk married white miners and worked with them. The Maranunggu regularly used a campsite area on Walkers Creek just upstream from its junction with Bamboo Creek. A number of the claimants were born there or at the mine-Nancy Dayi, Bilawuk's children Rose, Pava, Peter and Kolya, as well as Pandela Clayton's daughter, April, and Alice Koda's daughter, Miriam. Pandela Clayton's mother and sister are buried at a dancing and fighting ground downstream from Bamboo Creek junction and Leo Jakaboi was buried there in February 1980.

188. Among the Maranunggu claimants are many who have lived and travelled throughout the area of the Wagait Reserve and claim Area 1. Four kilometres south of Area 1 is Guridju, a camping area which Pandela Clayton and her parents used as a base camp when she was a child. From there they walked north to Kalngarriny, camping for a time and returning to Guridju or continuing on to Karpitar or Patj-Patj. From Bamboo Creek they used to visit Wulman. It is likely, from the description of the area as 'a camping and fighting ground', that Wulman and Pangar are the same place.

189. When the Maranunggu spoke of Kurrindju, they referred to the same location as did the Kungarakany but they used the term with reference to the paperbark swamp rather than to a particular locality. As to the latter, they mentioned Wanggany, a billabong on the main course of the river south of the swamp and Wandjali, the northern half of the swamp and the island camping area. Bilawuk with Pandela Clayton and her family have visited this area over the years and regard it as a place of importance. During the hearing I went there at the request of both the Kungarakany and the Maranunggu. The Maranunggu were not physically present while the Kungarakany showed and spoke of Kurrindju and the Kungarakany kept away while the Maranunggu did the same.

190. During the hearing, at the request of the Maranunggu, we met at McCallum Creek and later at Wulman. We then drove to Wandjali and to Guvirri past Kalngarriny. At Guvirri we climbed to the top of the hill where Fred Waters and others pointed out a number of features including Paralgatj, Murrenja Hill (Nolgy), Batjarr (Mount Johns), Ngalgat (Hatter Hill), Mawitji, Pulandjarpaj (Sweets Lookout), Muvaningga (Mount Farrington) and Param. From Guvirri we drove through the Reserve north east to



Paperbark trees- Kurrindju (near Area 1).

Photo G. Neate

Area 1 via Guridju then to Karkar on the north-west border of Area 1 along a fence where a track to Djulurrk was pointed out and from there to Regamen on the Finnis River. This segment of the journey took us through parts of Area 1 where, as a group, the Maranunggu seemed more familiar with places than the Kungarakany.

191. There was a body of evidence from the Maranunggu claimants relating to places of spiritual significance close to and within Area 1 together with information about dreaming tracks and stationary dreamings, most of which can be found in the material prepared by Dr Sutton, Exhibits 58 and 58A (restricted). The persuasiveness of this material is acknowledged in the final address by the Northern Territory Government which contains this statement:

There is also an abundance of evidence that the Maranunggu maintain a continuing and direct physical association with the land. They live permanently in the claim area, travel through it, and importantly, carry out religious activities relating to sites on the land. In this context they were able to demonstrate an intimate knowledge of the land and the mythological features of its sites. Under cross-examination the senior men showed convincingly that they have such a knowledge and maintain important rituals ... (Exhibit 147).

192. I have not found this an easy matter but these are my conclusions. While there are to the Kungarakany places of importance in the Wagait Reserve, I am not satisfied that they have sites on Area 1, in particular sites that would enable an inference to be drawn of traditional ownership for the whole or a substantial part of that land. On the other hand the Maranunggu not only have a familiarity with that country but it is of importance to them and it contains places such as Karkar, Djulurrk and Regemen from which it may reasonably be concluded that they have common spiritual affiliations to those sites that place them under a primary spiritual responsibility for those sites and for the land.

193. I am satisfied that the Maranunggu are entitled by Aboriginal tradition to forage as of right over Area 1. They have done so for many years and I think that they have done so in exercise of a right that has been handed down from one generation to another, which is what 'tradition' suggests. In any event it is 'Aboriginal tradition' with which the Act is concerned and that is defined to mean '... the body of traditions, observances, customs and beliefs of Aboriginals or of a community or group of Aboriginals ...'.

194. I am satisfied that the Maranunggu claimants listed in the claim book Exhibit 8, as amended by Exhibit 50, and shown in the genealogies in Exhibit 30 are the traditional Aboriginal owners of this land.



Mrs Morley shows bush tobacco to the Aboriginal Land Commissioner on a visit to Kiriliny.

Photo: G. Neate

Mrs Morley, shows bush tobacco to the Aboriginal Land Commissioner on a visit to Kiriliny. Photo: G. Neate

Area 2

195. Covering some 334 square kilometres, Claim Area 2 lies between Area 1 and the Darwin River Dam. It has as its southern boundary the Finnis River and in its western section it extends north to the Charlotte River. It is largely unfragmented by alienated land except in the north-west corner and to the south. It is roughly bisected by the Wangi Road running north and south.

196. Some of the problems mentioned in regard to Area 1 arise here. The Kungarakany claim the whole of Area 2 and the Maranunggu claim the south-west corner, the country west of a line drawn from Mount Bennet to Mount Finnis. A number of places were mentioned but often just as locations that were known or about which people had been told, without an indication that they had any traditional significance. In respect to the area east of the Wangi Road only one place was mentioned. I do not think that an overly precise consideration of sites in relation to land is demanded by the Act, see para. 175 of this report. Dreaming tracks will often provide a link between places spread over a wide area. But when there is no such link, within or without the claim area, the absence of sites in a particular section becomes more inimical to a claim.

197. Area 2 has had a long association with mining, lying reasonably close to such historical towns as Southport, Brocks Creek, Mount Wells and Mount Shoebridge. Alngindabu, from whom the McGinness family trace descent, married Stephen McGinness, a white man who had been working on the North Australian Railway. As Mr McGinness made his way to Bynoe Harbour to work on the tin mines, taking with him Alngindabu, her sister Kurmandam and her brother Maranda, they stumbled on what is now the Lucy Tin Mine. The story appears in the claim book (Exhibit 8 p. 95) and was told by Mr Val McGinness during the hearing. Lucy was Alngindabu's European name; the Kungarakany name for the area of the mine is Mugudiber.

198. Stephen McGinness took up the Lucy Mine in 1908 and remained there until just before his death in 1918. Between 1918 and 1922 Mr Val McGinness' brother-in-law worked the Lucy Mine and it then passed out of the family's hands. Between 1932 and 1939 Val McGinness and the author Xavier Herbert made several trips to the area to prospect. Dr Herbert's experiences found their way into the novels he later wrote. In 1939 Mr Val McGinness went to Queensland and did not return to the Territory until 1960. Not long after his return he learnt that the exploration licence over the Lucy Mine had expired; he pegged the



Part of the Lucy Mine (Area 2).

Photo: G. Neate

Part of the Lucy Mine (Area 2). Photo: G. Neate

land and took up the mine where he has continued to live with his family. The history of the McGinness' contact with the Area 1 illustrates some of the difficulties associated with this claim. The presence of the family may in a sense owe its origin to Alngindabu's traditional association with the land. But is its continuance (not overlooking the break between 1939 and 1960) explicable on that ground or because of the mine or perhaps a combination of both?

199. I propose now to list the places mentioned by the Kungarakany claimants and then say something about their significance. After that I shall do the same with the places mentioned by the Maranunggu.

Those mentioned by the Kungarakany were as follows:

Angudiber (Quenoy Gardens) Marram
 Djinany (Kogun) Melda
 Kanbak Pirrmainy Mugudiber
 Karkar Ngork Anwili
 Landji Nungalaku
 Laniyuk Pabidjpa
 Lulugun Tjel Pirrmainy
 Makanba Tjonor Pirrmainy
 Makapatik Walanggurrminy
 Maludpit

200. Angudiber is north of the eastern section of Area 2. It lies on the road that runs west from the Darwin River Dam to the Lucy Mine and on to Breakneck Pass. Mrs Stanton said that it was known to Europeans as Quenoy Gardens; it was not mentioned as a place of any significance. Djinany or Kogun was identified by Dr Layton (transcript p. 343) but was not mentioned by any of the claimants. Kanbak Pirrmainy was described by Mrs Stanton as:

A creek, a branch of the river, but it used to be a crossing.
 walking road (transcript p. 786).

it is a dreaming track. That place there was a foot

The creek appears to be that now known as Peel Creek, most of which is north of the eastern section of

Area 2 but part of which may fall within the claim. That part of Kanbak Pirrmainy north of the claim area lay on a walking track from the Lucy Mine to the Darwin River Dam and was named by Anmilil as a camping place on the way to Kurrindju (transcript p. 822). Some evidence was given about it in closed session; its name derives from a story of something said to have happened there but not as a place of any ritual or other special significance.

201. The name Karkar appears several times on the map, Exhibit 33. For Area 2 it is known as a hill and surrounding areas in the western section. Mrs Stanton described it as a big plain but no mention was made of any particular significance. Landji is well north of Area 2. It was said by Kerry Batton to be the highest point to which the salt water came on the Darwin River (transcript p. 782). The evidence given in closed session showed that it is a dreaming site of importance associated with the McGinness family. Several Kungarakany witnesses spoke of Laniyuk and its importance. But Laniyuk, also known as Berry Springs, is well north of Area 2 and no attempt was made to tie it in with the claim area. It is not clear whether Lulugun is in the claim area. There was some confusion with another place of the same name, also spelt Luludgun, in Area 5. It seems unlikely that it is in the claim area since Mrs Stanton located it north of Mugudiber (transcript p. 785). Several of the Kungarakany claimants referred to Makanba. I have already mentioned Makanba in connection with Area 1. It lies well south west of Area 2. It does not throw light upon the existence of sites in Area 2 nor, in my view, does it assist in establishing traditional ownership by the Kungarakany of that area. Makapatik is on the edge of the Darwin River Dam. It is outside the claim area.

202. Maludpit was described by Mrs Stanton as 'two small places or big area. Two places have the same name' (transcript p. 781). One of those places is Kings Table, well north of the claim area between West Arm and Middle Arm. The other is around Tumbling Waters, which is north of Area 2. Evidence was given in restricted session by Mr Val McGinness that the western end of Maludpit was regarded as a dangerous site but it was not at all clear that part of Maludpit fell within Area 2 or had some influence upon it. Marram is also known as Lake Deane; it is just south of Berry Springs and well north of the claim area. The account given by Mrs Stanton in closed session of damage to the place a few years ago shows its importance to Abalak. The appendix to the claim book (Exhibit 9) places Marram on the Miniling dreaming site but outside the eastern section of Area 2. Melda is the place known as Rocky Bar on the Charlotte River at the north eastern tip of Area 2. The claim book describes Larrakiya country as including:

a coastal strip taking in the Section of area too between Leviathan mine and Rocky Bar (Exhibit 8 p. 98). The Leviathan Mine is south west of Rocky Bar and just outside the claim area.

203. Mugudiber is a very good illustration of the difficulties of assessing the Kungarakany claim. It is the area around Lucy Mine and I accept that it, or at any rate a substantial part of it, lies within Area 2. I accept that historically it was Kungarakany country but I still have to determine whether there are now traditional Aboriginal owners as defined in the Act. There is no doubt that, in a general sense, the Area 1s of great importance to the McGinness family. It is the site of mining activities going back to Stephen McGinness' discovery early this century. Val McGinness was born there, he prospected with Xavier Herbert in the 1930s and the Lucy Tin Mine is now his home and that of his family. Mrs Stanton and Mrs Bishop spoke of visits to the area but again much of this seemed related to the presence of Mr Val McGinness and his family. It is interesting that the claim book discusses Mugudiber under the heading 'Kungarakany associations', says nothing of the spiritual significance of the area and does not mention Mugudiber in the appendix to the claim book where sites of spiritual significance to the Kungarakany are listed and does not mention it in Exhibit 9A, additional site information. None of the Kungarakany claimants who gave evidence spoke of any ritual or ceremonial significance attached to the area.

204. Ngork (Mgork) Anwili was pointed out by Mrs Stanton during a trip made through the claim area as part of the hearing. Exhibit 127, her written summary of that visit, locates it as within Area 2 and as associated with an ant-bed dreaming, Nungalaku, identified by Dr Layton in his Exhibit 9A as the Kungarakany name for the Finnis River upstream from Walanggurrminy in the very south-west corner of Area 2, was referred to by Mrs Stanton as Mungalaku, the Kungarakany name for the Finnis River generally. Pabidjpa is mentioned only in Exhibit 9A where it is referred to as the Leviathan Mine.

205. Tjel Pirrmainty is on the Miniling story track and, in closed session, was described by Mrs Stanton as being at the back of the Kangaroo Flats army training area. She told how once she and others used to go hunting there but now it is fenced. Again in closed session Anmilil and Mrs Stanton told how the place got its name. Tjonor Pirrmainty was described by Mrs Stanton as a creek, 'really our definition of that exact Tjonor Pirrmainty is a spring' (transcript p. 788). It is close to Tjel Pirrmainty, partly within Kangaroo Flats and said by Mrs Stanton to be part of dreaming tracks extending down to Adelaide River. It is not at all clear whether Tjel Pirrmainty or Tjonor Pirrmainty is within the claim area. Walanggurrminy is in the south-west corner of Area 2, south of the Wangi Road crossing of the Finnis River. Val McGinness and Doris White said they knew of no stories attached to it. Violet Stanton said there was a woman's story about which she could not speak (transcript p. 1286). When Anmilil was asked about Walanggurrminy she said she knew of it but had not been there. Asked whether it was a Kungarakany word or a Maranunggu word she answered 'yes-altogether, I suppose; one name' (transcript p. 2546).

206. The Land Rights Act defines traditional Aboriginal owners to mean a local descent group who have common spiritual affiliations to a site on the land that place the group under a primary spiritual responsibility for that site and for the land. The views I have expressed on these concepts have been collected in Exhibit 140. I have taken 'common spiritual affiliations' to mean that the members of the group possess, more or less equally, associations of a spiritual nature with sites on the land, that they share beliefs about the spiritual significance of those sites. As to 'primary spiritual responsibility', I have said that one has to look at the level of responsibility for sites and land discharged by those claiming to be traditional Aboriginal owners.

207. In regard to Area 2, I accept the evidence of the Kungarakany claimants regarding such places as were mentioned on that land. Some of those places have an importance because of family associations and because people used to go and still go there for visits. But I am not satisfied, from the evidence, that traditional ownership was made out by the Kungarakany for Area 2, that is, I am not satisfied that common spiritual affiliations or primary spiritual responsibility for sites was demonstrated.

208. The Maranunggu claim to the south-west corner of Area 2 presents problems, although of a different order. When asked in the course of his final address to define the area claimed, Mr Coulehan, counsel for the Maranunggu, answered:

I can only suggest ... that it be a straight line between Mount Bennet and Mount Finnis, and a straight line down to Pe-Karramala (transcript p. 3236).

It may be that this should read Pundikaramala see the map Exhibit 33.

209. When Dr Layton and Dr Williams prepared the claim book Exhibit 8, the only Maranunggu site said to be within Area 2 was Kiningkarrwa. Walanggurrminy was mentioned as an area 'not claimed by the Maranunggu but ... still of some importance to them' (Exhibit 8 p. 99). In Exhibit 58, the material prepared by him in support of the Maranunggu claim, Dr Sutton identified Kiningkarrwa and Walanggurrminy as country claimed by the Maranunggu although he had some doubts that the latter was in fact on unalienated Crown land. Kiningkarrwa is known as Mount Bennet. It is just south of Breakneck Pass and just north of Walkers Ford. Clearly it is a place of importance to the Maranunggu, being a possum dreaming site linked by a dreaming track with Panypiyaduk near Area 1. It is a burial place for Maranunggu and its significance is described by Dr Sutton in that section of his material entitled 'Part 2 at p. 15.

210. Henry Moreen, one of the Maranunggu claimants, when asked about Walanggurrminy, said that both it and Muvaningga should have been on the list of Maranunggu places. Muvaningga is Mount Farrington and is in the Wagait Reserve just west of the area under discussion. There is a problem of location with Walanggurrminy. It is an area rather than a particular feature but, at least in part, it seems to lie north of the Finnis River hence within Area 2. As part of the inspection carried out during the hearing, we travelled from Area 1 to Kiningkarrwa which was identified by Bilawuk, Nancy Dayi and Fred Waters who also pointed out Mount Alaric, Walkers Ford and Breakneck Pass. We then stopped at what was said to be Walanggurrminy.

211. I am satisfied that this small segment of land in the south-west corner of Area 2 has spiritual and ritual significance for the Maranunggu, that they have common spiritual affiliations to Kiningkarrwa and Walanggurrminy which place them under a primary spiritual responsibility for those sites and for that land. I propose to make a formal finding in this regard and I shall deal later with the strength of traditional attachment and the question of detriment that may result from a grant of this land. Those issues aside, clearly there are problems of identification and survey with this section.

212. I am satisfied that the Maranunggu are entitled by Aboriginal tradition to forage as of right over that corner of Area 2.

Area 3

213. This is an area of 107 square kilometres west of the town of Batchelor, having the eastern section of the Wagait Reserve as its western boundary. It is fragmented by sections of alienated land and separated from Area 4 by a purely notional line that does not relate to any physical feature or to the status of land. It may have been simply a convenient division in terms of the work being done for the preparation of the claim. In the end it will be appropriate to look at Area 3 in conjunction with Area 4.

214. Only two places, Miniling and Yitpiliny are mentioned as sites within Area 3; Ganwudak is described as adjacent thereto. I shall say something more about these places but it should be noted that this is country to which the Kungarakany and Warai jointly lay claim by reason of a company relationship.

215. Exhibit 150 p. 6 refers to Ganwudak as adjacent to Area 3. Doris White, a Warai claimant said that Ganwudak was her father's name, as did Roger Yates another Warai claimant. Mr Yates described Ganwudak as 'a small lagoon there-a big swamp ... not far from Yitpiling' (transcript p. 799). Tony Kenyon another Warai claimant, referred to Ganwudak as 'my father's place-Warai'(transcript p. 820). Ganwudak was not located with any precision; presumably it was described as adjacent to Area 3 because it lay on alienated land just west of the town of Batchelor.

216. Jimmy Tapnguk described Miniling as a Kungarakany place but others, Banjo Banderson and Tony Kenyon referred to it as Warai. Roger Yates placed Miniling 'just near the abattoir at Batchelor' (transcript p. 799). No one seems to have identified any natural feature associated with Miniling. The appendix to the claim book, part of Exhibit 9, speaks of it as Castlemaine Hill, inside the eastern part of Area 3 west of the Batchelor airfield. Castlemaine Hill seems to lie largely within special purposes lease 62 and it is perhaps surprising that none of the witnesses spoke of Minding as a hill. There is a small segment of unalienated land between special purposes lease 62 and the town of Batchelor. Miniling may be there; if not, it is so close to that unalienated land to warrant treating it as a site within the claim area. There is no doubt of its importance to the Warai. In closed session Anmilil told of the dreaming and the dangers associated with it.

217. Yitpiliny is just south of Miniling. Roger Yates described it as near the abattoir building. Mrs Stanton spoke of Miniling and Yitpiliny as brothers and, in closed session, told a story about them. Mr Pauling suggested (transcript p. 3383) that one might infer from the evidence a walking track from Amungal through Yitpiliny to Miniling thence to Wulinggi (Mount Deane) near the turnoff from the Stuart Highway to Batchelor. I agree with that and also with his suggestion that these natural features were invested with a spiritual significance because of events of mythology associated with them. This further points up the unreality of divorcing that part of Area 3 from Area 4 and in the end I shall have to look at them together. No sites were asserted for the balance of Area 3 nor was any suggested west or south west of that claim area to link with Minding or Yitpiliny or to suggest traditional ownership of that part of the claim.

218. I am satisfied that traditional ownership has been established in regard to the country around Miniling and Yitpiliny but not otherwise in respect of Area 3. I am also satisfied that the Kungarakany and Warai are entitled by Aboriginal tradition to forage as of right over that part of Area 3. A more precise identification of the traditional owners is made later in this report.

Area 4

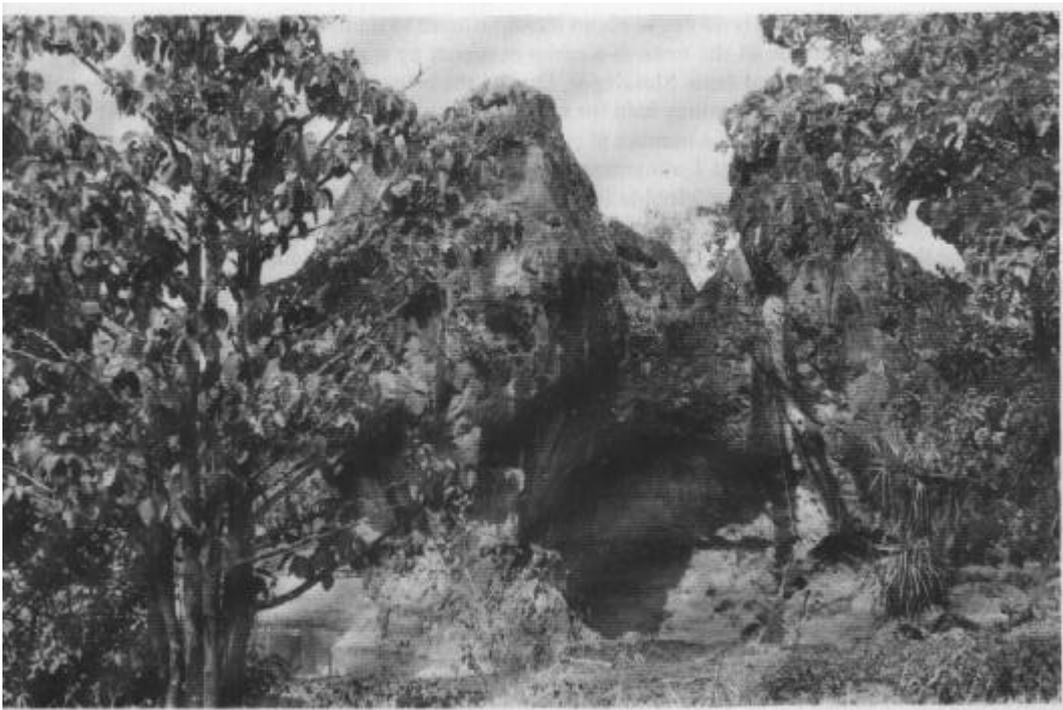
219. This is an area of just under 107 square kilometres, about the same size as Area 3. Its southern boundary is the town of Batchelor and the road from Batchelor to the Stuart Highway. Fragmented, it runs north to just south of the Darwin River Dam, having the North Australian Railway as an approximate western boundary and extending in an easterly direction towards the Stuart Highway. It includes Rum Jungle.

220. The historical material suggests that once this country was Warai rather than Kungarakany country but as already noted, the movement of the Kungarakany from the area around the Wagait Reserve took them east to Adelaide River where over the years they have entered into a company relationship with the Warai. I accept that within Area 4 are places of spiritual significance to both Kungarakany and Warai.

221. The place mentioned as of the greatest importance was Angurukulpam. It was described by Mrs Stanton as 'where the water is, near Miniling Ganwudak Spring ... where the lake is'(transcript p. 806), referring to the area known as Rum Jungle. It is the site of a leprosy dreaming described by Mrs Stanton in closed session. In the course of her inquiries, Dr Williams was told about it by Abalak, Doris White, Laniyuk, Eddie McGregor and Violet Stanton. Abalak was born there but white men told him and other Aboriginals to get out and they moved to Marrakai, Amungal and Kumili (Coomalie Creek). The Rum Jungle Mine itself is a dreaming site associated with the women's dreaming cycle--Exhibits 127 and 128 (Restricted).

222. Kingutung is a spring or billabong near the junction of the Batchelor road and the Stuart Highway. It is not far from where Anmilil lives and during the inspections it was pointed out by her and by Abalak. It is on a traditional walking track from Amungal to Kurrindju. The map Exhibit 33 suggests that Kumili is Mount Charles although the additional site information (Exhibit 9A) asserts that it is Kingutung not Kumili which is Mount Charles. As mentioned earlier, Kingutung was referred to as a spring or billabong. It seems likely that Kumili is the name for the area of Coomalie Creek, located on both sides of the Batchelor road. Anmilil spoke of it as the main camp on the walking track from Amungal to Kurrindju. It is a place rich in natural resources and some of the claimants still go there to hunt. It is the birth place of two of the claimants, Eddie McGregor and Janie McGregor. The claim book refers to Mandja as 'the name for Kumili waterhole and the adjacent creek' (Exhibit 8 p. 109). The map, Exhibit 33, puts Mandja on the Stuart Highway just east of Area 4 but I do not think that witnesses intended to suggest any sharp division between the two places. The claim book speaks of Mandja as a traditional site for mortuary ceremonies and in Exhibit 9, the appendix to the claim book, there is a description by Anmilil and Mrs Stanton of a shade-laying ceremony held at Mandja. I am satisfied that the area around Coomalie Creek has spiritual significance for the Kungarakany and Warai, that they have common spiritual affiliations to the site represented by the water there which place them under a primary spiritual responsibility for that country.

223. Kurnaldji (Kurrangaltji) is a ridge north east of Area 4. During the inspection it was pointed out as the boundary of Kungarakany country which followed the watershed towards Kanbak Pirmainy. Poordjitpadgin was said to lie between Batchelor and Rum Jungle. Anmilil referred to it as a very special place which she was not allowed to talk about; nothing more was said. Tangga is a billabong and group of rocky outcrops; it is near the Batchelor road and close to Wulinggi which I shall mention later. In his evidence, Dr Layton said that originally he had thought that Tangga and Wulinggi were the same place. It is either within Area 4 or so close that part of the claim must be regarded as falling within its influence. During the inspection it was pointed out and described by Anmilil. During the closed session Anmilil spoke of the spiritual significance of the rocks and associated Tangga with a dreaming track from Minding. It is a site for which Anmilil and Janie McGregor have particular responsibility. Tupuli is the name for the place where the Rum Jungle siding is located and is on the walking track from Amungal to Kurrindju. Wulinggi or Crater Lake is on the south side of the Batchelor road close to the Stuart Highway. It lies between Areas 4 and 5. During the closed session Anmilil described it as 'poison country'. She and Mrs Stanton told stories about the place. Janie McGregor said that she was responsible for looking after it for the Kungarakany and Warai. Anmilil described the ritual to be followed when visiting the place and she illustrated this when we visited Wulinggi during the inspection. Abalak sang a song connected with the



Tangga described as the 'head' of the snake dreaming from Wulinggi, a site just south of Area 4. Photo: G. Neate

Tangga described as the 'head' of the snake dreaming from Wulinggi, a site just south of Area 4. Photo: G. Neate

site and Mrs McGregor performed a ritual introduction ceremony for three young children. Exhibit 9 contains details of the dreaming connected with the site as recorded by Laniyuk, Anmilil and Abalak. There is no doubt about the spiritual significance of Wulinggi to Kungarakany and Warai.

224. While Wulinggi itself is outside the claim Area 4 it has a connection with sites to the north and to the west mentioned earlier, and I am satisfied that within Area 4 there are sites of importance. The Kungarakany and Warai claimants showed common spiritual affiliations to those sites, placing them under a primary spiritual responsibility for the sites and for the land. There is a natural connection between the country around Miniling and Area 4.

225. I am satisfied that the Kungarakany and Warai are entitled by Aboriginal tradition to forage as of right over Area 4 and that they still do so.

Area 5

226. Area 5 is 109 square kilometres, about the same size as each of Areas 3 and 4. It runs north from Adelaide River to just south of Glen Luckie Creek. It has the Stuart Highway as its eastern boundary and extends west past Mount Minza and Mount Durand, with Stapleton as its south-western corner. It has little fragmentation.

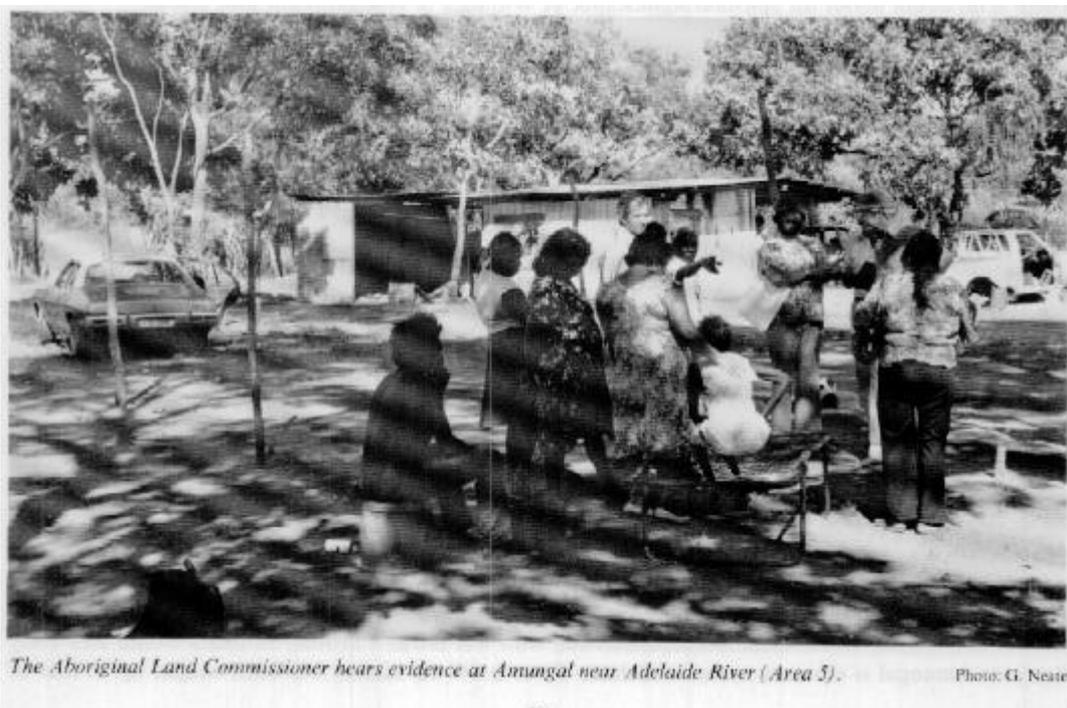
227. Many places were mentioned in connection with this part of the claim. Not all were said to have a particular significance and a number were outside the claim area. I shall mention each one in alphabetical order, say something about it and then see what conclusions should be drawn regarding traditional ownership of this part of the claim.

228. Ambambambala is a small hill on the east side of the Stuart Highway south of the Adelaide River. Tony Kenyon identified it as 'a very important place; it is a King Brown dreaming' (transcript p. 820). During the inspection, Mrs Stanton pointed out the hill, commenting that it had been a favourite camping place of a deceased Warai man, Ambambambala, who was father's brother to Doris White and Tony Kenyon. Amungal is the area around Adelaide River itself. Its history has been caught up in that of

European settlement but there is no doubt about its importance to many of the Kungarakany and Warai claimants. On the south side of the town is a camp occupied by a number of persons including Eddie McGregor, Eva McGregor and Janie McGregor. During the inspection, Eddie McGregor there pointed out the site of a shade-laying ceremony held for his father Edwin McGregor in September last year. We were shown the collective grave of a number of people who died as a result of accidental poisoning at the turn of the century. Mundang and Tjalinymara are buried at Amungal and in 1895 Parkhouse recorded the burial of Awarra (Warai) there. Mrs Ida Bishop spoke of Amungal as the 'foot' of Kungarakany and Warai country (transcript p. 1058). The claim book fairly describes Amungal as '... a site which Warai and Kungarakany hold jointly ... It has remained a centre for both groups throughout the contact period' (Exhibit 8 p. I 10).

229. Amutumul lies within Area 5; it is the location of the Snake Creek ammunition depot. It was described by Anmilil as 'just a little spring down there and a creek' (transcript p. 800). In closed session she gave details of a dreaming track passing through Amutumul, Krilin, Deraderbel, Purungu, Yaldanga and Mimirri. These places are just east of Area 5. Tom Calma described Amutumul as a camping ground which people still use to get away from Adelaide River to camp and to hunt. Boko Anwili is located as bordering Area 5 near Batchelor. It is a dreaming site of particular importance and was described by Doris White. Bulngumi, one of the hills on the south side of Adelaide River south of Area 5, probably Mount Foelsche, is a dog dreaming site. Deraderabel is a lagoon north east of Adelaide River and east of Area 5. It is part of the dreaming track mentioned earlier in connection with Amutumul.

230. Anmilil identified Djanggalpa as a little billabong between Tangga and Kurnaldji. It is either part of Glen Luckie Creek or is close thereto. It is within Area 5. Gunlucki is a billabong and is the origin of the name Glen Luckie Creek. It and Djanggalpa are close together. Kangatmu is referred to in Exhibit 150 as part of Area 5. But it appears to be north of the claim area close to Batchelor. Kigoyang (Kiboiyong) is a spring adjacent to Smoky Creek which is east of the Stuart Highway and north of Adelaide River. During the inspection Mildred Morley pointed it out as the place from which she took her Aboriginal name. Krilin (Kiriliny) is on the Adelaide River near Mount Bunday. It is associated with traditional camp sites and old fish traps can still be seen there. It is on the dreaming track described by Anmilil see the preceding paragraph.



The Aboriginal Land Commissioner hears evidence at Amungal near Adelaide River (Area 5). Photo: G. Neate
Page 38

231. Kumili, between Areas 4 and 5, was discussed earlier. Luludjun is in the southern corner of Area 5 and is close to Mount Carr. In closed session Eddie McGregor told of its significance as a dreaming place as did Anmilil during the inspection. Eddie McGregor, Janie McGregor and Doris White spoke of it as a place still used for hunting. Midada is north of Adelaide River and just east of the Stuart Highway. It is therefore just outside Area 5. Jimmy Tapnguk described it as a place for Kungarakany and Warai. It used to be a big camping ground. During the inspection Joyce Patullo and Violet Stanton spoke of the 'hidden water' there. Anmilil described how she and her first husband, Edwin Verberg, cultivated a pineapple plantation there. In closed session Mrs Stanton, Mrs Patullo and Anmilil spoke of the spiritual significance of Midada which clearly is a place of considerable importance. Mimirri is north of Midada and is also just east of Area 5. It is part of the dreaming track described by Anmilil. Perrmadjin is the western part of Area 5 near Stapleton Creek. Its importance relates mainly to the poisoning of a number of Kungarakany, Warai and Parlamarnyin years ago. Purungu is a dreaming site near Deraderabel, east of Area 5.

232. Tjakatalma Pirrmainy is a hill near Adelaide River. It is either in the southern corner of Area 5 or immediately south of the southern boundary. It is part of the kangaroo dreaming track described in more detail in the closed session by Edwin McGregor and Violet Stanton. Topoting, a billabong next to the Adelaide River race course, is just east of Area 5. It is a woman's ceremonial site of considerable importance. During the inspection information about the site was given to me by Mrs Stanton, Mrs Mills and other women. Walula is on Burrell's Creek; it is a small hill on the south side of Adelaide River and probably just outside Area 5. I have already spoken of Wulinggi in connection with Area 4. Wundindi is a billabong on the south side of Adelaide River about 7 kilometres east of Area 5. Several witnesses described its significance as a dreaming place and during the inspection Abalak spoke of the restrictions that applied when entering that country. Yalbanga is close to Midada and so outside the claim area. It too is on the dreaming track described by Anmilil and referred to earlier in this report.

233. It is true that many of the places mentioned by the witnesses are outside Area 5 although, in most cases, just outside. But a number of places of spiritual significance lie within the claim area. Coupled with the sites just east of the Stuart Highway and those around Minding with which they are linked they satisfy me that in regard to Area 5 there is a pattern of sites to which the Kungarakany and Warai have common spiritual affiliations which place them under a primary spiritual responsibility for those sites and for the land generally.

234. There is ample evidence that the Kungarakany and Warai are entitled by Aboriginal tradition to forage as of right over the land and that many of them still do so.

Traditional owners-Kungarakany, Warai and Maranunggu

235. I have, in respect of Areas 1 to 5, made findings of traditional ownership, the Maranunggu as to Area 1 and that part of Area 2 claimed by them, the Kungarakany and Warai as to part of Area 3 and Areas 4 and 5. Ordinarily identification of the relevant local descent group, with a consideration of the characteristics demanded by the definition of 'traditional Aboriginal owners' in the Act, will sufficiently identify the traditional owners. There may be problems concerning the existence and relationship of particular individuals but the obligation cast by s.50 of ascertaining the traditional Aboriginal owners is one to be met within the limits of reasonable practicability.

236. The complications in the present claim are not of this order. When the Act speaks of a local descent group who have common spiritual affiliations to a site on the land, it is not referring to something which has a corporate existence independent of the members who comprise it. Individuals make up the group but they must be united by some relevant principle of descent. The Act does not in this regard call for an examination of the individual beliefs and outlook of those comprising the group if generally it appears that the members possess common spiritual responsibility for the land. Not all members of the local descent group will give evidence; inevitably there will be those who speak not only for themselves but for other members.



Mr T. Coulehan, assisted by Dr P. Sutton, cross-examines witness while Maranunggu claimants observe the proceedings. Photo: G. Neate

237. Some more individual examination may be called for when measuring the strength of traditional attachment and quantifying those Aboriginals who would be advantaged by a grant. That will depend upon the particular case being presented.

238. Complications in the present claim spring from lack of information about certain families and also from the existence of a number of people described as Kungarakany, Warai or Maranunggu, who do not wish to be included among the claimants. Mention has already been made of April Bright, see para. 129. Most of these live away from the claim area (some interstate) and assert no ties with the land.

239. Apart from remarks during oral testimony, the material relating to the identity of the claimants is to be found mainly in the claim book (Exhibit 8), the amendments to lists of claimants tendered during the hearing (Exhibit 50), the genealogies (Exhibit 30) and some material prepared by Dr Williams regarding the whereabouts of certain Kungarakany witnesses representing two major lines, the descendants of Alngindabu and Stephen McGinness and the descendants of Maranda and Anmilil. Anmilil was also married to 'Old' Andy Snape. None of their descendants and none of the descendants of Bali Angeles and Mymurr, who appear in the genealogies but whose connection with the other Kungarakany is not stated, gave evidence. The two descent lines take in the Cardona, Adams and Angeles families. At least in the case of Anmilil and Old Andy Snape matrilineation is suggested but the evidence is inadequate to conclude that either descent line forms part of the local descent group constituted by the McGinness, McGregors, Verbergs and Calmas. I asked Dr Williams about the inclusion of the Snapes, Cardonas, Adams, Angeles, O'Briens, Coopers and Judy Ah Mat. She said that those whom she had contacted identified themselves as Kungarakany (transcript p. 1377) but that is not enough to constitute them members of a local descent group.

240. Mrs Stanton commented:

... we cannot disregard the Kungarakany and Warai forebears in our relationship. To us it's a big shame if we don't include them. We cannot disregard them; its disrespectful (transcript p. 1121).

I understand why they have been included as claimants but I am unable to find that they are traditional owners of any of the land in question. The inevitability of this was recognised by counsel for the Kungarakany and Warai when, in speaking of these families, he said that the intention was not to enable me to make a finding of traditional ownership 'but simply to list them as people advantaged' (transcript p. 1120). Counsel suggested that the members of these families might be regarded as 'potential traditional owners'(transcript p. 1120). I cannot so regard them; the term is a misnomer in this context. The most that can be said is that in the event of a grant of any of the land claimed, s.24 of the Land Rights Act obliges the Land Council to compile and maintain a register of those persons who, in its opinion, are the traditional Aboriginal owners of the land. For some purposes connected with this report, that is identifying the traditional owners, assessing the strength of their traditional attachment and considering the implications of s.50(4), I must disregard these families.

241. The Warai claimants include the Hazelbane family, descended from Harry Hazelbane Senior and Natkali who herself was a daughter of Minding and Anyulnyul. Again this was apparently a case of matrilineal descent but there was insufficient evidence to enable me to conclude that the Hazelbanes are part of the local descent group made up of the Yates family and those other families descended from Ganwardak, Natkali's younger brother. The comments made in the last paragraph about the relevance of such conclusions apply here also.

242. As mentioned before, the Maranunggu trace their relationship to a common set of parents, Taybut and Ngulikang. Although very little, if anything, was said about some of the claimants, such as the Sprys and Copelands, the Maranunggu claimants together properly constitute a local descent group. As with the Kungarakany and Warai, the number showing an active interest in the claim is a matter for consideration when assessing the strength of traditional attachment and numbers to be advantaged.

Formal findings

243. I make the following findings for the purposes of this hearing and in accordance with s.50(1)(a) of the Aboriginal Land Rights (Northern Territory) Act 1976.

- A. Land the subject of grazing licences within the claim Area 1s unalienated Crown land.
- B. Land the subject of the extension to the Kangaroo Flats training area within the claim Area 1s unalienated Crown land.
- C. Areas 1 to 5, as shown on the map Exhibit 33, are unalienated Crown land save for the land in Area 3 now the subject of miscellaneous lease no. 581 as discussed later in this report, paras 441-442.
- D. There are Aboriginals who are the traditional owners of Area 1, being the Maranunggu claimants whose names appear below.
- E. There are Aboriginals who are the traditional owners of part of Area 2, being the Maranunggu claimants whose names appear below.
- F. There are Aboriginals who are the traditional owners of part of Area 3, being the Kungarakany and Warai claimants whose names appear below.
- G. There are Aboriginals who are the traditional owners of Area 4, being the Kungarakany and Warai claimants whose names appear below.
- H. There are Aboriginals who are the traditional owners of Area 5, being the Kungarakany and Warai claimants whose names appear below.
- I. The traditional owners so named are in each case entitled by Aboriginal tradition to the use or occupation of the land in question although that entitlement may be qualified as to place, time, circumstance, purpose or permission.

These names were taken from lists supplied by the claimants in the claim book (Exhibit 8) and later amendments (Exhibit 50). Some discrepancies appear when the lists are compared with the names of persons appearing in the genealogies (Exhibit 30). As the lists provided and the spellings used were relied on by the claimants, they were relied on by me in making a formal finding as to traditional owners.

MARANUNGGU

George Wigma Kolya Nickaloff (Jr)
Goldoy Henry Moreen Dangu Peter Nickaloff
Goldoy Norman Moreen Bunarrbunarr Shirley Henwood
Mudjiya Glen Moreen Waditj Fred Waters
Yangin Lyn Moreen Modjikarr John Waters
Frederick Moreen Parralmuk Leslie Waters
Frank Spry Wudjiwalan Sandra Waters
Frank Spry (Jr) Pamari Laurie Waters
Jennifer Spry Djarrbitja Jeffrey Waters
David Spry Andju Pandela Clayton
Bessie Spry Copeland Ngulirrkang Miriam Stead
Darryl Copeland Belyuwun Andrew Jackaboi
Bradley Copeland Dayi Nancy Sargent
Bianca Copeland Pulum Cathie Devereux
Ruby Spry Zimmermann Milyangga Donna Devereux
Peter Melyen Wilmarra Kim Devereux
Wurrmangany Bryan Melyen Ngalgal Rankin Devereux
Anita Melyen Wandjimal Margaret Sargent
Bilawuk Bilawuk Jackaboi Billy Sargent
Ngulirrkang Rose Anderson Jansen Madjitha Richard Sargent
Sonya Anderson Payi Linda Sargent
Roy Jansen Therese Sargent
Nicole Jansen Bill Liddy
Mangilimba Pavalina Henwood Scott Patricia Ann Liddy
Madjitha Richard Henwood Wulinggi Evelyn Sarah Liddy
Michelle Henwood Kevin William Liddy
Peter Henwood Tanya Pearl Liddy
Paul Henwood David Ashley Liddy
Maurisa Luanna Scott Ngalgarritj Ann Majar
Madjitha Kolya Nickaloff Regamen Daisy Majar
Edward Nickaloff Aribarr Audrey Majar
Carla Nickaloff Mindiyal Mindy Majar
Colin Nickaloff Payi Jane Majar
Pavalina Nickaloff Marawunngar Karen Majar

KUNGARAKANY

Wulinggi Jane McGregor Tjungadulma Eddie McGregor
Almolmi Eva McGregor David James McGregor
Yangananga Jennifer McGregor Ngarmatju Diane McGregor
Edwin McGregor Patricia McGregor
Joanne McGregor Sandra McGregor
Wandjal Patrick McGregor Marianne McGregor
Michael McGregor Susan McGregor
Anmilil Magdaline England Tjalinymara Ada Calma
Anmilil Madeline McIntosh Edna Barolits
Pabutj Elizabeth Delahunty Bruce Verberg
Thomas Calma Lenore Dembski
Bobette Goodrem Adeliesje Goodrem
Rhonda Calma Danny McIntosh
Linda McIntosh Monica Barolits
Steven Barolits Bruce Delahunty
Joe Delahunty Lance Verberg
Poorjetpudjen Margaret McGinness Edwards Wooridjuwidj Valentine Bynoe McGinness
Pumeri Joseph McGinness Koormandum Ida Edwards Bishop
Cho-unga Helen Bytheway Gnumbra Anthony Bishop
Taboongboong Andrew Bishop Ulyunduboo Margaret Bishop
Wadjitjpal Barbara Taylor Dotkoomadum Gemma Lucy Taylor
Yernungmumbajik Katherine Plichta Elmulel Megan Bytheway
Wirrma Martin Bytheway Cecil McGinness Garcia
John Joseph McGinness Almilil Naomi McGinness
Talpul Valmai McGinness Geraldine McGinness
Donald McGinness Wayne McGinness
Elsie Ahmat Christine Ahmat
Patrick John Ahmat Dorothy Ahmat
Buddie Ahmat James Ahmat
John Francis McGinness Gwendolyn Frances McGinness
Nicholas McGinness (adopted) Sandra McGinness
Mim-merri Amber Neilley-McGinness Stephen Abala
Aaron Abala Stephen Abala (Jr)
Sally McDowell Bianca McDowell
Teresa Abala-Clarke Letticha Abala-Clarke
Vanessa Abala-Clarke Lorna Abala (Jr)
Yolande Abala-Riddle Paula Abala
Thomas Abala-Nicholls Sharma Abala-Nicholls
Ronald Abala Bradley Abala
Braden Abala Denise Abala
Ronald Abala (Jr) Rowena Abala Monck
Darryl Stroud Stephanie Monck
Damien Monck Gertrude Monck
Gerald Monck Brendan Monck
Vincent McGinness Glen McGinness
Kerry McGinness Susan McGinness
Xaviera Fitzgerald Robin McGinness Edwards
Lindsay McGinness Kay McGinness
Kurt Hoffman Kim Hoffman
Anthony Stroud Patricia Stroud
Amanda Stroud Page 43

Lowana Hatch Margaret McGinness Wells
Elaine Peckham Watts Margaret Peckham King
Michael Wells Bernard Wells
Kaylene Wells May Wells
Reginald McGinness Deborah Watts
Anne Watts Shaun Watts
Helen Watts Toni Watts
Stanley King Lance King
Reginald King Alfred King
Gloria McGinness Dunn Caroline Dunn
Gabriel Dunn James Dunn
Vincent Dunn Ivan Dunn
Marie Dunn Myers Menabirrinuh Edith McGinness Ramsey
John Ramsey Valentine John McGinness
Bernard McGinness (Jr) Midada Joyce McGinness Patullo
Zoe Patullo Clements Vernon Patullo
Ryan John Clements Patullo Mimbingal Violet McGinness Stanton
Woltjarr Edwyn Stanton Tjalinymara Cecily (Sue) Stanton Myles
Pumeri Frederick Stanton Nangalacor Lynne Stanton Lewis
Laniyuk Berryl (Rena) Stanton Purundutminya Kerry Stanton Batton
Nathan Myles Adam Myles
Soneva Donald Travis Donald
Erin Stanton Crosley Brian Stanton Lewis
Deedren House Ian House (Jr)
Roy House Miltjat Melissa Leng
Rikki Stanton Jilaling Skei Batton
Kumulchuri John Batton Muradoop Kathleen McGinness Mills
Gunluckee June Mills Adjrun Kaye Villaflor
Michael Villaflor Rudi Adjrun
Ricco Adjrun Adjibak Allyson Mills
Ian Redpath Michael Redpath
Nyinj-Ngori Barbara Mills Ulmanyung David Mills
Minawoolee Weslin Mills Putj Putj Robert Mills
Ungungul Violet Mills Co-Alee Desmond Mills
Kibbimloonj Sadie McGinness Ludwig Murrinjah Alan Ludwig
Kwinnung Samantha Ann Ludwig Ngutkarli Wendy Ludwig
Pelwenee Robert Ludwig Elmelmookme Gregory Ludwig
Miranda Steven Ludwig Kiboiyong Mildred McGinness Morley
Sandra Morley Brunner Ngarmatja Kylee-Rachel Brunner
Leewingoo Damien Brunner Derritj Judith Morley
Brian Douglas Morley Kurrama Susan Morley
Boonambo Brian John McGinness Merrin McGinness
Raymond Keith McGinness Natasha McGinness
Raelene McGinness Raymond McGinness (Jr)
Clifford McGinness Tjutjparra Marie Ruth McGinness Corby
Ambambambala James Corby Doris Angela Corby

WARAI

Lidawi Doris White Barrambim Sammy Wright
Ganwardak Roger Yates Angudjin Philip Yates
Priscilla Yates Kurrwak David Yates
Ammilil Cathy Yates Georgina Yates
Danyamil Esther Rose Yates Ivy Yates
(adopted by Roger Yates) Susie Yates
Annabel Yates (adopted by Roger Yates)
Charmain Yates (adopted by Roger Yates)
Purmirri Christine Yates (adopted by Roger Yates)
Waltjarr Keith Yates (adopted by Roger Yates)
Ngurrminh Mark John Yates (adopted by Roger Yates)
Mabul Dolly Fejo Pulen Elizabeth Thompson Yates
Purrnali Michael Madjunga Gunany Linda Fejo
Malarra Gregory Fejo Paradami Sammy Fejo
Luwanbi Tony Kenyon Brian Kenyon
David Kenyon Dubmul Graham Kenyon
Steven Kenyon (adopted by Tony Kenyon)
Linda Campbell (adopted by Tony Kenyon)
Henry Yates (adopted by Tony Kenyon)
Adjibak Ada Goodman Neville Goodman
Marburra Helen Goodman Nelson
Ginny Farah Waranga Dorothy Goodman
Justin Wanirr Harold Goodman
Mugul Philip Goodman Mimirri Jacqueline Goodman
Midada Selena Goodman Djalkut Denise Goodman
Kalmarr Barbara Tambling Djarrngatjpi Ronnie Yates
Ngalmatju Queenie Yates

Functions of Commissioner-Section 50(3) and (4)

244. I turn now to an issue that was said to be jurisdictional but which in my view does not answer that description. It concerns the functions of the Commissioner under the Land Rights Act and involves, if not the interpretation of words, the construction of s.50 of that Act. It is matter to which I adverted in the report of the first claim heard under the Act and to which I have adverted since-see for instance Borrooloola Report paras 15 24, Warlpiri Report paras 9 12, 1978 Annual Report para. 15 and 1979 Annual Report paras 20 25.

245. When an application is made by or on behalf of Aboriginals claiming to have a traditional land claim, s.50 describes the functions of the Commissioner in terms of ascertaining the traditional Aboriginal owners of the land, reporting findings and, where there are traditional owners, making recommendations to the Minister for the granting of the land. If s.50 went no further, the making of a recommendation would seem to follow once traditional owners had been ascertained. But the section does go further and in a way that is not entirely clear.

246. Sub-section (3) provides that in making a report in connection with a land claim the Commissioner: shall have regard to the strength or otherwise of the traditional attachment by the claimants to the land claimed. It continues by requiring the Commissioner to 'comment' on a number of matters in the event of a claim being acceded to. Put briefly, those matters concern the extent and nature of advantage to Aboriginals, the detriment to persons or communities and the effect on existing or proposed patterns of land usage in the region. Sub-section (4) provides that in carrying out his functions the Commissioner shall have regard to certain principles connected with living or non-living by Aboriginals on traditional country of their tribe or linguistic group. In the present hearing two views were advanced as to the place of sub-ss. (3) and (4) in the making of recommendations by the Commissioner. They accord with submissions made since the hearing of claims began, as illustrated by the reports to which I have just referred.

247. The view pressed by the Northern Territory Government and by certain of the mining interests was that the ascertainment of traditional Aboriginal owners was a prerequisite to the making of a recommendation but that such a recommendation depended upon weighing all the considerations referred to in sub-ss. (3) and (4), drawing no distinction between those to which the Commissioner is obliged to have regard and those upon which he is required to comment. The other view, and it is the one to which I have so far adhered, is that Parliament must have intended a distinction in speaking sometimes of matters to which the Commissioner 'shall have regard' and at other times to those upon which he 'shall comment'. As I said in the Borrooloola Report:

Seen that way the matters mentioned in the paragraphs of sub-s. (3) will be truly the subject of comment only, the weight to be attached to them being a matter for the Minister when considering whether he is satisfied that the land should be granted to a Land Trust in accordance with s. 11 of the Act (para. 19).

248. The Act does more than merely empower the Commissioner to do certain things. It imposes duties on him. Some of those duties are clearly set out in the sections quoted. He must ascertain facts, report his findings to the Minister and make recommendations on the basis of those findings. In making that report he must have regard to the strength of the traditional owners' attachment to the land and to the principles set out in s.50(4). He must also comment on those matters listed in s.50(3) paras (a)-(c) which are relevant to the claim. The ultimate decision whether or not to make a grant of land rests with the Minister. The scope of his decision making power is restricted only by the need for a recommendation in a report from the Commissioner (s. 11(1)). If no recommendation is made the Minister cannot act to make a grant. But if a recommendation is made the Minister must satisfy himself that the land or part of it should be granted. Only one decision is made, that by the Minister based on the Commissioner's recommendations. The Minister may act on all, some or none of those recommendations.

249. There is force in the argument that the Minister ought to be assisted in every way possible in making his decision and that by appointing as Commissioner a judge, who has experience in hearing and evaluating evidence and reaching conclusions based on it, the Minister is placing reliance on that person to weigh up all the relevant factors and come to a conclusion. The Commissioner is capable of performing this function through powers of inquiry (s.54) which the Minister lacks. The Minister is not in a position to conduct an inquiry but still has to be satisfied that the land should be granted. The Act itself seems to meet

this argument. A distinction is made between those matters to which the Commissioner 'shall have regard' in making a report and those matters on which he 'shall comment'.

250. Mr Hamilton, while recognising that there is some significance in the shift of language, submitted that it did not go so far as to exclude matters for comment from consideration in making a recommendation. Mr Hiley submitted that the words 'shall comment on' should not be restricted to mean 'shall do no more than comment on', urging me to view my function as, in effect, considering twice the matters for comment; first taking the matters in s.50(3) paras (a)-(c) and any other relevant matters into account in making a recommendation and then commenting specifically on them. This approach is not precluded by the Act, for while s.50(1) defines the Commissioner's functions, nowhere do those functions expressly exclude what he can take into account. Section 50 says what the Commissioner shall do; it does not determine what he shall not do.

251. On this approach the Minister could be satisfied that a grant should be made, either on the basis of the Commissioner's recommendations alone or on further consideration of the comments. One objection to this approach is a practical one. There would be unnecessary duplication if the same matters were dealt with in both the recommendations and the comments. The Minister would then look at recommendations based in part on those matters, followed by further comment on them. There seems to be no obvious benefit in this approach and the Act does not compel its adoption. Also it tends to beg the question for if a factor is not mentioned in the Act, what gives it relevance other than the Commissioner's comment? The legislature has gone to some pains to spell out matters to which the Commissioner shall have regard and matters upon which he shall comment, leaving no room for the argument that the Commissioner may take into account other matters of which the Act does not speak but which in his judgement might be thought to have some relevance. Furthermore there may be good reason against adopting this approach. If the purpose of the legislation is, as its long title suggests, to provide for the granting of traditional Aboriginal land to those who are found to be the traditional owners, it might unnecessarily restrict the scope of the Minister's discretion if the Commissioner were to base his recommendations on matters to which the Minister might give different weight. It would be possible for the Commissioner not to recommend a grant where the Minister might otherwise have been inclined to make one. In that situation the Minister could not act because the Act does not contemplate that he will make a grant in the absence of a recommendation. Alternatively, after giving what appeared to him the proper weight to all interests, the Commissioner might recommend a grant only to find that for other reasons the recommendation was not implemented by the Minister.

252. Mr Pauling submitted that the problem be resolved by recognising that the draftsman erred by putting the word 'report' in s.50(3) instead of 'recommendation'. In the alternative, 'report' ought to be read as meaning 'recommendation' in that sub-section. This approach is not satisfactory. The words used may not, on one view, lead to a satisfactory result but by adhering to the grammatical and ordinary sense of the words a result is reached which is not absurd, repugnant or inconsistent with the rest of the statute.

253. In my opinion the Commissioner's function is to determine questions concerning traditional ownership and the strength of attachment to the land, to make an evaluation of the evidence concerning those other matters set out in s.50(3) and leave the resolution of competing interests to government, by such criteria as are thought to be relevant in the light of that evaluation.

254. The argument was put that unless the Commissioner balances the competing interests on which he must comment he has nothing against which to measure the factors going to traditional Aboriginal ownership when making a recommendation. If that recommendation is seen in terms of Aboriginal entitlement to the use and occupation of the land, there are criteria in the Act which must be satisfied. Section 3(1) sets out the definition of traditional Aboriginal owners and evidence is assessed to establish whether claimants fall within the definition. In addition, s.50(3) obliges the Commissioner to consider the strength of attachment of any traditional owners to the land claimed. This is a more subjective assessment but one which can be made. It would be made no easier by attempting to 'measure' it against the strength of another type of interest or the extent of the financial detriment which might result if a grant were made. On the criteria in the Act a judgement is made and it is possible, and indeed has been the case, that no one will meet the requirements of the definition or that they will do so but show insufficient attachment to the

land to warrant a recommendation. On the other hand the Act itself provides no scale by which to measure such diverse interests as traditional ownership and detriment. Assuming that the matters to which the Commissioner can advert are limited to those stated in s.50, there is no guidance as to the priority of competing matters or how to resolve conflicts between them.

255. It follows from the approach I have taken that the Minister may decide not to accept a recommendation, in whole or in part, because in the light of the Commissioner's comments regarding such matters as advantages and detriment he is not satisfied that a grant of land should be made. So long as the Minister makes this clear, and it is clearly understood, no contradiction is involved.

Strength of attachment

256. Section 50(3) of the Act directs the Commissioner, in making a report in connection with a traditional land claim, to have regard:

to the strength or otherwise of the traditional attachment by the claimants to the land claimed.

257. In a number of reports I have expressed views about the meaning and implications of this direction. Those views have been collected in Exhibit 140 pp. 31-37. It is traditional attachment to the land claimed with which the sub-section is concerned and it is the traditional attachment of the claimants. The Act is one to provide for grants of traditional Aboriginal land and the emphasis of the Act is upon traditional land claims, traditional Aboriginal owners and traditional attachment. Exhibit 140, the conspectus prepared on behalf of Peko Exploration Limited and other mining companies, carries as a frontispiece an extract from para. 199 of the Uluru Report:

When the movement of Aboriginal people from their traditional country has been forced upon them, it may seem especially ironic that their claim should be weakened by absence of traditional attachment.

Correspondingly the maintenance of a land-oriented culture despite displacement and the pressures of European settlement may imply a strong traditional attachment to land even though some of the indicia of traditional life have been lost.

258. In a powerful written statement tendered at the hearing, Mrs Ida Bishop one of the Kungarakany claimants said:

We belong to this special place. We do not think to possess the earth, the trees, rocks and waters of our traditional home, because it is the other part of us. It brought us forth and taken many of us back.... There are the sacred places of the dreaming. There are the special places for food gathering, water to drink and where we once hunted for game to feed us. This land is our heritage; our home; it is our history. This land is our very life. Separate us from it and we are nothing. (Exhibit 43).

259. There was not the same evidence of performance of ceremony and ritual as in some other claims. The significance of this rather depends upon knowing how much has been lost and, to some extent, that must be a matter of speculation. There was compelling evidence of women's ritual for the Maranunggu (Exhibit 113) and for the Kungarakany and Warai (Exhibit 128 Restricted). The shade-laying ceremony and ngirrwat, the ceremony of conferring place names on young persons, are still of importance to the Kungarakany and Warai. Each Maranunggu possesses two kinds of dreamings, the awa ngirrwat, usually passed from father to child, and the awa mirr or conception totem. The transmission of knowledge of country is more evident in some families than in others, which is hardly surprising. It may have been due to the dedication of a few people but there was evidence that before this land claim began or could have been visualised, traditional knowledge was being fostered among the Kungarakany and Warai, as well as the Maranunggu.

260. Exhibit 147, the final address of the Northern Territory Government, submits that a profile of the biographies of the Kungarakany witnesses

... shows a spasmodic association with the claim areas. It also shows that the group itself could only come together infrequently to assert its common identity or links with the land.

This is a fair submission, more so in relation to Areas 1 and 2, but one has to look at a group of claimants comprising both Kungarakany and Warai. In that respect and in regard to Areas 3, 4 and 5, the submission has less force. A number of Warai live at Amungul and have close physical and spiritual associations with that country.

261. The same submission (Exhibit 147) acknowledges the orientation of the Maranunggu towards traditional life, reflected in the use of traditional language and of traditional religious beliefs and practices. This goes hand in hand with a close physical association with the land.

262. I am of the opinion that in regard to Area 1 and that part of Area 2 claimed by them, the Maranunggu have established a strong traditional attachment to land. In regard to that part of Area 3 around Minding, Area 4 and Area 5, I am also satisfied that there is among those Kungarakany and Warai found to be traditional owners a strong traditional attachment, maintained despite the very great pressures of the last one hundred years.

Desire to live on the land

263. Earlier reports have discussed the meaning and significance of s.50(4) para. (a). I refer in particular to the Borroloola Report para. 109, the Alyawarra Report paras 109-110 and the Uluru Report paras 133-134.

264. The only claimants living on any of Areas 1 to 5 are the Warai claimants and that is by reason of their occupation of special purposes lease 453 immediately south of the Adelaide River township. By virtue of that lease, they have a right or entitlement to live there. Outside the claim areas, there are claimants living on traditional country, for instance, the Maranunggu at McCallum Creek. They are on the Wagait Reserve which is part of Schedule I land under the Land Rights Act.

265. Many claimants expressed an interest in visiting parts of the claim area mainly to hunt and gather food. Apart from the Maranunggu people at McCallum Creek, there is no pattern, at least in recent years, of claimants visiting the claim area. That is not to say that individuals have not done so from time to time.

266. As to the future, some interest was expressed by the Kungarakany and Warai in running cattle and mining, mainly on Areas 1 and 2. Among those expressing interest were Eddie McGregor, Roger and Tony Yates and Tom Calma. The absence of any general interest in living on Areas 1 to 5 is largely explained by the whereabouts and lifestyles of the claimants. It would be unreal to demand of them as the price of succeeding in a land claim, that they quit their present homes, many of which are in Darwin and other cities, and take up residence in the claim area. Section 50(4) does not operate as a guiding principle in the present claim, leaving findings of traditional ownership and strength of traditional attachment as the relevant criteria in deciding what recommendations if any should be made.

Recommendations

267. In the light of the findings I have made as to traditional ownership, the identity of traditional owners, the strength of their traditional attachment to the land claimed and the principles spelled out in s.50(4) of the Act, I recommend that there be a grant of land to two Land Trusts. Specifically I recommend:

- (a) that there be a grant to one Land Trust of the unalienated Crown land in Area 1 and of the unalienated Crown land in Area 2 south west of a line drawn to include Mount Bennet and Mount Finnis thence due south, which line will be determined in part by the existence of alienated Crown land;
- (b) that there be a grant to another Land Trust of the unalienated Crown land in Area 3 east of a line drawn from the north-west corner of section II 68 to the south-west corner of section 1 164 and of the unalienated Crown land in Areas 4 and 5.

The boundaries of the claim area are as appearing in Exhibit 13A with the modifications necessary in the case of Areas 2 and 3.

268. My formal recommendation in each case is that the land be granted to a Land Trust for the benefit of Aboriginals entitled to the use or occupation of the land, whether or not that traditional entitlement is qualified as to place, time, circumstance, purpose or permission.

Matters for comment-Number of Aboriginals advantaged

269. Section 50(3)(a) of the Land Rights Act requires the Commissioner in making a report to comment upon:

the number of Aboriginals with traditional attachments to the land claimed who would be advantaged ... if the claim were acceded to either in whole or in part.

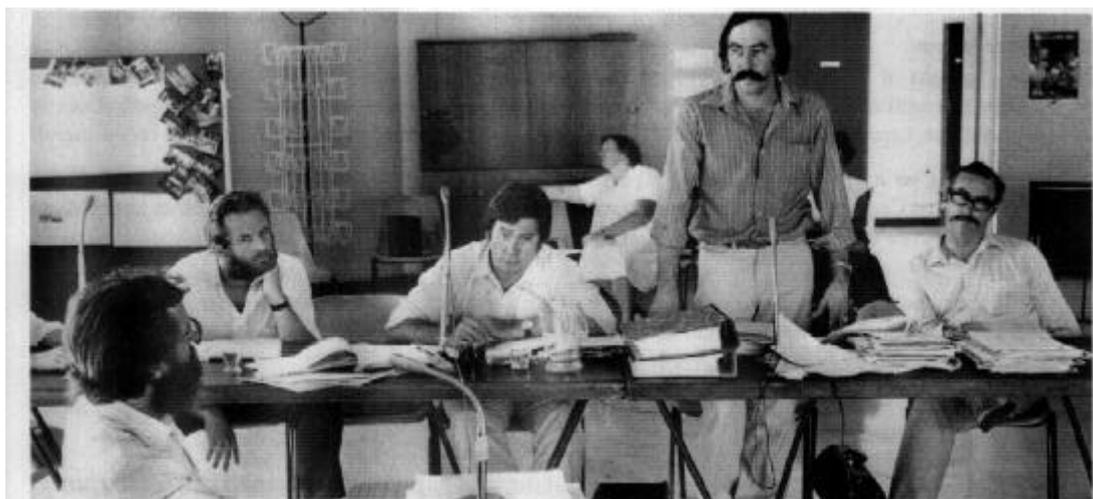
As in other land claims there is difficulty in specifying a number.

270. There are 68 Maranunggu found to be traditional owners and it is reasonable to assume that at least that many people would derive some advantage from a grant of the land in claim Area 1 and that part of Area 2 recommended.

271. The claim book listed a total of 189 Kungarakany and 40 Warai claimants but that number was increased in the course of the hearing to a total of 354 Kungarakany and 62 Warai (Exhibit 50, transcript pp. 1371, 1372). Of that total 9 Kungarakany had said they were not to be considered claimants. As I have found that only 193 Kungarakany and 44 Warai are traditional Aboriginal owners under the Act, it is necessary to consider whether those others named as claimants would benefit from a grant of part of Area 3, and Areas 4 and 5 by virtue of traditional attachments to the land. It is not possible on the evidence available, nor does it seem necessary under the Act, to determine the types of traditional attachments each of those additional persons has with the claim area. It is enough to say that such attachments as they do have arisen from traditions handed on to them as Kungarakany and Warai and so it may be assumed that to a greater or less degree each would derive some advantage from a grant of this land.

272. Other Aboriginal groups whose traditional country surrounds the claim area may also benefit. When asked to comment on who would be advantaged as a result of a grant Mr T. Calma named people with whom the Kungarakany and Warai have traditional ties such as the Wadjiginy, Kiyuk, Malak-Malak, Larrakiya and others around the area for instance the Wagaman, Wulna and Minitja. No estimate was given of numbers. There was no evidence of direct traditional attachments between these people and the land claimed though Mr Calma did mention that people from Delissaville go to the Wagait Reserve and around the Finnis River hunting (transcript p. 11 17).

273. Dr Layton and Dr Williams noted in the claim book (Exhibit 8p.21) that many of the claimants have close relatives who live with them and who would benefit from a grant of land through being able to live on the land claimed, use its natural resources and participate in the claimants' economic enterprises, particularly in Area 1 and a small portion of Area 2. A provisional list of 48 people (of which 4 were later deleted, see Exhibit 50) includes Brinken, Werat Madngela, Maringar, Manda, Kuwama, Malak-Malak, Wagaman, Djawany and Warramunga.



Dr R. Layton (left) is examined by Mr T. Pauling (standing) as (left to right) Mr D. Parsons, Mr P. Cameron and Dr D. Tryon listen.

Photo: G. Neate

Dr R. Lay ton (left) is examined by Mr T. Pauling (standing) as (left to right) Mr D. Parsons, Mr Photo: G. Neate P.Cameron and Dr D. Tryon listen.

Matters for comment-Nature and extent of advantage

274. Section 50(3) also requires the Commissioner to comment on:

... 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.

As I have said in earlier reports the Act is concerned here with something reasonably specific as opposed to the recognition of traditional ownership which, although important, is an essential step in any recommendation made under the Act.

275. A real advantage to the Maranunggu is that, in recognising them as the owners of the land, a grant may serve to resolve disputes between them and others as to the ownership of Area 1 and part of Area 2. The Maranunggu placed no stress on other advantages.

276. It was clear from the evidence of the Kungarakany and Warai witnesses that the advantages flowing from a grant of land would be spiritual in part, helping to retain and even bolster the identity of those people as Kungarakany and Warai. Mrs Mills spoke of sites on the land and secrets associated with them that are 'vital to our lives, from the conception to birth, to puberty on to adulthood, to marriage, back to conception and so on ... the cycle of life itself'. She spoke of 'the land being the mother to care for and feed the people' (transcript pp. 1116, 1117). She linked ownership of the land with 'the continuance of our tribe's existence' (transcript p. 1152) as did Mrs Stanton, and Mrs Batton spoke of restoring 'something more than just something material for all of us' (transcript p. 1153). Mrs McIntosh spoke of it giving their identity back to the people and other witnesses linked it with the revival of the traditional teachings of the ancestral way of life for younger generations. Wendy Ludwig spoke of a grant being 'unification between tribal people and urban people and the country' (transcript p. II 53).

277. The economic advantages anticipated by some of the claimants included small mining ventures, some sort of cattle project in Areas 2 and 5, the possibility of crocodile farming and the establishment of a cultural centre. There was a suggestion that part of Area 2 which is fairly poor for cattle grazing could be used for cash crops to supplement cattle production. The possibility of outside graziers being able to negotiate for the use of part of the land for grazing was also mentioned. Plans were spoken of to form an incorporated association of Kungarakany and Warai owners for economic development. But I do not think that any substantial economic advantage is likely to result from a grant of the land recommended, except through agreements for the grant of mining interests made in accordance with Part IV of the Land Rights Act.

The notion of detriment

278. The Commissioner is required to comment upon:

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.

279. In the present hearing I was asked by counsel appearing for mining companies to reconsider a view expressed in the Warlpiri Report that the quarrel mining interests had was with the Act not with a grant made as a result of a claim. Since the Act expressly precludes mining on Aboriginal land without the consent of the Land Council or, in those cases where s.40 is not operative, requires that consent be reached as to the terms upon which mining shall take place, I inclined to the view that detriment did not result from acceding to the claim, rather from the operation of the Act itself.

The legislature has in Part IV of the Land Rights Act provided a complex scheme by which mining interests in respect of Aboriginal land may arise, with a requirement that certain interests be the subject of agreement and in default arbitration. When s.50(3) para. (b) of the Act speaks of detriment that might result if a claim were acceded to it is I think looking at something that is the product of a grant of land to a Land Trust rather than of the Act itself. For instance, if such a grant made it difficult for Magellan to get access to the areas it wished to prospect or deprived it of the most economical way of removing the mined product, that would constitute a detriment, especially in a situation of known petroleum with reasonable prospects of mining in the near future. But when Parliament itself has replaced the certainty of the Petroleum Ordinance with the uncertainty of negotiation and arbitration, I do not think that can fairly be regarded as a detriment resulting from acceding to a claim. If I am wrong the detriment that might result is precisely that suggested by Magellan, the substitution of unknown financial obligation for known ones (Warlpiri Report para. 328).

280. It has been put to me that this approach is too narrow. I am willing to reconsider the matter but wish to say this by way of preface. What was said in the Warlpiri Report was in relation to the situation of the mining interests there concerned, in none of which had any substantial expenditure been incurred and in none of which was there reasonable expectation of economic return. Furthermore any views expressed must reflect to some extent the nature of the submissions made. Until this hearing I have not been asked to look at the matter afresh.

281. The Land Rights Act casts a tight net around mining operations where Aboriginal land is involved. A useful starting point is s.70, a provision applicable to mining operations although expressed in wider terms. By reason of that section no one may enter or remain on Aboriginal land except in the performance of functions under the Act or'. . . otherwise in accordance with this Act or a law of the Northern Territory'. Sub-section (2) provides that where a person other than a Land Trust has an estate or interest in Aboriginal land, that person is entitled to enter and remain on the land for any purpose that is necessary for the use or enjoyment of the estate or interest. It was suggested by counsel for Peko Exploration Limited that s.70 preserved existing mining leases. In my view it does and the reason is that s.70 must be read in conjunction with s.66. Section 3(2) provides that, unless the contrary intention appears, a reference in the Act to an estate or interest in land does not include a mining interest. But ss.66 and 70 are within Part VII of the Act and s.66 provides that a reference in this part 'to an estate or interest in Aboriginal land 'includes a mining interest. Section 3(1) defines 'mining interest' to mean 'any lease or other interest in land (including an exploration licence) granted under a law of the Northern Territory relating to mining for minerals'. Thus on a grant of land under the Act all mining interests are preserved. But in the case of an exploration licence no greater interest may then be granted except in accordance with s.40.

282. A further restriction may be found in s.75 whereby a miner's right is expressed not to apply to Aboriginal land unless immediately before it becomes Aboriginal land the land was being occupied or used by virtue of the miner's right.

283. Mention has already been made of s.40 of the Land Rights Act and of the rather complex system introduced by Part IV of that Act. The difficulty about the submission made on behalf of the mining interests is that unless at the time of the hearing of a claim some detailed agreement has been reached between the claimants or the Land Council and the mining company (as to which see s.43 of the Land Rights Act and in particular s.43(5) introduced by Act No. 72 of 1980), it can always be said that acceding to a claim will cause detriment. At any rate, it may be said in all cases that detriment might result from acceding to the claim because there is no guarantee that an agreement will be reached. I question whether that sort of comment is envisaged by s.50(3) para. (b) of the Act and whether it is likely to be of any assistance to the Minister. As I have said in previous claims, it seems to me that the relevant detriment is one likely to arise because a particular area of land becomes Aboriginal land. This may present problems of access; it may require a mining company to transport minerals over a longer distance hence causing the company additional expense. I think too it would be appropriate to mention by way of detriment the situation of a miner who has already incurred substantial expenditure under an exploration licence where there is evidence of a reasonable expectation of economic return. Without that, no likelihood of detriment has been demonstrated; the expenditure has been in vain in any event. But I am not persuaded that s.40 of itself represents a detriment within the meaning of the Act even though the section will operate once a grant has been made. If it does it is a detriment considered and deliberately created by Parliament, hardly requiring comment by the Commissioner.

284. Because of the complexity and sweeping implications of this claim and the relationship of are as one to another, I have dealt with all matters raised under the head of detriment or land usage even where there is no relevant recommendation for a grant of land.

Detriment to Aboriginals

285. I have already mentioned the obligation cast by s.50(3)(b) of commenting upon: 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.

Government, individuals and companies made submissions on the detriment which they might suffer if

some part of the land claimed were granted to a Land Trust. Before dealing with those submissions I mention the effect which such a grant may have on some Aboriginal groups.

286. Late in the hearing evidence was given by Betty Moreen Bilawuk and Joy White, on behalf of the Ngungut people who live in the Port Keats Alphonse Beach (Nadirri) area. They expressed concern about evidence given earlier in the hearing by some Maranunggu claimants that the Maranunggu own the Makmak (swamp or sea eagle) dreaming. For example, Pandela Clayton had said that this was the dreaming of her father, grandfather and great grandfather (transcript pp. 1602, 1751). The women claimed responsibility for a Makmak dreaming (black and white sea eagle) which they said is exclusively theirs and which relates only to their land. It was said to have flown over Kurrindju but not landed there and to have its nest at Nadirri.

287. Counsel appearing for the Ngungut submitted that if I were to accept that the Maranunggu have the Makmak dreaming and that their claim in part succeeded because of it, such a finding would be a major public affirmation that the dreaming belongs to the Maranunggu. This would deprive the Ngungut of the spiritual basis of their traditional attachment to the land.

288. In the end I have not had to decide the Maranunggu claim on that basis and indeed the discussion about the Makmak dreaming seemed to centre on Kurrindju, which is not part of Area 1. Also I am not satisfied that the Makmak dreamings of the Maranunggu and Ngungut were the same. The Ngungut made no claim to any land in this land claim and so would not suffer any detriment by a grant of Area 1 to the Maranunggu.

289. Mrs Margaret Rivers gave evidence of her links with the claim area over many years and her knowledge of some places on the land. Mrs Rivers is a Wadjiginy, her mother and mother's father having been Wadjiginy and her father thought to be Chinese. She claimed the land on behalf of herself and her 'people'(transcript p. 2268). I am not persuaded that Wadjiginy country which lies to the west of the claim area extends eastward into it. There was no historical or other evidence that the Wadjiginy are the owners of the areas claimed and Mrs Rivers conceded that Wadjiginy country traditionally started about halfway through the Wagait Reserve and included the coast opposite the Peron Islands (transcript pp. 2266, 2279). Consequently I do not find Mrs Rivers to be a traditional Aboriginal owner of any of the land claimed and have no reason to believe that she will suffer any detriment from a grant of any of that land to a Land Trust.

290. It may be that the Kungarakany and Warai will suffer some disadvantage from a grant of Area 1 and the south-west part of Area 2 to the Maranunggu. The argument about ownership of this country was put by both groups on an 'either or' basis, though the Maranunggu and the Kungarakany and the Warai recognised and accepted the presence of each other in these areas. There was no evidence whether the recognition of the Maranunggu as traditional owners of this country would result in them shutting out the Kungarakany and Warai and I am not in a position to speculate on this. However a grant pursuant to s. 11 is for the benefit of all Aboriginals entitled by Aboriginal tradition to the use or occupation of land, whether or not that traditional entitlement is qualified in terms of para. (a) of s.1 I(I).

Detriment-Kangaroo Flats Army Training Area extension

291. The Kangaroo Flats Army Training Area includes an extension which takes in sections 2731 2734 in the Hundred of Hughes comprising 2600 hectares of which 80 per cent is subject to this claim. The extension was reacquired for defence purposes pursuant to the Northern Territory (Self-Government) Act 1978 in 1979. It is adjacent to land held by the army in section 2730 since 1972, and reacquired by the Commonwealth in June 1978. I have found it to be unalienated Crown land within Area 2 but I did not find traditional ownership established for that part of the claim.

292. The extension Area 1s not fenced and no improvements have been made to it. Access is by vehicular track from section 2730. There was evidence that section 2730 is not large enough for developments proposed by the army to provide for concurrent use of ranges for minor tactics and fieldcraft exercises. Major capital works programs are anticipated during the financial years 1983-84 and 1984-85 for the construction of a range complex and related facilities on section 2730. As yet no plans are available;

however, Major C. Ford, Chief Engineer at the headquarters of the 7th Military District, said that because of the terrain the safety area for the firing ranges would extend into sections 2733 and 2731 part of which falls within the present claim. Because of the danger of unexploded ammunition, areas used for mortar ranges would not then be available for any other purpose. He said that no significant use has been made of the land presently under claim but that the army considers it to be in operation now even though it has no facilities. The army felt obliged to use the area even under such poor conditions though some improvement in facilities is anticipated within the next few years.

293. If I had made the findings and recommendations necessary for a grant, the continued use of this area by the army and other defence force units would be permitted by s. 14 of the Land Rights Act, so long as the land is being occupied or used by the Commonwealth. During the period of its occupancy or use, any buildings or improvements on the land are deemed to be the property of the Commonwealth and the only detriment to the Commonwealth would be the payment of rent to the Land Council under s. 15 of the Act. Rent is payable only if the use of the land by the Commonwealth is for a purpose that is not a community purpose.

294. If s. 14 of the Act does not cover this operation, those activities presently carried out on the land would have to cease pending successful negotiations with a Land Trust. The Commonwealth might then be said to suffer some detriment in the way of money payable to a Land Trust under such an agreement or the reallocation of resources on section 2730 if that extension land was not made available. As little money has yet been spent on facilities on section 2730 that detriment may not be great. But if the Commonwealth is then obliged to acquire land in the area, compulsorily or otherwise, the cost of that acquisition may be seen to be a detriment arising from a grant of the land.

295. The Commonwealth sought the excision of that land from any grant made to a Land Trust. It put its submission on the basis of the detriment it would suffer if its interests were not protected by s. 14 of the Act. In view of my findings regarding traditional ownership and the absence of any relevant recommendation it is unnecessary to say anything more.

Detriment-Commonwealth Railways

296. Submissions were made on behalf of the Australian National Railways Commission regarding existing and proposed railways in the claim area. A narrow gauge railway from Darwin to Pine Creek was constructed late in the last century, and a deviation of part of that railway ten years ago. The route of the railway and the places at which it passes through or abuts areas of land under claim are clearly set out in Exhibit 137. Broadly speaking it enters the claim in the north-eastern corner of Area 2, runs south through Area 4 and continues south close to the western edge of Area 5. The land sections through which the railway passes and the status of that land are set out in Exhibit 136. Although there was some uncertainty during the hearing as to the status of some sections, I take it as agreed that all of the land occupied by the railway is unalienated Crown land hence available for claim.

297. That railway ceased operations on 30 June 1976 although the North Australian Railway continues to exist pursuant to the Australian National Railways Act 1917, pending recommencement of operations or statutory closure under that Act. Mr D. R. Green, Chief Planner for the Australian National Railways Commission, gave evidence that operations on the existing narrow gauge railway would be recommenced only if there was a 'sustained effective demand for such services' (Exhibit 120 p. 1). That sort of demand would only arise from the growth of Darwin expected after the year 2000 or the emergence of some large mineral or agricultural development. The line is periodically inspected in part and could be made operational within twelve months of a decision being made to use it. Irrespective of any future use, the line has value in terms of the sale of the railway and sleepers.

298. Evidence was given of an undertaking by the Northern Territory Government to issue titles to all railway land that is presently occupied or would be required for occupation in the future. A prerequisite to such a grant is a survey of the boundaries of the North Australian Railway corridor by a Commonwealth surveyor. At this stage surveys of that part of the corridor cutting across the claim area have not been completed and so precise information as to boundaries is unavailable.

299. Mention was made of an undertaking by the Commonwealth Government to build a rail link between Darwin and Alice Springs within ten years. This would be a standard gauge railway and would replace the present narrow gauge railway without necessarily following that route. Mr Green could not say with certainty where the new line will go as the route identification work will not be completed for the Katherine to Darwin section until late in 1981. He said that the new line would probably follow that part of the existing line constructed to standard gauge specifications which bypasses the Darwin River Dam catchment area. However, he thought that the existing route from Adelaide River through to Stapleton is quite unsuitable for a standard gauge railway and that some deviation will be necessary, possibly taking the new line outside the claim area.

300. Any new line would require a corridor of at least 60 metres on either side of the centre line. Such a corridor may need to be wider in places for the control of drainage, stockyards, housing, sidings and other such matters. It may also be necessary because of the terrain, where high ground requires a greater width at the base of the cutting.

301. In the event of a grant under the Land Rights Act (and there has been no finding of traditional ownership for the relevant part of Area 2), the interests of the Australian National Railways Commission in the narrow gauge line will be protected by s. 14 of the Land Rights Act; it is an authority occupying land at the time of vesting that land in a Land Trust. To the extent that any new line varies from the existing route, some cost would be incurred in the compulsory acquisition of necessary land or, less likely, the lease of land. Given the present uncertainty as to the route of a future line, including the possibility of a major diversion were the proposed Finnis River Batchelor Dam constructed, a grant of title excising land as a railway corridor is hardly possible at present. It may be possible later. As the policy of the Commission is to acquire freehold land (Australian National Railways Act 1917 ss.16, 63) that land may have to be acquired by or for the Commission as the need arises unless there is a surrender pursuant to s. 19(4). No evidence was given either of the cost of compulsorily acquiring or of leasing land but such a payment would represent a detriment to the Commonwealth. Any understanding to surrender land given by the Land Council at this stage could only be in general terms.

Detriment-Snake Creek: uranium ore stockpile

302. Late in 1977 200 tonnes of uranium bearing ore were transferred from Rum Jungle to the Commonwealth Storage Depot at Snake Creek. That depot is 3 kilometres north of the Adelaide River township and 1 kilometre west of the Stuart Highway. It is in Area 5. A site plan is attached to the submission on behalf of the Department of Trade and Resources (Exhibit 73).

303. The land upon which the ore stockpile is located vested in the Northern Territory by virtue of s.69 of the Northern Territory (Self-Government) Act 1978. Nothing in that Act affected title to the stockpile. The ore is kept at Snake Creek because of an understanding between the Commonwealth and Northern Territory Governments. Occupation of the land is not specifically authorised by any legislation. It is proposed to remove the stockpile for treatment; that could be achieved within twelve months from the start of removal operations. No work has yet commenced and there was no indication when it may occur or the number of persons who may need access to the land to remove the stockpile and clean up the area.

304. Section 14 of the Land Rights Act protects the Commonwealth's right to occupy the land if it becomes Aboriginal land. The Department of Trade and Resources made no objection to the claim, asking only that suitable access be given to it to remove the stockpile and to carry out rehabilitation of the environment should that prove necessary. The Act does not in express terms create or preserve access through Aboriginal land to land to which s. 14 applies. Perhaps such a right may be inferred. The only additional cost would be any rent payable by the Commonwealth under s. 15 of the Act.

Detriment-Snake Creek: proposed defence use

305. From the end of World War 11 until 1962 an ammunition depot was maintained at Snake Creek in Area 5. Although not used since for the storage of ammunition, a recent tri-service working party recommended its revival. No decision has yet been made; however, evidence pointing to pressure on other

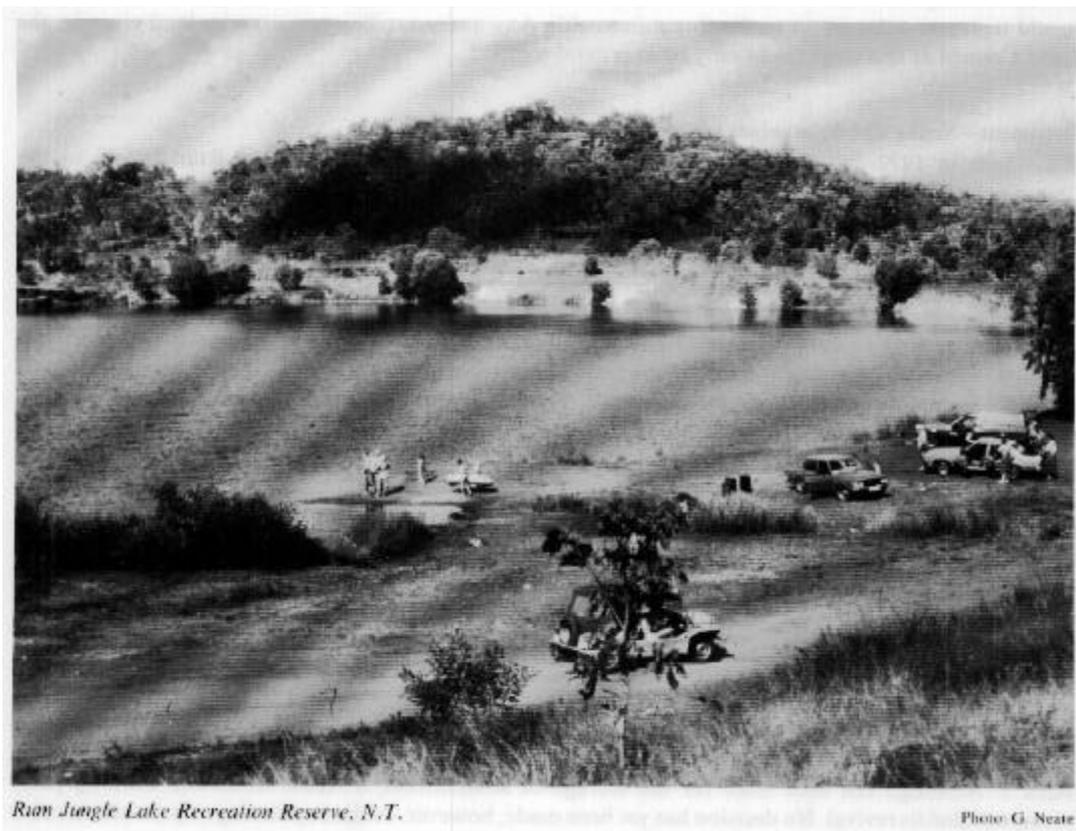
storage facilities in Darwin suggested that a move to Snake Creek may be made in the foreseeable future. Renovation of existing structures and new buildings would be necessary before ammunition could be stored there. It was agreed that the land, the buildings presently on the land and the spur railway line are all owned by the Northern Territory Government.

306. If the land becomes Aboriginal land and is compulsorily acquired for the Department of Defence, or leased by it, detriment to the Commonwealth would arise if the cost of acquiring or leasing from a Land Trust was greater than if the land had been acquired or leased from the Northern Territory Government.

Detriment-Rum Jungle

307. A submission was made on behalf of the Department of National Development and Energy concerning the rehabilitation of the Rum Jungle Area 1n Area 4. The land concerned falls within sections 1090, 1091 and 2890 in the Hundred of Goyder; a plan showing the remains of mining operations and buildings forms Exhibit 76. Mining operations began in 1954 and continued until 1963. Thereafter milling operations of stockpiled ore continued until 1971 when the operation was closed down and assets at the mine site were disposed of. The Commonwealth acknowledges that remaining buildings and equipment formerly owned by the Australian Atomic Energy Commission now belong to the Northern Territory Government.

308. Sampling of liquid effluent from the mine site began in 1969 and a more detailed environmental survey of the area was conducted between 1973 and 1975. In 1977 the Commonwealth Government announced a policy of rehabilitating the old Rum Jungle mine site and set aside money for that purpose (Exhibit 77 pp. 16, 17). A study was later made to formulate a comprehensive program to clean up the area. Money was set aside in the 1980-81 budget to commence this program and, with the concurrence of the Northern Territory Government, ought to be completed in approximately four years.



Rum Jungle Lake Recreation Reserve, N.T.

Photo: G. Neate

309. The principal objectives of the program will be to reduce or eliminate residual public health and safety risks, reduce continuing pollution originating from the site and landscape the region including establishing permanent vegetation. It is expected that at least 55-60 people will be involved on the site with up to double that number at times, depending on the nature and scheduling of operations. Mr R. Z. de Ferranti, Assistant Secretary of the Uranium Branch, Department of National Development and Energy, said that there was no guarantee that continuing pollution can be eliminated entirely and to that extent would not give any assurance of the land's suitability for residential use. Some of this pollution is a result of uranium mining; however the major source is the oxidation of the heavy metals (copper, manganese and zinc) in the abandoned open-cuts, overburden heaps and leach heaps associated with mining activity. There is no significant radiological health hazard provided that public access to the former mine site is transitory (Exhibit 75).

310. The road to Rum Jungle is a public road and would be excluded from any grant of land to a Land Trust. The continuation of the project could be permitted under s. 14 of the Land Rights Act. There was no evidence to suggest any opposition to such a project from the traditional owners of the land (see transcript pp. 1109, 3155) and it appears that the Commonwealth would suffer no detriment by its becoming Aboriginal land.

Detriment-solar energy project

311. Written evidence was tendered on behalf of the Department of Mines and Energy concerning a possible solar energy project involving the Japanese, Australian and Northern Territory Governments. The object of the project is to assess the feasibility of a megawatt scale solar thermal electric power station for the Northern Territory and to determine an appropriate design and siting for a demonstration plant.

312. Three regions are presently being considered as appropriate sites. These are the Batchelor-Rum Jungle, Katherine and Alice Springs areas. The Rum Jungle site falls within section 2890 of the Hundred of Goyder (Exhibit 86 item 10), part of claim area 4. A possible location of the plant was indicated by Mr N. Conway of the Atomic Energy Commission on a visit on 7 October 1980 (transcript p. 3111). At this stage it is not known whether the project will proceed and if so whether it will be in Rum Jungle.

313. I have mentioned the solar energy project in this part of the report because of the Commonwealth Government's interest. But that government made no submission on the matter and I shall return to it when considering the detriment raised by the Northern Territory Government.

Detriment-Northern Territory Government: general comments

314. In his notice of intention to be heard, the Attorney-General for the Northern Territory listed many matters on which comment was sought. The Northern Territory Government has the responsibility of providing a range of services for the public including water, electricity and roads. Facilities are provided as the need arises or in anticipation of such needs and it was counsel's submission that the Northern Territory Government is hampered when land becomes Aboriginal land. A major limitation arises from s.67 of the Land Rights Act which reads:

Aboriginal land shall not be resumed, compulsorily acquired or forfeited under any law of the Northern Territory. Consequently the Northern Territory Government cannot use the provision of its own Lands Acquisition Act to acquire Aboriginal land for essential public purposes.

315. A further limit is imposed as a result of the definition of Crown land in s.3(1) of the Land Rights Act which excludes:

(a) land set apart for, or dedicated to, a public purpose under the Lands Acquisition Act 1955 or under any other Act. I have previously interpreted that reference to 'any other Act' to mean statutes of the Commonwealth and not of the Northern Territory Government. That interpretation it appears has received general agreement. The limitations on Northern Territory Government activity thus arise before land becomes Aboriginal land and are compounded after a grant to a Land Trust.

316. As the Northern Territory Government lacks the power compulsorily to acquire Aboriginal land occasions may arise when it asks the Commonwealth to do so on its behalf. The Lands Acquisition Act 1955 s. 6(1) reads:

The Commonwealth may acquire land for a public purpose-

- (a) by agreement; or
- (b) by compulsory process.

'Public purpose' is defined as:

a purpose in respect of which the Parliament has power to make laws, and, in relation to land in a Territory, includes any purpose in relation to that Territory.

The Act was amended in 1978 to include s.5AA which reads:

For the purposes of the application of this Act in relation to the Northern Territory-

- (a) a reference in this Act to a State shall be read as including a reference to the Northern Territory;
- (c) a reference in this Act ... to a Territory shall be read as not including a reference to the Northern Territory.

317. Consequently the Commonwealth may acquire Aboriginal land in the Northern Territory only for a purpose in respect of which that Parliament has power to make laws. Those powers are limited by the Constitution and in my opinion would not include, for example, acquiring land in the Northern Territory so that the Northern Territory Government could build a dam for the benefit of people resident within the Territory.

318. Section 14(1) of the Land Rights Act provides some protection for existing facilities. It reads:

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

The section contemplates that the use or occupation by the Crown is continuing at the time an estate in fee simple vests in a Land Trust. It will not apply to protect the prospective interests of the Crown and cannot be invoked after the title has vested in an effort to reserve land for use by the Crown. I repeat my comment in the Mudbura Report:

Any views I express on the application of this provision are advisory only and cannot oust the jurisdiction of the Supreme Court to deal with a particular situation should one arise (para. 120).

319. Mr Hiley submitted that even the protection offered by s.14 is tinged with detriment for the Northern Territory Government because under s. 15 it may be required by the Minister to pay rent for the occupation and use of its own facilities. That section reads in part:

(1) Where an occupation or use of Aboriginal land to which section 14 applies is for a purpose that is not a community purpose, the Crown shall pay to the Land Council for the Area 1n in which the land is situated amounts in the nature of rent for that occupation or use at such rate as is fixed by the Minister having regard to the economic value of the land.

Community purpose is defined in s.3(1) to mean:

a purpose that is calculated to benefit primarily the members of a particular community or group.

Mr Hiley submitted that the definition made it arguable that government projects on behalf of the population of the Northern Territory at large would not be for a community purpose and so rent may be payable. It is not for me to decide that question.

320. Counsel urged on me a number of alternative courses of action to cater for the future interests of the Northern Territory Government. They were:

1. that I make no recommendation for a grant of any land presently used by the Northern Territory Government or of land which may be needed by it for future projects;
2. that any recommendation be in the form that no grant be made until the location of proposed projects has been delineated and that I recommend that such areas of land be excised from any land granted;
3. that any grant of land be conditional upon the relevant Land Trust surrendering, leasing or licensing (as the case may be) to the Crown in right of the Northern Territory such land as the government may require for projects and associated purposes;
4. that I recommend to the Minister that the Commonwealth acquire and vest in the Northern Territory such interests as the Crown in right of the Northern Territory reasonably requires for and incidental to public purposes including those about which evidence was adduced.

The view which I have taken of my functions under this Act as expressed in this and previous reports

precludes me from following any of these courses. I repeat, in effect, what is said in the Borroloola Report paras 144 and 145. While the Act speaks generally of making recommendations, it does not contemplate a recommendation that is conditional. The reason is that matters such as those raised by the Northern Territory Government are matters for comment under s.50(3). The Commissioner's recommendations depend essentially upon the existence or otherwise of a traditional land claim, not upon matters in the paragraphs to subsection (3) of s.50. Those are matters going to a decision by the Minister whether or not (and perhaps, when) to act upon a recommendation made. I am not suggesting that these matters are not important, for clearly they are, but I do not think that I should condition my recommendation in the way suggested and so appear to make recognition depend upon considerations that have nothing to do with traditional ownership.

321. For like reasons I decline to recommend a grant of land that is itself conditional. In any case the grant of a conditional fee simple title may not resolve the difficulties posed by proposed development. As I said in the Mudbura Report (para. 13 1), although the notion of a conditional fee simple is known at law, a grant of land subject to an interest in favour of a third person or the public does not create a conditional fee simple. In any event, even if a conditional title were granted it may be only the Crown in right of the Commonwealth which would have the power to re-enter and determine the fee simple upon non-fulfilment of the condition and this may leave the Northern Territory Crown in no better position than if the land were granted in toto to a Land Trust. It would be entirely dependent upon the Commonwealth choosing to exercise its right of re-entry, and the interests of the Commonwealth in that regard might not coincide with those of the Territory.

322. This would seem to be a very practical obstacle even to the form of conditional grant suggested by Mr Hiley. The only condition that could be imposed and which the Act enables the parties to fulfil, he submitted, is a condition whereby the Minister, the Land Trust, the relevant Land Council, and the persons described in s. 19(5) of the Land Rights Act all agree to the lease, licence or transfer of an interest required by the Northern Territory Government. If such a condition were applied, he argued, the Land Trust could be called upon to grant a lease or licence or to surrender such estate or interest in land as the Northern Territory Government needed for the appropriate purposes. If the Land Trust was then unable to obtain the consent necessary or the direction of the relevant Land Council to proceed along the lines of s. 19(4), the condition would not be fulfilled and as a result the Crown would have the right to re-enter and determine the fee simple. Presumably that is the Crown in right of the Commonwealth and the Commonwealth may not wish to determine the fee simple because the Northern Territory Government hoped to build a dam on or extend power lines across Aboriginal land.

323. If I seem to have trespassed into areas of governmental policy, it is only to point up some of the difficulties attached to the courses suggested. In the end it seems to me that these are matters for the Minister, going to whether or not he 'is satisfied that the land, or any part of the land should be so granted' (s. 11(1)(b)). Without seeking to instruct the Minister as to the courses open to him, it is tolerably clear that, in the light of comments made in a report, he may decide that a recommendation should be acceded to, leaving it to the Land Council and the interest affected to resolve the matter if they can. Or he may decide that the detriment is such that no grant should be made of the relevant land at all or at any rate until the scope of detriment can be defined more precisely and that land excluded. It would, I suppose, be open to the Minister to express an intention to make a grant if satisfactory arrangements can be made to cater for an established or likely detriment and then abide the outcome. Again, if these remarks appear to go beyond the comment demanded by s.50(3), it is only to set the report in a context which, if I may be pardoned the expression, is meaningful. Before leaving this section of the report I draw attention to the expression 'surrender to the Crown' in s.19(4) and (5) and to s.3(6) which contemplates that such a reference may be to the Commonwealth or the Northern Territory or both 'as the case requires'.

324. The concern expressed by the Northern Territory Government may be seen in some cases as going to detriment, in others as relating to land usage and in most as answering both descriptions. It is convenient to deal with them all in one section of the report without seeking to draw any distinction.

Northern Territory Government-power supply

325. Evidence of existing and proposed power lines was given on behalf of the Northern Territory Electricity Commission. The approximate position of those power lines is marked on a map (Exhibit 4). The only existing line affecting the claim area runs south west from the Stuart Highway at the Batchelor turnoff and follows the Batchelor Road to Batchelor and then continues to Meneling Station. The proposed lines would form part of a grid system bringing power from the Ord River project, from the proposed Mount Nancar scheme and linking the Darwin and Katherine area. Although none of these schemes has been finalised, the Ord River proposal being dependent upon agreement between the Northern Territory and Western Australian Governments, there was evidence that at least one of those schemes would go ahead within the next ten years, and that easements would be required for some if not all of the lines marked on Exhibit 4.

326. The exact route of the lines is not presently known. Mr A Hunter, a senior surveyor with the Northern Territory Electricity Commission, said that it would be necessary to bring power from the Ord project through the claim area because of the cost involved. If this route were not available, then the Ord River scheme and the Mount Nancar scheme would probably be discontinued (transcript p. 2421). The unavailability of the Finnis River claim area would also affect future power services between Darwin and Katherine and the Daly-Douglas basin. Such a break in the proposed grid system would mean that power generated in Darwin could not be sent out of Darwin and a total power system further south of the scheme would have to be developed at considerable expense. It would also mean that back-up systems to assist each of these centres in the event of any fault in the system would not be available.

327. Even if the Ord River scheme does not proceed the Mount Nancar scheme probably will and some easements will be needed. The easements containing lines from these projects are required to be 174 metres wide. Easements entering the Batchelor area are required to be 30 metres wide, and easements entering Adelaide River from the west, which may cut across the southernmost part of Area 5, must be 55 metres wide. All other easements will be 30 metres wide (Exhibit 86 item 8).

328. A substation at Batchelor is to be built in 1982-83 and there is a proposal to build another at Adelaide River in about 1987. Both of these will be on sites just outside the claim area; however transmission lines may cut across portions of that land.

329. It may be that land needed for easements for power lines could also be used for other projects. For example, Mr Hunter spoke of the possibility of pipelines being built beneath transmission lines, and a letter from the Northern Territory Electricity Commissioner noted that the Australian National Railways Commission has:

... indicated a willingness in principle for the Commission to place transmission lines, oil or gas pipe lines on their projected standard gauge railway reserve between Alice Springs and Darwin (Exhibit 16 item 1).

Whether or not such joint projects are undertaken, Mr Hunter thought that the corridors requested would be 'adequate for all future requirements' of the Commission (transcript p. 2418). He said that an easement would be sufficient for the Commission's purposes and that people owning the land would be free to use land beneath transmission lines. He expected that although some access tracks may be needed in addition to the land over which an easement had been granted, most of the lines could be maintained by helicopter. In any case this was a preferable method, given the need for speedy access to power lines in times of emergency.

330. The Northern Territory Electricity Commission has power under the Electricity Commission Act 1978 of the Northern Territory to:

acquire by lease, purchase or other means any land, buildings, easements and other property ... which it thinks necessary ... (s. 14(2)(g)).

By operation of s.67 of the Land Rights Act those powers will not be available to the Commission in regard to Aboriginal land, see the discussion in paras 314-317. As the land is not presently used or occupied by the Commission, s. 14 of the Act would not protect its interests and it would need to seek a lease or a surrender to the government under s. 19 of the Act. There was no suggestion from any of the claimants that the construction of power lines would be blocked; a concession in principle could perhaps have been made, the precise location of the proposed power lines being not yet known.

331. In its notice of intention to be heard the Northern Territory Government spoke of:

The need to protect:

- (a) existing Darwin River Dam and Manton River Dam and their respective catchment areas;
- (b) the proposed Finnis River Dam and its catchment area;
- (c) access roads, pipelines and powerlines between the said Dams and the Darwin, Batchelor and Adelaide River;
- (d) existing and future monitoring stations.

332. No evidence was given and no submissions were made as to the effect of a grant of land on the Darwin River Dam or the Manton Dam. The northern edge of Area 4 falls within the catchment area of the Darwin River Dam (see the map Exhibit 11A) but I am unable to comment on the impact a grant of that land would have on the catchment area.

333. Evidence was called concerning the expected growth in the population of Darwin and of the consequent need for an increased water supply. It was estimated that present water storage facilities can continue to supply sufficient water for the population of the Greater Darwin region until that population reaches 75 000. The present population is about 50 000. Various projections of future growth rates were put into evidence. They ranged from estimates based on a 4 per cent annual increase (Exhibit 94) to those based on a 7 per cent annual growth rate (Exhibit 95). On one the population would exceed 75 000 by 1989, on the other by 1985. This shows the difficulty of making predictions and witnesses agreed that numerous factors could affect the actual growth rate. However, it is clear that some additional water supply will be necessary for Darwin before the end of the 1980s.

334. Mr A. H. Wand, Assistant Director of the Water Division of the Department of Transport and Works, spoke of the need to know where an additional supply would come from seven years before the water would be needed. This lead time was necessary for the design and construction of any new dam and to allow two years for the filling of a dam after construction. He gave evidence of studies conducted by the Snowy Mountains Engineering Corporation to locate suitable sites. Those investigations proceeded on the assumption that Darwin's population would grow at a rate of 6 per cent per annum (Exhibit 97 vol. I p. 7). Various alternative dam sites were studied (Exhibits 97 and 12) and the first option was a dam south west of Batchelor, referred to as the Finnis River-Batchelor Dam (marked on the maps Exhibits 13B and 88). Large-scale sites, Mount Bennett, Marrakai and Warrai, each has the potential to supply what is needed but factors such as water quality and the cost of delivery make medium-scale developments like Finnis River Batchelor better suited.

335. One of the main attractions of the Finnis River-Batchelor Dam site is its elevation and the consequent ability to use gravity to feed water over a short distance into the Darwin River Dam catchment area. In future developments a dam in the Warrai area could be linked up to the Batchelor Dam with water flowing from the former to the latter thence to the Darwin River Dam. If water were supplied from Acacia Gap or Marrakai it would need to be lifted further and pumping charges would become more significant (Exhibit 16, items 14A and 14C).

336. In terms of environmental comparability, the Batchelor project was ranked third behind the McMinn's borefield and the Warrai project. Further investigations are being made and a recent geological study indicates that the proposed position of the dam may have to be shifted slightly. Mr Wand said that:
if it were technically feasible it would be the cheapest solution ... indications so far are that the Batchelor Dam would be the best option (transcript p. 2372).

He agreed that if it were not possible to construct a dam at the Finnis River Batchelor site, it would be feasible to construct one at the Warrai Reservoir and use that, but it would involve pipelines taking water across Areas 5 and 4 into the Darwin River Dam catchment area. He said, however, that if it were not possible to use either site:

There really is not any other favourable dam site in the Darwin region so we would be in a very difficult situation (transcript p. 2379).

337. If a dam were built at the Finnis River Batchelor site it would affect most of Area 3 including that portion recommended and alienated land as well. Some of that land would be submerged and some would come within the boundary of the catchment area (Exhibit 13B). It is not intended that the whole of the

catchment area be fully protected. The fully protected portion would follow the 75 metre AHD (Australian Height Datum) contour line with a not so rigidly controlled area comprising the balance of the catchment (Exhibit 86 item 13). That contour line and the land affected can be seen in Exhibit 88. By 'fully protected' is meant that the land will be fenced and public access prohibited. Other activities in the rest of the catchment area considered incompatible with water storage would be regulated or prohibited under the Control of Waters Act 1939.

338. Mr Wand also gave evidence of proposals to develop McMinn's borefield, to the north of the claim area, if it proves feasible to do so. Water from that area would supplement the present supplies until a new dam could be built. The McMinn's project is seen as the first stage of the combined McMinn's, Finnis River-Batchelor and Warrai schemes. Heavy exploitation of McMinn's borefield however could result in bores in the area running dry. Even with water from that borefield, Mr Wand estimated that by 1988 the demand would exceed the supply available, especially since the rate of consumption per person is increasing alongside the increase in population.

339. Mr Hiley drew my attention to the relevant provisions of the Control of Waters Act which enables land to be constituted as a water control district and gives the Minister power to prohibit or control certain activities within such a district; additional authority is given to the Controller of Waters. Rights of entry upon private land to authorised persons may be conferred under the Act. Counsel submitted that this Act together with the Lands Acquisition Act (N.T.) would ordinarily give to the Northern Territory Government and the Water Division all power needed in relation to water resources, including the power to acquire land for dams, the power to control the use of land within catchment areas but not fully protected and power to acquire land for the purpose of reserves for pipelines. He submitted that in respect of Aboriginal land this legislation would not be available, at least to the extent that it is inconsistent with the Land Rights Act. That being the case the Northern Territory Government, it was said, would need to negotiate with the Land Trust for a lease or licence in perpetuity so that the Water Division might do all things that it would be able to do under the Control of Waters Act. A lease or licence for more than five years of Aboriginal land requires the consent of the Minister (Land Rights Act s.19(7)(b)). Counsel submitted that this would not give the Water Division all the powers it has under the Control of Waters Act, for example 'powers of enforcement, and powers against persons other than those represented by the land trust' (Exhibit 147 item E6). But s.71(2) of the Land Rights Act offers protection against traditional use and occupation and the Control of Waters Act is of general application; any portion of the Northern Territory may be constituted a water control district.

340. Another option, available under s.19(4) of the Land Rights Act, is for a Land Trust to surrender to the Crown the whole of its estate or interest in land necessary for water storage purposes. The Control of Waters Act would apply to that land. The land could then be leased back to the Land Trust subject to conditions. This assumes that 'Crown' in s. 19(4) may be the Crown in right of the Territory, see para. 323. Alternatively the land necessary for the construction of a dam and the storage of waters, say to the 75 m AHD line, could be excised from any grant to a Land Trust.

341. Land would be needed not only for water storage but for related activities such as pipelines, power lines for pumping purposes, and access roads to the pipes and power lines. Precise details were not given as to the proposed route of pipelines from the Finnis River-Batchelor Reservoir to the catchment area of the Darwin River Dam; however an approximate route is indicated in the map marked 14C in Exhibit 86. Mr Wand indicated that some of that route might be through open tunnels with a pipeline or a number of pipelines for the rest of the way. He spoke of the possibility that one pipeline would be used initially, to be duplicated as demand increased. If the proposed Finnis River-Batchelor Dam does not proceed but the Warrai Dam does, provision will have to be made for pipes to carry water from the Warrai Reservoir to the Darwin River Dam catchment area. No details of this proposed route were given. Mr Wand estimated that a reservation about 50 metres wide would be sufficient for two or more pipelines, an access track and powerline needed for pumping purposes. He suggested that an easement over the land would not be satisfactory as there would be a risk of the terms of an easement being violated. The water authorities need absolute control over land so as to have access to any part of it should an emergency arise, as well as for maintenance purposes (transcript p. 2378).

342. Given the uncertainty whether or not such a reservation will be necessary and if so where the pipeline will go, an excision can hardly be made from an immediate grant of land. In the event of such a grant it is not inconceivable that the Northern Territory Government would be able to secure a surrender of the necessary land or perhaps a lease of it. The alternative approach is to defer a grant for a reasonable period to enable the government to conclude its investigations.

343. Evidence was given that if the Finnis River Batchelor Dam project is not proceeded with but the Warrai project is, access by road would be necessary to the Warrai project, that road crossing some of Area 5. As the proposed Warrai dam site is not itself within the claim area any protection of the right to build a road which s.68(4) of the Land Rights Act might otherwise provide would not be available and the consent of the Land Council in accordance with s.68(l) would be necessary before a road could be built.

344. There is no doubt about the need for an additional water supply for Darwin and no doubt about the potential for serious detriment if there is a grant of land in an area found necessary for a water supply. Trying to accommodate this within a report under the Land Rights Act presents insuperable problems because of the absence of firm proposals. I have sought to draw to the attention of the Minister and the Administrator what may happen and the various courses open.

Northern Territory Government-water resources: monitoring stations

345. Exhibit 11A shows the location of a number of monitoring stations, some of which fall within the claim area and others of which are immediately adjacent to it. The gauging stations (marked GS on map Exhibit 11A) measure the flow and height of water in streams. The rain gauges or pluviometers (marked R. on Exhibit 11A) are simple basins to measure precipitation. The gauging stations need checking approximately every two months and the rain gauges are checked regularly, every day if necessary. No more of these monitoring stations will be constructed if a new dam is built in the claim area; however access to the existing stations and protection of them is required by the Northern Territory Government.

346. The right to maintain them in their present positions is, I think, protected by s.14 of the Land Rights Act and the right of access to them by authorised persons is protected by s.70 of the Land Rights Act. That protection would include small areas of land adjacent to the installations where helicopter landing pads and fuel storage facilities have been constructed. The Northern Territory may also, if it wishes, seek to lease the land occupied by those monitoring stations on Aboriginal land (Exhibit 16 item 7 and Exhibit 86 item 13).

Northern Territory Government-roads

347. Earlier reports have discussed the way in which the Land Rights Act, especially ss. 11(3) and 12(3), excludes from its operations any road over which the public has a right of way. There is a summary in the Uluru Report paras 166 167. As I said in the Mudbura Report:

It has become the practice to identify those roads where possible. This cannot oust the jurisdiction of the Supreme Court to determine such a question should it arise but it seems sensible and practicable to indicate areas of agreement and otherwise what appears to be the position. It is at least a guide to the Minister in the practical implementation of any recommendation that may be made (para. 140).

348. Exhibit 87, a map tendered by the Northern Territory Government, shows the roads maintained by government. Those roads are named on that map and further particulars are given in items 15 and 16 of Exhibit 86. Adopting the numbering used in the map, the maintained roads are:

- | | |
|---------------------|---|
| 1. Stuart Highway | -a national road and part of the National Highway System |
| 57. Batchelor Road | the link between Batchelor and the Stuart Highway |
| 90. Mt Mabel Road | -an access road to Mt Mabel agricultural lease off the Eva Valley Road |
| 93. Eva Access Road | -an access road to Eva Valley agricultural lease |
| 96. Wangi Road | -an access road to Stapleton pastoral lease and freehold blocks north west of the lease |

- 97. Finnis River Road -an access road to Finnis River pastoral lease
- 197. Hanna's Access Road an access road to agricultural lease 527
- 276. Batchelor Waterhole -an access road to the Batchelor waterhole, a recreational area

The fact that the Government maintains a road does not of itself make it a road over which the public has a right of way, but it is a reasonable inference that the Government does not ordinarily maintain a road unless the public has, a right of way over it. There was no dispute that those roads are public roads.

349. The question of how much land should be excluded is essentially a practical matter which depends on the purpose for which a particular road is or may be used, the amount of traffic it is likely to bear and requirements for drainage and maintenance. In some reports I have said that a 100 metre reserve was tenable. In this case there was evidence that:

Normally a 100 m road reserve is the maximum requirement for Rural Roads (Exhibit 86 item 15).

350. Also marked on Exhibit 87 are a number of tracks in Areas 2, 3, 4 and 5, described as tracks or non-maintained roads (Exhibit 86 item 15). The details of these came from aerial photography in 1978 and from an inspection of the Area in September 1980. The tracks were described by use of letters and numbers and were rated on a scale of 1 (well-used tracks properly maintained) to 5 (poorly defined, overgrown, little used tracks). Some of these tracks are described briefly in Exhibit 86 item 16; however little evidence was given about who used them and how frequently they were used. Mr R. T. Baker of the Northern Territory Association of Four-Wheel Drive Clubs Inc. spoke of roads used by those clubs. He indicated a number of tracks in Areas 1,2 and 3 which were not maintained roads, some of which are kept merely as firebreaks to fence lines and other smaller tracks which branch off main tracks to follow the Finnis River and to give access to some of the more permanent sections of the watercourse. He told of numerous tracks branching off those tracks marked on Exhibit 87 and said:

A lot of these smaller access tracks as they get less usage on them are subject to revegetation during the wet season periods and often are very faintly discernible and hard to find, but normally they are there in the dry season and of recent times with the heavier impact in these areas, a lot of these tracks are starting to become a permanent fixture on the environment: (transcript pp. 2487-2488).

Some of these he marked on Exhibit 139.

351. In the Limmen Bight, Report paras 168-169 I discussed the definition of 'road' in the Control of Roads Act 1953, a Northern Territory statute, and expressed agreement with the comment of Blackburn J. in *Elizabeth Valley Pty Ltd v. Fordham* (1970) 16 FLR 459 at p. 461, that:

the word means a public road which the public is entitled to use in the manner allowed at common law.

As Blackburn J. commented in that case, there is some difficulty in applying principles of law to conditions in the Northern Territory:

where on one hand large tracts of unalienated Crown land can relatively easily be traversed without the knowledge of anybody except the person who traverses them, and where, can the other hand, a track made through the bush by a single vehicle; once made, can so easily be followed by a casual traveller some time afterwards (p. 464).

In view of the lack of oral evidence about any dedication of the tracks as public roads or of the use of them and the imprecision with which they were described in Exhibit 86 item 16, none can fairly be described as a road over which the public has a right, of way. Such evidence as there was suggested spasmodic use by a few people for a particular purpose.

353. If these tracks are not excised from a grant of land it is conceivable that some people may experience difficulty in obtaining access to their land. Section 70(2) of the Land Rights Act protects the right of a person who has an estate or interest in Aboriginal land to enter and remain on the land for any purpose that is necessary for the use or enjoyment of that estate or interest. This offers no protection to those who have to cross Aboriginal land. Such a person is prohibited from entering or remaining on Aboriginal land without a permit obtained under s.4 of the Aboriginal Land Act 1978 (see the discussion in *Utopia Report* paras 196-199). Section 68 of the Land Rights Act prohibits the construction of new roads over Aboriginal land without the consent of the Land Council and expressly limits the use to which such roads can be put.

354. There was no evidence that access would not be allowed, especially to the owners of land adjoining Aboriginal land. Mr T. Calma said:

I suppose it is just courtesy to allow people to go through. They have got access to their blocks now and we would just continue to let them have it ... (transcript p. 1111).

But of course Mr Calma was expressing his own view and not purporting to bind others. It is not possible to predict what may happen nor is it possible on the evidence to be more, precise about access except as appears in the next section of this report.

Access to land

355. Several owners and lessees of land in and around the claim area expressed concern about possible restrictions on access to their land. Because this matter is related to roads, it is convenient to deal with it in this part of the report.

356. Mrs C. Marson, in a letter to the Commissioner (Exhibit 104), stated that although 'legal access' (by which she meant the old Goyder surveyed roads) is provided to her freehold blocks sections 2113, 2118 and 980 in the Hundred of Goyder but not to section 2115 according to maps of the area no physical access is possible except by bush tracks over vacant Crown land and unimproved freehold. These blocks abut Areas 2 and 3; a grant of those areas as recommended is unlikely to interfere with her access.

357. Mr D. L. Ottens leases blocks 19,20,21 and 22 south of Batchelor and immediately south of Area 3. He spoke of the road used by him but his evidence suggested that it was the Eva Valley Access Road marked No. 93 on Exhibit 87. That was conceded to be a public road (transcript p. 2538).

358. Solicitors wrote (Exhibit 103) on behalf of M. R. and J; Brodribb, K. and C. Teague and M. Vance, the owners of section 992 in the Hundred of Goyder, objecting to the claim to land adjacent to their block. The basis of the objection was twofold, that it would interfere with access to section 992 and that this land might become a natural access way to other land. As landowners they have the right to restrict the passage of others across their land and so Aboriginal owners of section 2104 would need permission to cross section 992. That land straddles the boundary of Areas 3 and 4; any grant of land nearby will cause detriment unless adequate access is ensured.

359. A notice of intention to be heard was received from solicitors acting for J. K. Holdings Pty Ltd, the registered proprietor of section 863 in the Hundred of Cavenagh. No one appeared for that company, however the notice expressed concern that access to the land which abuts part of , the eastern boundary of Area 2 be preserved. Currently that access is protected by easements over adjacent land, though the notice did not specify over which adjacent land the easements run. I can do no more than comment that a grant resulting in lack of access to section 863 will cause detriment to the owner.

360. Counsel for the Northern Territory Government urged me to comment on the difficulties which pastoralists may experience in recovering straying cattle from Aboriginal land. There was no evidence of difficulties and I reiterate the comments made on this matter in the Utopia Report paras 196-200. In summary what I said there was that by virtue of the operation of s.4(1) of the Aboriginal Land Act problems may be experienced in regard to the recovery of straying cattle and in the construction and repair of fences where private individuals are involved. Pastoralists may need to obtain permits from a Land Council or from traditional owners. As I said in the Utopia Report:

If problems do arise or the situation is thought to be inequitable, the remedy lies in amending legislation (para.200).

Northern Territory Government-proposed solar energy project

361. This matter is mentioned briefly in connection with the interests of the Commonwealth, see paras 311-313. A study is presently being undertaken involving the Japanese, Australian and Northern Territory Governments to assess the feasibility, of, a megawatt scale thermal electric power station for the Northern Territory. These regions are under consideration at the site for a demonstration plant-around Katherine, Alice Springs and the, Batchelor -Rum Jungle area The latter is within section 2890 of the Hundred of Goyder, part of Area 4. According to a letter from the Department of Mines and Energy:

It is the most significant solar energy project with which the Northern Territory has been involved.... The potential for application of solar energy is much greater in the Northern Territory than in Other parts of Australia, and the size

of solar thermal power stations expected to be developed in the near future is appropriate to the needs of small communities ... Aboriginal communities can expect to benefit ... (Exhibit 86 item 10).

362. Mr C. P Smith, principal registrar of the Department of Mines and Energy, said that about 50 acres would be required for the project which would include infrastructure and the plant. The Atomic Energy Commission is still assessing the feasibility of each possible site. Counsel for the Northern Territory Government submitted that a grant of land in the area to an Aboriginal Land Trust ought to be deferred until a decision had been made about this project. He indicated a possible site in the old Rum Jungle mine area (transcript pp. 3110-3111, Exhibit 76) but given the uncertainty of the project being in the Batchelor Rum Jungle area at all and the possible delay in a decision being made this may not be a satisfactory approach. I think I can do no more than draw this matter to the Minister's attention.

Northern Territory Government-Rum Jungle--4611 core and sheds

363. Drill core samples extracted at Rum Jungle are stored in sheds there. These core sheds were not demolished or removed during the cleanup of the mine area as the Department of Mines and Energy wished to retain them to protect the drill cores. Counsel mentioned that under the Mining Act 1939 s.38P(1) holders of exploration licences are required to lodge with that Department samples of drill core.

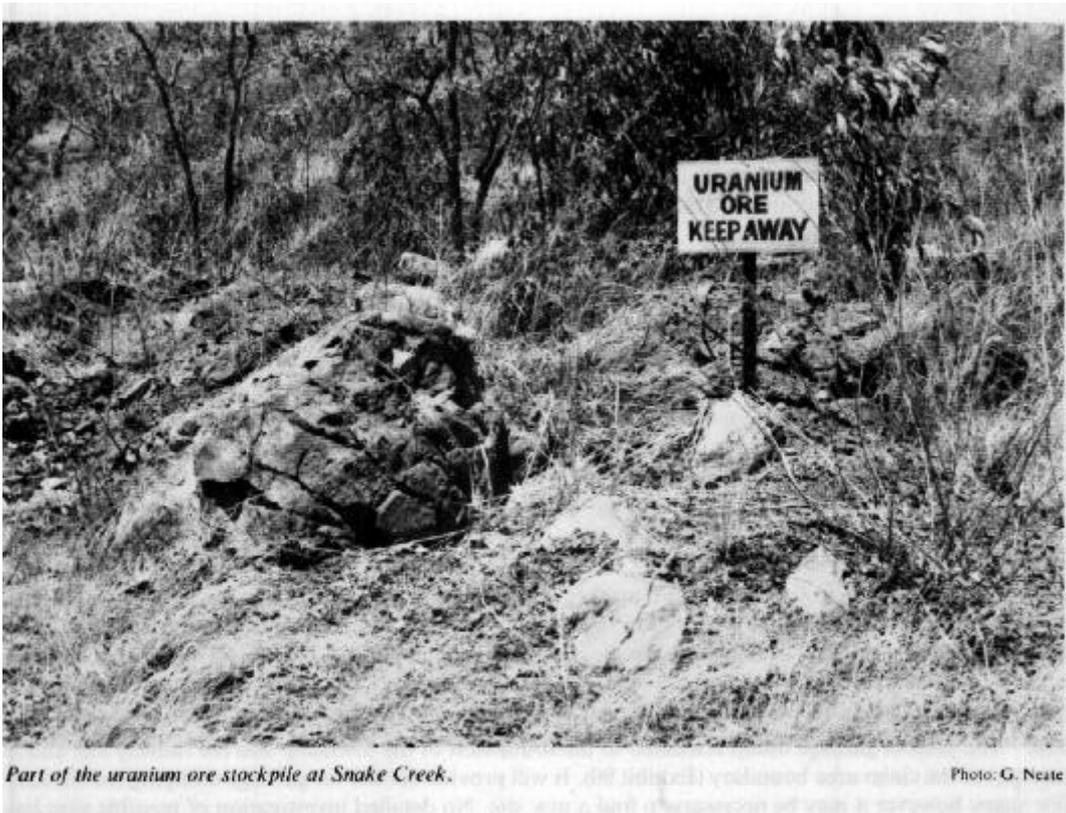
364. Although it appears that no formal arrangements were made to transfer ownership of the drill cores and storage sheds from T.E.P., the operators, or from the Australian Atomic Energy Commission to the Northern Territory Government, by common consent they have become the property of the Department of Mines and Energy. That Department wishes to preserve the drill cores and finds it convenient to maintain the core sheds. It wishes to retain responsibility for them at Rum Jungle, rather than incur the expense of housing them in Darwin and facing problems associated with storing partially radioactive samples (Exhibit 86 item I 1). Section 14 of the Land Rights Act would seem to protect the Department's interests, and the only detriment which it might suffer if the land became Aboriginal land is the possibility of rent being payable under s. 15, if the storage is not a community purpose.



Mr N. Conway of the Australian Atomic Energy Commission speaks about proposals to rehabilitate the Rum Jungle mines area.

Photo: G. Neate

Mr N. Conway of the Australian Atomic Energy Commission speaks about proposals to rehabilitate the Rum Jungle mines area. Photo G. Neate



Part of the uranium ore stockpile at Snake Creek.

Photo: G. Neate

Northern Territory Government-Snake Creek

365. The Northern Territory Government expressed a desire to retain assets at Snake Creek acquired by it from the Commonwealth pursuant to the Self-Government Act. Those assets are buildings, described in Exhibit 86 item 7, and tracks which constitute a spur line of the existing Darwin to Birdum railway line. The land concerned is about 1365 hectares and is an explosives storage centre. The land being occupied or used by the Crown and the entitlement to continue that use or occupation will continue under s. 14(1) of the Land Rights Act. During that period of use or occupation the buildings and improvements on that land would be deemed to be the property of the Crown (s. 14(2)).

Northern Territory Government-Overland Telegraph, bridlepath and historic relics

366. The Department of Community Development sought the exclusion, from any grant, of the route of the Overland Telegraph built in 1872 and of the site of other historic relics. The route of the Overland Telegraph line is indicated on maps accompanying Exhibit 86. It abuts much of the claim area but cuts through sections 813, 815, 818, 820 and 865 in the Hundred of Cavenagh (Area 2). Ground surveys to locate precisely the position of historic relics in this area have not yet been completed. I do not think that any of the telegraph route falls within the land recommended for grant.

367. There is a proposal to provide a bridlepath for community use in the Southport area and eventually to extend that south through the claim area. Such a path would follow the old north-south road, which was closed for the building of the Darwin River Dam and that section south from Southport would be used for equestrian pursuits, bush walks and camping. The route of the Overland Telegraph continues in most places along the middle of the old road reserve, departing from it only where physical features such as hills made road building impractical. Any bridlepath development would follow the old road route. The road reserves were created pursuant to a South Australian statute which, it seems, became part of the law of the Northern Territory in 1911 and was repealed by the Control of Roads Ordinance 1953. Mr Hiley submitted that these reserves became roads over which the public had a right of way and therefore are still roads with-

in the meaning of the Lands Right Act and ought to be excluded from any grant of land. He relied on the principle that 'once a highway always a highway' (Halsbury's Laws of England 3rd ed. vol. 19 para. 130, see also the Mudbura Report para. 145). However a length of highway will be extinguished if public access to it at both ends has been lawfully cut off (Halsbury para. 130) and, according to maps tendered with Exhibit 86, that seems to be the case here, at least as to that portion from the north of section 864 to the south of section 870. There was, on the other hand, no firm evidence that any of the old north-south road is now a public road (transcript pp. 3112-3113, 3118-3119) and it may be that those sections in the claim area are unalienated Crown land.

368. Mr P. G. Spillett, a project officer with the Department of Community Development, spoke of long-term plans to restore some buildings in the area. Investigations are still being made to determine what should happen. Where professional advice has been given about the renovation of places on private land the Department may negotiate with the owner of that land so that government finance can be spent on the restoration and preservation of buildings. He agreed that negotiations in a similar vein could be entered into with the traditional Aboriginal owners of land for the restoration and maintenance of historic sites. There was nothing in the evidence to indicate that At original owners would be uncooperative if the proposed preservation of historic sites and the old telegraph line and the development of a bridlepath were to go ahead, assuming that any of these undertakings involve Aboriginal land.

Northern Territory Government-Batchelor

369. Land within the town of Batchelor, marked in the map Exhibit 14, is not available for claim. There is sufficient land within the town boundary to accommodate the short and medium-term expansion of Batchelor, but it is not known whether more land would be required for urban development at some later time (Exhibit 86 item 5). Should more land be needed, the Northern Territory Government lacks power compulsorily to acquire Aboriginal land. I refer to the discussion in paras 314-317 of this report.

370. The present garbage dump is located to the south west of the township and the railway line and is just east of the claim area boundary (Exhibit 90). It will provide the site for garbage dumping for the next few years; however it may be necessary to find a new site. No detailed investigation of possible sites has been undertaken although there was evidence of an intention to extend the present garbage dump west towards special purposes lease No. 62 in the area of the sewerage treatment plant (transcript p.:2400),,a location within claim Area 3. It may be possible to locate the next dump site within the present town boundaries so long as the site conforms to health and other requirements. There could be problems in siting the dump too near to the airstrip (Exhibit 86 item 2) and a location further east on pastoral lease No. 769 was mentioned as a possibility (transcript p. 2401). In the event of a grant of Area 3 it would be reasonable to excise land for a future garbage dump, if this is practicable. This should be done in consultation with the Northern Territory Government and the traditional owners.

Residents of Batchelor

371. A petition signed by 98 residents of Batchelor (Exhibit 116) registered the objection of the signatories to a grant of land for the following reasons:

- A. The land claimed surrounds the township on three sides.
- B. The Rum Jungle Area 1s of national interest and ought to be accessible to everyone, as well as being a mineral area of interest to prospectors.
- C. The land north of the Finnis River in Area 2, if granted, would cut off access by the people of Batchelor and Darwin to the Finnis River.
- D. The land claimed represents about half of the development area south of Darwin and a grant would have a detrimental effect on the development of the top end of the Northern Territory.

372. Oral evidence was given by Mr B. Havlik and Mr L Drewes in support of the petition and it became clear that their chief concerns and those of the signatories were that access to surrounding areas, for recreational and prospecting purposes would be prohibited or severely restricted if the land became Aboriginal land and that the future expansion of the township, dependent as it is on increased mining activity, would be threatened. I have dealt with the question of access by persons, having interests in

specific sections of land elsewhere in this report. The concern of the Batchelor residents is, a more general one and arises, for example, from the spontaneous desire, for recreation in the district. Some witnesses expressed a willingness to obtain permits from Aboriginals whom they knew and considered to be traditional owners, but were less enthusiastic about seeking permits from a Land Council.

373. The Aboriginal Land Act empowers a Land Council to issue a permit to a person to enter onto and remain on Aboriginal land subject to such conditions as the 'Council thinks fit (s.5(1)). It also provides that traditional Aboriginal owners may issue a permit and that'. a Land Council or the traditional Aboriginal owners may delegate all or part of their authority to issue Hermits (s.5(2), (4)). Mr Eames pointed out that the Act does not limit the period over which permits may be granted. Residents of Batchelor would be able to seek long-term permits from the traditional Aboriginal owners in the area which, if granted, would enable them to enter Aboriginal land for recreation. This would overcome many of the fears and objections presently held. This may well be true but undoubtedly there are difficulties. Of course the game problems would arise if the land were alienated land. The objection goes to any change in the status of the land surrounding the town.

374. The expansion of the township was said to be dependent on mining. Any major mining activity would turn on, a range of factors of which Aboriginal ownership of adjoining land would be but one. The likelihood of mining in the area and the effect on it of a, grant to a Land Trust is discussed at length elsewhere in this report and I need not repeat what is said there. Access to Rum Jungle in so far as it is by way of a public road would be reserved to the public but the limitations of this are apparent.

Recreational use of claim areas

375. Evidence was given about the use of land in and around the claim area for recreational purposes. Unfortunately the Northern Territory Government presented no material on this important matter and I have been compelled to draw what conclusions I can from the testimony of individuals with a private interest.

376. Mr B. Havlik, a resident of Batchelor, spoke of recreational fishing activity on the Finnis River, pig hunting and other activities around Coomalie Creek near the road from the Stuart Highway to Batchelor, and swimming at the Rum Jungle South Lake. He also mentioned private prospecting in the area. Mr I. Drewes, another resident of Batchelor and a trustee of recreational reserve No. 1438 (the Rum Jungle South Lake), spoke of the, popularity of that place as a swimming and Camping spot. Access to it is by, a road from the Old Rum Jungle Road into the reserve. That road does not seem to appear on Exhibit 87. It is an old mine road and Mr Drewes said it is maintained by government three or four times a year. A partially completed ablution block, has been erected near the swimming hole, which is an old open-cut mine filled with water. Mr Drewes also spoke of another popular swimming, picnicking and camping spot known as Whitestones which is part of the river behind Meneling Station. He and his sons go bushwalking around the Batchelor area. Neither of these men gave evidence of the number of people who regularly use the area for recreational purposes, but they expressed concern that should the claim be granted their use would be severely restricted as would their access to any good fishing spots on the Finnis River.

377. I have no doubt that Mr Havlik and Mr Drewes were expressing a genuine concern, based mainly on the uncertainty of what might happen if these areas became Aboriginal land. Certainly permits to enter would be necessary. It may be said that over the years some of this land might be alienated in which case the same difficulties would arise. that may be but it is perhaps unlikely that areas used for recreation would be alienated.

378. Submissions were made by the Northern Territory Association of Four-Wheel Drive Clubs Inc. and evidence was given by its secretary, Mr R. T. Baker. He spoke of a wide range of recreational pursuits such as bush-walking, bowhunting, fishing, camping, canoeing, bird watching, sightseeing, photography. He pointed out that the Finnis River Area is a major semi-wilderness recreational area near Darwin and the loss of that area to the public would be significant not only in terms of activities then prohibited but also because of the cost and inconvenience of travelling further afield.

379. He was able to give some idea of the number of people using the area. The written submission by his Organisation identified that body as representing directly 400 individuals who are owners of four-wheel drive vehicles (Exhibit 105). Mr Baker said that all these people live in the top end of the Northern Territory and most of them are regular participants in club activities over some periods of the club year (transcript p. 2498). Although not able to give detailed records of the number of trips into the area and the numbers of people on those trips, he thought that groups of five to ten and up to twenty vehicles at a time go into the bush, and that over the last ten years or so member clubs and their members have conducted hundreds of trips into the claim area. Physical evidence of this was seen in the number of tracks and camping areas.

380. It is reasonable to assume that other members of the public use this area for various recreational purposes. Amateur fishermen do so and the Review of the Northern Territory Barramundi Fishery lists the Finnis River as one of the popular amateur fishing areas (Exhibit 107 p. 6). Access to waterways in the Area 1s already a problem (letter from Minister for Lands and Housing, Exhibit 108); it could be exacerbated by a grant of this land to a Land Trust. Access to the river is gained by numerous tracks through the bush, most of which are impassable during the wet season. Among these are: a track from Walkers Ford just south west of Area 2, which proceeds through most of Area 1 to Sweets Lookout and adjoining sections of the Finnis River; tracks from the Wangi Road back to tracks on the Breakneck Pass section; smaller tracks which branch off these main tracks and follow the river, giving access to some of the more permanent sections of the watercourse in Areas I and 2; tracks branching off that track marked B20 to the north and south which give access to the upper Finnis reaches; and numerous camping spots and tracks off the B2 track to the river (see the map Exhibit 139). Many of these tracks are overgrown during the wet season.

381. Mr Baker also spoke of a road between Batchelor and the Wangi Road (marked 96 on Exhibit 87) which follows the north side of the Finnis River and meets the Wangi Road near the Finnis River crossing. He said that this track is in a well-maintained condition and that it occasionally is graded, though he did not know by whom. He said, however, that it would be wise to use a four-wheel drive vehicle even during the dry season.

382. Mr Baker expressed concern at the possibility that access to some of these areas would not be granted to the members of his association if the land became Aboriginal land. He drew attention to an advertisement which appeared in the Northern Territory News on 29 March 1980 purporting to make it an offence for anyone to enter the Area 1n and around the Wagait Reserve including 'the Finnis River from Walker's Ford to the coast . . .' (Exhibit 109). Apart from the legality of including land that is not part of the reserve, the advertisement was said to evidence a general intention to prohibit recreational use. When it was put to Mr Baker that an application could be made to Northern Land Council for individual permits or permits on behalf of four-wheel drive clubs, he suggested that such permits would not be forthcoming and cited an example of a member who had been refused a permit to the Wagait Reserve. He agreed that only limited access was available to areas of alienated Crown land which access was gained only 'with great difficulty'. Negotiations with the owners of alienated land had been attempted 'but they do not look upon us very favourably' (transcript p. 2500).

383. Mr T. Calma, president of the Wagait Association and a claimant said:

I think with four wheel drive clubs, and I suppose with anyone coming through, as long as people are willing to abide by the sort of conditions that are placed down by the people ... it is the same as the Northern Land Council entry permits.... If they generally don't disturb people I don't suppose there would be too many problems, but I think that people should ask permission before they go into the land (transcript p. 1109).

Similar statements were made by Mr V. McGinness and Mrs I. Bishop (transcript p. 1110). The problem is in part the substitution of the unknown (the attitude of a Land Trust) for the known (general access over unalienated Crown land).

384. Although no other evidence was called on behalf of the community as to the recreational use of this area, the evidence of the Four-Wheel Drive Clubs is indicative of use of parts of the claim area by the public at large. If land around the Finnis River becomes Aboriginal land people using the country for recreation stand to suffer a very real detriment. That detriment may be alleviated by reserving from any

grant some land as recreation reserves or as esplanades along parts of the waterways which are regularly used. Counsel for the Four-Wheel Drive Association, Mr Walker, conceded that the use of the area fluctuates and that there is no guarantee that a camping site used one year might be used the following year. However, he suggested that two areas mentioned in *The Impact of Recreation in the Top End*, a publication of the Environmental Council (N.T.) Inc. (Exhibit 106 pp. 111-112 and 119-120), namely the Finnis River crossing and Walkers Ford should be considered for reservation. The Finnis River crossing site has an area of 20 hectares adjacent to the Wangi Road; it is used for camping, fishing, swimming, shooting of waterfowl and passive recreation. The Walkers Ford site appears to be outside the claim area.

385. Counsel was unable to identify with any precision other sites which might be excised. He did suggest excision of a corridor of 1 mile on each side of the Finnis River watercourse and, in regard to the road which runs to the south of the Finnis River from Walkers Ford to Sweets Lookout, an excision of that land north of the road to the Finnis River. While such excisions in totality might be an extreme solution, reservations alongside watercourses with adequate access to them is reasonable. I adhere to the opinion expressed in the Borroloola Report para. 158 that the Control of Waters Act 1939 would continue to apply to watercourses within an area of land granted to a Land Trust, and so recreational use of the Finnis River itself and of watercourses in the claim area would not be restricted by a grant of land to a Land Trust.

386. I conclude this section of the report by again lamenting the absence of a comprehensive submission and some proposals on a matter of such general importance.

Fires

387. Concern was expressed by a number of persons that the risk from uncontrolled bushfires would be increased if the claim areas became Aboriginal land. Mr D. L. Ottens, a landholder near Batchelor, said that the main area of fire risk to his property was to the eastern side in Area 5. Mr R. Bright also expressed concern at the problems of bushfires on land held in effect by absentee landowners. The fears of these men and of other property owners in the area seemed to arise not so much from the risk of fire, which as Mr Ottens said has always been there with Crown land, but from the possibility of restricted or prohibited access to Aboriginal land in time of emergency. In the past, access to Crown land by local pastoralists and the Bushfire Council in times of fire risk has caused no difficulty; any future problems could be avoided by agreements for access to Aboriginal land by adjacent pastoralists and bushfire authorities in times of fire emergency or by appropriate legislation.

388. The submission by Uranerz Australia Pty Ltd and its joint venture partners was put on a different basis. It suggested that Aboriginal activity in the area would necessarily increase the fire risk to neighbouring properties. There was some evidence to support the submission that fire is traditionally used as a method of hunting. Waditj Fred Waters, a Maranunggu claimant said:

We light fires to keep that green grass coming. Every year we burn grass; green grass changes every year ... If you don't light that grass, it would be dry every year. You must burn that grass so that young green grass comes up (transcript p. 1768).

No evidence was led by Uranerz Australia Pty Ltd or anyone else to show the effect of fire on land in the area or that uncontrolled fires would increase if the land became Aboriginal land. The only detriment said to flow to Uranerz was the possibility of suspicion falling on people conducting exploratory activity on behalf of the company and the cost of delay occasioned by assisting local residents in firefighting and fire control.

389. There was no evidence that the risk of uncontrolled fire activity would be increased if the land was owned by Aboriginals nor was there any evidence that Aboriginal owners would be less co-operative in the control of fires which threatened adjacent properties.

Mining tenures: general comments

390. As discussed in the Warlpiri Report paras 303-307, no interest created under the Mining Act 1939 can render land alienated Crown land for the purposes of the Land Rights Act. Mining tenures of various forms, both granted and applied for, cover almost the entire claim area. These tenures are depicted on the map Exhibit 10 which shows exploration licences, mining leases, a gold mining lease, dam water rights, a

Page 71

tailings area, a licence to treat tailings, an extractive authority and mining reserves. Details appear in Exhibit 16 item 2 and Exhibit 102.

391. The effect of an exploration licence is to authorise the holder- to explore for gold and minerals, and to carry on such operations and execute such works as are necessary for that purpose, in the Area In respect of which it is granted, but it does not authorise the recovery of gold or of a mineral (Mining Act s.38M(1)).

A mining lease enables the holder to carry on mining operations and broadly speaking to do all things ancillary to mining (Mining Act ss.39, 45).

392. By reason of s.40 of the Land Rights Act no mining interest may be granted in respect of Aboriginal land unless either the Minister and the appropriate Land Council consent in writing or the Governor-General by proclamation declares that the national interest requires that such a grant be made. Section 40(3) exempts from this requirement the holder of an exploration licence who before 4 June 1976 had applied for another mining interest in respect of that land, Section 40(4) provides that where before 4 June 1976 a person was issued with a permit under the Petroleum (Prospecting and Mining) Ordinance 1954 the requirements of s.40(1) do not apply to the grant to that person of a lease under the ordinance. Section 40(5) provides that the requirements of s.40(1) do not apply to the grant to a person of a lease in respect of Aboriginal land under the Petroleum Ordinance if that person applied for the grant of a lease before the land became Aboriginal land.

393. Section 70, read with s.66, means that where a person has a mining interest or an interest by virtue of a miner's right in Aboriginal land, that person is entitled to enter and remain on the land for any purpose that is necessary for the use or enjoyment of that interest by its owner. But s.75 reads:

A miner's right does not apply in relation to Aboriginal land, unless immediately before the land became Aboriginal land, the land was being occupied or used by virtue of the miner's right.

394. 'Mining interest' is defined in s.3(1) of the Act to mean:

any lease or other interest in land (including an exploration licence) granted under a law of the Northern Territory relating to mining for minerals.

395. 'Miner's right' is defined to mean:

a miner's right or other authority issued under a law of the Northern Territory relating to mining for minerals, being a right or authority that empowers the holder to take possession of, mine or occupy land, or take any other action in relation to land, for any purpose in connection with mining.

396. As many of the tenures mentioned above are no more than applications, sub-ss.(3), (4) and (5) of s.40, ss.70 and 75 have no application to them. In those cases if the claim is acceded to, the applicant's entitlement to a mining interest will be dependent upon the consent of the Minister and the Land Council unless a declaration is made in the national interest.

397. Evidence was called and submissions were made on behalf of a number of mining companies and individuals holding various forms of mining tenure. I shall comment on each separately but before doing so note that in the absence of evidence from a particular miner as to its financial capacity and its intentions if the land remains unalienated Crown land I cannot say what effect the grant of land to an Aboriginal Land Trust will have. Indeed, in the absence of any such evidence it is reasonable to conclude that the miner does not regard itself as likely to suffer detriment. I

398. Exhibit 16 item 2 and Exhibit 102 state the position with regard' to tenures granted and applied for as at 9 June 1980. Evidence was given by Mr C. P. Smith, principal registrar of Department of Mines and Energy, that some of these tenures had changed since that date. Mineral lease ML 948B, listed as being granted to E. R. Petherick and D. Growden, had been transferred to J. C. and D. Walton. Other rights had been transferred to Mr and Mrs Walton, presumably WR19B, SWR27B and TA3B. The Waltons' interests will be discussed later. One of the GMLs listed as granted to N. Wigg has since been transferred. Other applications may have been lodged since June 1980, for instance EL Application 2685 on behalf of Marathon Petroleum Australia, Ltd.

Mining: R A Smith and R J Stone

3". Mr R A Smith and Mr R J Stone hold or have applied for gold mining lease GML232B in Area 5 of the land claim, just north west of Adelaide River (transcript pp. 2438-2439). They have applied for

exploration licence EL2338 which runs north of Adelaide River to the west of the Stuart Highway and covers about one third of Area 5 (Exhibit 10). No evidence was called by them but in a letter dated 24 June 1980 Messrs Smith and Stone lodged an objection to the land claim. The grounds of their objection were first that access to GML232B would be denied and second that their application for EL2338 may not be successful if a grant of land is made to an Aboriginal Land Trust. Their interest in GML232B and their rights of access to it are protected by s.70 of the Land Rights Act. If the goldmining lease or exploration licence is not granted prior to a grant of land to an Aboriginal Land Trust (it was not certain at the hearing whether either had been granted), Messrs Smith and Stone would need to negotiate with that Land Trust for the right to mine or explore. If either has been granted, s.70 will protect their interest but in the case of the exploration licence, it will preclude the grant of any other interest except in accordance with s.40.

Mining: Marathon Petroleum Australia, Ltd

400. Marathon Petroleum Australia, Ltd, as manager under the terms of a joint venture agreement with International Mining Corporation N.L., is engaged in mineral exploration operations in the Rum Jungle area. The joint venture holds three mining tenements over land affected by this land claim and has applications for two other exploration licences in the area. They are:

Tenement	Date of grant	Title holder
EL I 181	28.7.77	International Mining Corporation N.L. (within Area 3 as recommended)
EL1700	27.7.78	International Mining Corporation N.L. (partly within Area 3 as recommended)
EL1701	16.6.78	International Mining Corporation N.L. (Area 5)

Tenement	Applied for	Applicant
ELA2205	27.8.79	Marathon Petroleum Australia, Ltd (within Area 3 as recommended)
ELA2206	27.8.79	Marathon Petroleum Australia, Ltd (Area 5)
ELA2685	14.7.80	Marathon Petroleum Australia, Ltd (within claim area but location not specified)

The land claim takes in approximately 25 per cent of EL1181 and 1700 and all of EL1701. It also includes approximately 40 per cent of the land applied for in ELA2205 and all of ELA2206 and ELA2685 (Exhibit 142).

401. No evidence was called on behalf of Marathon Petroleum Australia, Ltd or its joint venturer to show that any detriment would flow to the company from a grant of land to an Aboriginal Land Trust (transcript p. 2901). I am unable to comment on any detriment acceding to the claim would have.

Mining: CRA Services Limited and CRA Exploration Pty Ltd

402. CRA Services limited and CRA Exploration Ply Ltd, both wholly owned subsidiaries of CRA Limited, hold mineral leases and an exploration licence 4nd have applied for mineral leases, all with one exception partially or wholly within Areas 4 and 5.

CRA Services Limited

1	Brown's Leases	Granted	Renewed to
	Mineral leases		
	Nos 123B to 128B	10.7.1956	31.12.1997
	Mineral leases		
	Nos 133B to 135B	10.7.1956	31.12.1997
	Mineral leases		
	Nos 161B to 163B	2.9.1957	31.11.1998

2. Intermediate leases

Mineral leases

Nos 306B to 310B 27.1.1964 (for 21 years)

3. Area 55

Mineral leases

Nos 363B to 364B 11.8.1966 (for 21 years)

(MI-36413, though contiguous to ML363B, falls just outside the claim area.)

CRA Exploration Pty Limited

4. Brown's West Granted Renewed to

Exploration licence

No. 1239 6.5.1979 5.5.1981

5. Mount Minza Waterhouse 2

Applied for

Mineral leases Nos

1358B 1364B, 1367B 1369B

138313, 138413, 138613-138913,

1392B, 1398B and 1395B

September 1978

6. Stapleton

Applied for

Mineral lease No. 1168B

9.9.1976

This information has been taken from Exhibit 79, furnished by the companies. There are discrepancies with Exhibit 16 item 2 and Exhibit 102, furnished by the Northern Territory Government. That material lists additional mineral leases said to be held by CRA Exploration in the Mount Minza-Waterhouse area. The location of each tenure is marked on the map Exhibit 10 and most of them appear on the locality plan, schedule B to Exhibit 79.

403. The companies submitted that they would suffer detriment if the claim to land on and adjacent to their tenures is successful. As the projects are at different stages of development and the type of detriment suffered may vary, it is desirable to deal with each one in turn.

CRA Services-Brown's leases

404. The Brown's deposit is located close to the site of the former Rum Jungle operations and has been considered in the past merely a lead and copper deposit. It was discovered in 1952 and since then a number of drilling operations have been undertaken and metallurgical studies made of the core samples. About \$1.2 million (estimated as equivalent to \$5.7 million in current value) has been spent to date on the Brown's and Intermediate leases. A combination of factors including metallurgical problems, bad ground conditions, relatively low grade deposits, unfavourable metal prices and high costs has resulted in the deposit not being mined.

405. Several proposals for mining have been made including an open-cut mine to a depth of 190 metres. As recently as 1979 it was thought that the known reserves at Brown's were not sufficient to support a major development program, though it could be mined as a marginal ore body concurrently with some better ore bodies in the area. Recent steep rises in world prices for cobalt have led to a reassessment of the prospect to determine whether cobalt can be produced along with saleable concentrates of lead and copper. The deposit is estimated to contain 20 million tonnes. An open-cut mine would recover 9.7 million tonnes of ore including some 8 million kilograms of cobalt which may be at least as valuable as the lead deposit. A program to obtain and test new ore samples, estimated to cost about \$90 000, would also be looking for indications of gold to enhance the prospects of mining.

406. Mr W. H. Johnston, district manager of CRA Exploration, said that it is reasonable to assume that cobalt prices will remain at present levels and that the deposit has a 'reasonable chance of becoming economically viable'(transcript p. 2299). He estimated that if these studies show a good chance of saleable cobalt a full feasibility study over at least five years and costing \$5 6 million would be undertaken. Open-
Page 74

cut mining would take a further ten years to complete and would permanently employ 200 250 people. Underground mining, which would take longer because it would double the resource available to be mined and employ more people, is less likely because of the physical conditions.

407. Mr Johnston said that given the estimated size of an open-cut mine and the need for an adjacent area for dumps, a mill and storage for tailings, the land presently leased would not be adequate to accommodate these related activities. Additional service leases would be required. That land would probably include land presently forming part of the claim area; the freehold land owned by CRA Services to the west of Brown's leases is a less economical distance away.

408. The main detriment said to flow from a grant of land in this Area 1s economic. If the company decides to mine this deposit it seems that it will be of marginal economic viability only, even if other base metal deposits in the area are mined and infrastructure costs can be shared. The main additional costs to the company will come from acquiring the extra land to service the mine and the extra royalties payable to the Northern Territory Government under s.5013 of the Mining Act because the mining takes place on Aboriginal land. That section reads in part:

... the lessee of a mining lease or a special mineral lease of, or the holder of a claim registered under the regulations, in respect of, land that is ... Aboriginal land or included in Aboriginal land shall pay to the Territory, in respect of gold and minerals other than prescribed substances within the meaning of the Atomic Energy Act 1953 of the Commonwealth ... a royalty calculated in the manner prescribed in and twice the rate fixed by ... ss.43, 50 and 50A of the Act.

There is also the possibility of negotiated rates of payment to the Land Council; these may determine whether or not mining goes ahead.

409. Sections 40(3) and 70 of the Land Rights Act protect operations under those leases due to expire in 1997 and 1998, and given the prospective timetable, any mining activity ought to be completed by then. Access to the leases is preserved by s.70 and in any case a public road goes to and through the Brown's leases. Delay and cost occasioned by negotiations with a Land Council for permission to use other land is anticipated by the Act, as is the possibility of permission being refused. Negotiations are only likely to concern areas of land presently covered by EL 1 239, due to expire on 5 May 1981, the eastern part of which abuts the southern boundary of Brown's leases; it may be needed to make mining activity on these leases viable. There is a potential detriment to the extent that refusal by a Land Trust to make that land available could place future development of the Brown's leases in jeopardy.

CRA Services-Intermediate leases

410. The ore body on these leases was mined between 1964 and 1969 using the open-cut method. The pit is now flooded but some unpayable copper mineralisation was left at the bottom. One of the drilling programs on the Brown's leases immediately to the west included some work on the Intermediate leases. These leases are due to expire in January 1985 and, as the main ore body seems to be mined out, new leases may not be sought. No direct evidence was given of detriment to CRA Services if this land becomes Aboriginal land.

CRA Services-Area 55

411. The deposit in this area was explored from 1960 to 1967. According to the statement of evidence of CRA Services:

The deposit is not viable alone, nor, at present, if it were combined with Brown's deposit. It is both small and of low grade. But at some future date, given favourable metal prices, it might become payable as an adjunct to any larger operation which might eventuate in the other leases (Exhibit 79 para. 25).

These leases are protected by the operation of s.70 of the Land Rights Act.

CRA Exploration-Brown's West

412. As mentioned in para. 408, this exploration licence is due to expire on 5 May 1981. It was not referred to in evidence but in the course of his opening counsel for CRA said that it was 'probably not really the subject of any very great exploratory activity over the years' (transcript p. 108). No detriment was mentioned, except as appears in para. 409.

CRA Exploration-Mount Minza-Waterhouse 2

413. Prospecting authority 2483 for the general area was acquired in 1971 and portion of it was converted to EL610 in September 1973. Various studies of the area were carried out with sample drilling and when the exploration licence expired in September 1978, forty mineral lease applications were lodged to protect the Mount Minza-Waterhouse area. Much of the land covered by these applications falls within the western part of Area 5 of this land claim. The prospecting is at an earlier stage than the prospecting on the Brown's leases and is essentially uranium oriented. Mr Johnston said that the results of drilling to date have shown the presence of sufficient minerals to warrant an ongoing program of drilling; however it was not possible to make any estimate whether these areas will be economically viable. Half a million dollars have already been spent in the area and considerable further expenditure is contemplated in the hope that something worthwhile will be found. The companies' concern, according to Mr Johnston, was that if they decided to mine the ore body, when metal prices rise sufficiently and metallurgical problems are solved, there was always the risk that such an operation would be, vetoed by Aboriginal owners of the land. This possibility along with the potential costs arising from successful negotiations for permission to mine in the area arise directly from the Act. The lack of more definite evidence about the prospect of a viable deposit makes it impossible to say that the expenditure to date may be in jeopardy if there is a grant. If the mineral lease applications are granted before the land becomes Aboriginal land s.70 of the Land Rights Act will preserve the right to continue work on the land and access to it.

CRA Exploration-Stapleton

414. Some surveys have been done of this country which lies within Area 5 to the south of the Mount Minza Waterhouse project. The mineral lease application of September 1976 was lodged to protect the area for a proposed program which would include drilling to see if there were economic quantities of uranium on the site. Although some money has already been spent on this land there was no evidence of firm proposals to proceed with exploration or mining activity. Consequently any detriment CRA Exploration would suffer if the land became Aboriginal land must be minimal.

Mining: Peko Wallsend Operations Limited and Electrolytic Zinc Company of Australasia Limited

415. The land in which Peko Wallsend Operations Limited and, Electrolytic Zinc Company of Australasia Limited are interested lies in the north east of Area 4. The mining tenures, referred to, below, are registered in the name of Geopeko Limited (now known as Peko Exploration Limited) which holds most of them in trust for a joint venture in which the two companies each has a 50 per cent beneficial interest.

1. Mineral Leases 93 1 B-933B, which lie within the claim area and cover the original Woodcutters L5 discoveries, and 957B-959B and 106213-1063B which are potential extensions to the north and south, lying just to the east of the Stuart Highway.
2. Mineral leases 120513-121813, 124113-124311, 1278B-1284B and 1324B 1331B which cover the Woodcutters area 44 group about 2 kilometres west of Woodcutters L5. Of these M LS I 21613- I 218B, 1278B and 128 1 B 1284B have been excised from the joint venture agreement and are held solely by Peko Wallsend.

416. The Woodcutters L5 anomaly was revealed in the early 1960s and in 1968 the companies began an intensive exploration program which continued until 1971. At that time a detailed feasibility study concluded that the resource, although of high grade, wasn't of sufficient size to justify development. Since then base metal exploration has been continued by the joint venture delineating the L5 lodes and searching for the additional tonnage in the surrounding area necessary to capitalise a new mining project. Actual exploration cost to date is in excess of \$745 000 (Exhibit 82). At the conclusion of the 1970 drilling program there was indicated ore of 720 000 tonnes and inferred ore of 470 000 tonnes in the Woodcutters L5 resource. More recent surveys have suggested a possible extra 306 000 tonnes of ore. Despite the evidence of relatively high concentrations of base metals in the ore bodies, the total estimated ore tonnage makes this a fairly small deposit:

Both Peko and E.Z. are emphatic at this stage that they could not commit to a mining operation and the very large investment involved (Exhibit 81 p. 4).

417. Mr J. N. W. Elliston, a director of Peko Wallsend Limited, testified that despite the rich deposits of lead and zinc and the possibility of some silver, which at current prices may enhance the prospects of mining, the ore body is a very small one and at best is of marginal economic viability. He said that the companies had applied for an exploration licence so that they could explore in the general vicinity of their present leases. He estimated that it would take a resource in the order of 12 million tonnes (rather than the approximately 1.5 million tonnes presently known to lie, within the leases) to substantiate a long-term mining operation and to justify the financial investment necessary to set up plant, infrastructure and supporting facilities. Even if a larger reserve is of a lower, grade, it may be sufficiently rich to warrant a formal and fully planned mining operation which would return the exploration costs and other expenditure to the companies and a suitable level of profit.

418. Although it is open to the companies to undertake an open-cut mining operation they would rather systematically mine the whole resource than take just the thick rich cap at the top. Open-cut mining would take approximately eighteen months to two years to complete and would involve approximately 120 workers and may well recover most if not all of the investment and exploration costs. But, Mr Elliston said, by taking the barely economic ore from the top and leaving the rest, that remaining ore would probably never be mined and would remain sub-economic. The companies preferred an approach in which the maximum amount of ore could be extracted in the long term. Whether an open-cut mine was used or deep shaft mining or some alternative or combination of these methods, additional land to that presently under lease would be necessary for the supporting infrastructure. The estimated costs of mining range from \$12 million to \$15 million for a short-term open-cut operation to \$40 million to set up a larger underground mining venture.

419. The area said to be required by the companies for proposed mining activities, including land additional to that presently held under lease, is set out in a map Exhibit 152. It includes sections 1249, 1248, 1247, 1241 and the strip of land east of 1241 to the Stuart Highway. As well as providing room for mining operations, it links all the land presently leased to the companies and so removes any problems of access. Access to the land held under mineral leases, while preserved by s.70 of the Land Rights Act, may pose problems although Woodcutters L5 area leases appear to run very close to the Stuart Highway so that ready access may be available from there. However there may be some difficulty in getting access to the other leases 2 kilometres to the west of the Woodcutters L5 area.

420. Despite encouraging results from mineral surveys, Mr Elliston stressed the marginal nature of the deposit. He said that irrespective of the land claim it still lacks a sufficient resource to commit to a mining program, one of the major risks being the uncertainty of future metal prices. Additional costs consequent upon the land becoming Aboriginal land could well make the difference between viability and non-viability.

421. The companies submitted that they would suffer detriment in several ways from a grant to an Aboriginal Land Trust. First there is the liability to pay royalties at double the normal rate pursuant to s.50B of the Mining Act. Coupled with this is uncertainty regarding changes in royalty rates which would in turn be doubled by reason of s.50B and the effect this has in deterring investment in a deposit which is marginal anyway.

422. Fear was expressed that the operations of the companies may be confined to the lease areas they presently hold, additional land being refused to them by Aboriginal owners. So the only economically feasible type of operation would be a short-term open-cut mine, leaving or neglecting the more expensively won ore lying at a greater depth. Even this sort of operation may require additional land to that presently held under lease, in which event mining would be impossible and financial investment in the area would be completely lost. Even if such mining were to take place the total metal produced would be significantly less than in a larger scale operation. Whether this land becomes Aboriginal land or not, additional land to that presently held under lease will be necessary for the proposed mining activity and the company will still have to negotiate with nearby landholders and government departments. Furthermore these companies may not be the only ones interested in the area and Mr Elliston noted that there is already a competing application for an exploration licence over relevant land.

423. The companies also submitted that the prospect of possible veto of proposed mining activity by Aboriginal owners or the demand by them for a financial consideration so great as to upset the economics

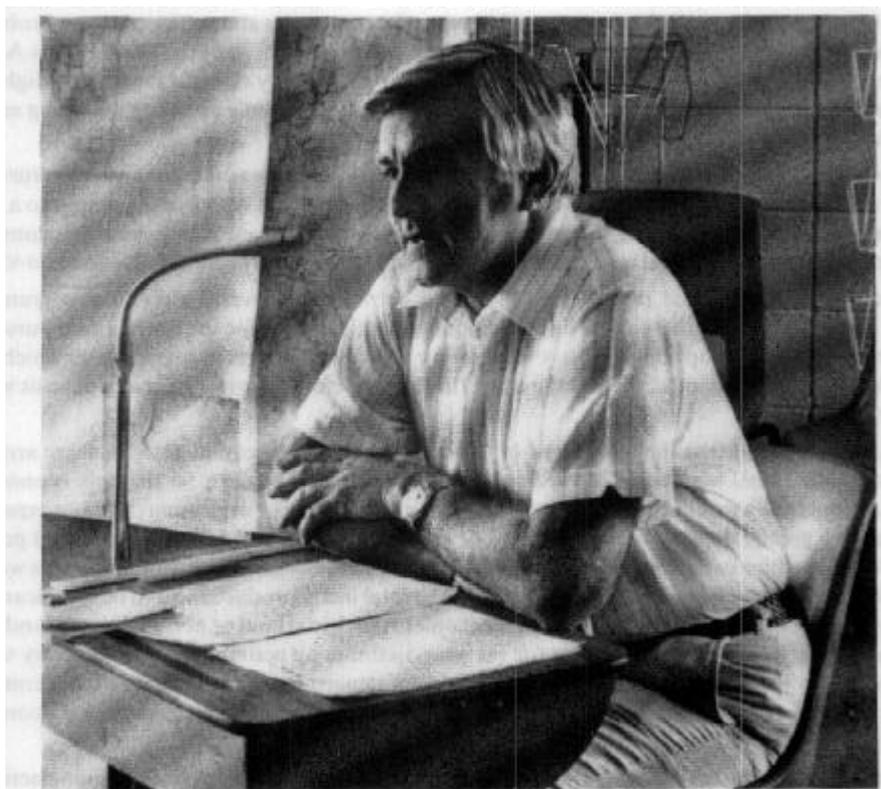
of mining a marginal deposit would not only inhibit mining in that area but may cause these companies and others to be reticent to spend money exploring and setting up mines in areas where the return from a mine was doubtful. Whether or not these fears are well founded cannot be said with any certainty at this stage; however they are clearly of significance to the companies involved. But they arise directly from the provisions of the Act.

424. It was also submitted that detriment would flow to the community at large if substantial mining projects which might otherwise be carried out on this land were inhibited or prevented because the land became Aboriginal land. The companies estimated that for every dollar of gross metal sales revenue some 73 to 78 cents is passed on directly and indirectly to the community in the form of wages, essential service costs, freight costs, supplies, equipment purchases and forms of taxation. As well larger long-term mining projects would employ more people than short-term projects such as open-cut mining limited to surface deposits within the areas of present leases.

425. The companies sought the excision of the land marked in Exhibit 152 from any grant of land, being the land described in para. 419. Certainly the excision of that land would remove any likelihood of detriment; there would be sufficient land for the companies' requirements and adequate access.

Mining: Uranerz Australia Pty Ltd

426. Uranerz Australia Pty Ltd holds seven exploration licences in the claim area, three with its joint venture partner, Mines Administration Pty Ltd, and two with another joint venture partner, AOG Minerals Pty Limited. Uranerz is an equal partner in those joint ventures and holds the sole interest in two other exploration licences. Three applications for exploration licences were frozen because of the claim. Details of these licences and applications are set out in a table taken from Exhibit 62. Their boundaries appear on a map Exhibit 10.



Dr D. Zimmerman gives evidence for Uranerz Australia Pty. Limited.

Photo: G. Neate

Dr D. Zimmerman gives evidence for Uranerz Australia Pty. Limited.

Photo: G. Neate

URANERZ EXPLORATION INTERESTS DIRECTLY AFFECTED
BY THE FINNISS RIVER LAND CLAIM

Title	Ownership	%	Date applied	Date granted	Present area km.sq.	Areas of EL's affected by claim	
						%	km.sq
EL* 1295	UAL, Minad	50:50	24.5.76	3.5.77	6.66	25	1.66
EL 1296	UAL, Minad	50:50	24.5.76	3.5.77	29.98	90	27.00
EL 1297	UAL, Minad	50:50	24.5.76	3.5.77	23.32	60	14.00
EL 1562	UAL, AOG	50:50	18.3.77	31.8.78	39.86	40	16.00
EL 1563	UAL, AOG	50:50	18.3.77	31.8.78	36.52	65	23.70
EL 1618	UAL	100	10.5.77	30.11.77	6.66	20	1.33
EL 1856	UAL	100	26.5.78	28.11.78	2.10	75	1.58
ELA#1901A	UAL	100	3.8.78	held up	209.30	50	104.66
ELA 2133A	UAL	100	5.6.79	held up	16.64	40	6.66
ELA 2207A	UAL	100	28.8.79	held up	9.97	10	1.00
TOTAL					381.01	52	197.09

*EL = Exploration Licence

#ELA = Application

The land already under licence includes parts of Areas 2, 3 and 4. According to Exhibit 62 those licences cover an area of 145.1 square kilometres, 85.27 square kilometres or 58.7 per cent of which is within the claim area. If the three licences applied for by Uranerz are granted the total area of land over which the company holds exploration licences will be 381.01 square kilometres, 197.09 or 52 per cent of which falls within the claim area. In terms of the recommendations, the picture is not entirely clear but it seems to be as follows:

EL1295 partly within Area 4

EL1296-partly within Area 3 but not as recommended

EL1297-partly within Area 3 but not as recommended

EL1562 a small part within Area 4 and part within Area 2 but not as recommended

EL1563-partly within Area 4

EL1618-partly within Area 4

EL1856 partly within Area 3 as recommended

ELA1901 within Area 2 but not as recommended

ELA2133-a small part within Area 4, partly within Area 3 but not as recommended

ELA2207 partly within Area 3 as recommended

427. The 'prime objective' of Uranerz Australia Pty Ltd, is to explore for, mine and sell uranium. The company has never been able to work in the East Alligator region but considers the Finnis River district the second best area of uranium potential in Australia. It has been operating there since 1973, gaining its first licence in 1977. It currently employs eighteen men working on exploration plus nine contractors' employees. Approximately \$750 000 has been spent by the company on licences now subject to the land claim. Some work in the area has been adjusted to minimise interference in the claim area until the result of this land claim is known.

428. The company estimated that intensive exploration is likely to continue in the area for at least another ten years and if economic discoveries are made exploration would last much longer. Because of statutory requirements for a certain level of work and expenditure on land subject to exploration licences, and the requirement to surrender half of the licence area by a certain date and every year thereafter until expiry, Uranerz is anxious to continue exploration activity in those areas presently under licence. The first of these licences is due to expire in December 1983 and should the application for other licences be successful those licences are likely to expire approximately six years from the date on which they are granted. The company plans to explore in the area until it is satisfied whether or not there is economic mineralisation. Dr D. O. Zimmerman, general manager of Uranerz Australia Pty Ltd, said:

There is no direct proposal to mine; there are some reserves identified from the earlier work at Rum Jungle and Mount Fitch. That is all (transcript p. 1738).

429. The detriment already suffered by Uranerz Australia Pty Ltd and its joint venture partners is fairly small in financial terms. The only costs directly attributable to this land claim have been in engaging a consultant to look at the question of possible traditional ownership of the areas claimed and some modification of the exploration program. The delay in the possible grant of three further exploration licences by the Department of Mines and Energy because of the land claim may also be considered to the company's detriment. The company, however, put its submission on the basis of future activity and the possible effects that a grant of land to a Land Trust would have in inhibiting such activity. That approach is not unreasonable given that s.50(3)(b) of the Land Rights Act requires the Commissioner to comment on the detriment to persons that 'might result if the claim were acceded to either in whole or in part'.

430. However, many of the points raised by the company were aimed more at the philosophy of the Land Rights Act and the necessary consequences of its operation than with particular detriment which that company and its partners would suffer were the claim to be acceded to. Concern was expressed about the possibility of traditional Aboriginal owners of land having the power to veto mining and exploration activity, the social divisiveness of a grant of land in this area, the costs incurred by delays in exploration while negotiations were conducted with the Land Council on behalf of the traditional Aboriginal owners, and the possible discouragement of prospecting for minerals in the area. In my view these matters arise from the operation of the Act, not from acceding to the claim.

431. Dr Zimmerman said that the company would certainly wish to talk with the traditional owners of land in the areas in which the company is interested 'regardless of the outcome of the claim' (transcript p. 1734), adding:

As far as we can tell so far we have not infringed on any sites of significance, and we would certainly aim to keep it that way (transcript p. 1726).

He agreed that the possibility of a veto by traditional owners of the company's activities was the worst possible consequence of a grant of land and expressed the hope, in the light of other successful negotiations with Aboriginals over mining projects, that there would be no exercise of such a power in negotiations with his company. He stressed that the company would attempt to develop the best possible relationship with any traditional owners of land when exploration on their land was contemplated, and stated that if Aboriginal people were willing for his company to work on an area of land 'on their terms ... this certainly would remove much of the detriment which we are afraid of' (transcript p. 1726).

432. There was no evidence of financial loss which would necessarily flow to the company from a grant of land. Such money as has been spent already and may be lost in the future on exploration in the area may be spent in any case if no worthwhile deposits of minerals are found. Submissions based on the possibility of mining not going ahead because of opposition from Aboriginal owners can only be considered speculative at this stage and offer no evidence of actual or probable detriment to the company. The company submitted that it would suffer some detriment because of the possibility of it unintentionally trespassing on land owned by Aboriginals, as the claim Area 1s largely unfenced and often without clear landmarks which might indicate the ownership of particular pieces of land. It also submitted that difficulties would arise in negotiations because of the different types of title to land scattered through the areas in which the company has some interests.

433. There was some evidence that access to the company's interests in the Hundred of Goyder has usually been through Batchelor along public roads in the area. Some concern was expressed that if the land became Aboriginal land, access to other areas in which the company has an interest may be restricted or made more costly. The rights which presently arise under existing exploration licences are protected by the operation of s.70 of the Land Rights Act and any future rights would be subject to negotiations with the Northern Land Council.

434. The company also suggested that it would suffer detriment from the possible increase of bushfires in the area should the land become Aboriginal land. I have dealt with the question of fires elsewhere in this report (paras 387-389).

435. Even if all the company's submissions were adopted as relevant and persuasive, the detriment feared by it is considerably reduced in the light of the recommendations made for grants of land.

Mining: J. C. Walton

436. Mr J. C. Walton holds and operates a tin and tantalite mine at Mount Finness. It is situated on the southern part of Area 2 some 1.75 miles from the Finness River crossing and, it would appear, within that portion recommended for a grant. Six tenements have been granted or recommended and are marked on Exhibit 10 as follows:

Pipe track water right PTW32B

Mineral Lease ML948B

Water right WR19B

Dam water right DW R31 B

Stream water right SWR27B

Tailings area TA313

Mr Walton gave evidence that all these tenements are necessary for the operation of the mine and that PTWR32B and DWR31B, though recommended by the Mining Warden, had not been granted by the

Department of Mines and Energy.

437. Despite the delay in granting PTWR32B, a pipe has been laid along the pipe track, a motor installed and water is being pumped to a dam which takes up half of ML-948B. Mr Walton said that it would not be possible to run the mine without the pipe track. The mining operations require 60 000 gallons of water an hour and, although most of this is cycled through dams and can be reused, about 4000 gallons an hour are pumped from the Finness River to replace water lost by seepage and waste. The pipe track water right is necessary to maintain this operation, especially because of Mr Walton's preference for this mode of operation rather than damming water on the Finness River and using the tailings area as he is entitled to do with SWR27B and TA3B.

438. Some \$350 000 was spent by Mr Walton in getting the mine to production, and the first ore was shipped out in October 1980. He estimates that the ore body is approximately 40 feet thick and will yield 200 000 to 300 000 tonnes. Allowing for one year to remove alluvial material over the ore body, three to four years to mine, crush and treat the ore at the mine site, and some time to meet the requirements of the covenant on ML948B to restore the land and contours as far as he can, mining activity may be completed within about five years.

439. There is no reason at law why the tenements recommended but not yet granted to Mr Walton will not be granted to him. Even if they are, they are not interests in land and therefore the land remains unalienated Crown land. Section 3(2) of the Land Rights Act provides that unless the contrary intention appears a reference to estate or interest in land does not include a reference to a mining interest, 'mining interest' meaning 'any lease or other interest in land ... granted under a law of the Northern Territory relating to mining for minerals'. Section 75 of the Land Rights Act protects all miners' rights held by Mr Walton immediately before the land became Aboriginal land provided that land was being occupied or used by virtue of the miner's right. Section 70 read with s.66 preserves his entitlement to enter and remain on the land for any purpose that is necessary for the use or enjoyment of his mining interests.

440. If those tenements are not granted before any grant to a Land Trust, one way of protecting Mr Walton's interests would be to excise the land necessary for his operations. This may not be the best approach given the relatively short period over which mining and related activity is expected to continue and the permanency of such an excision. An undertaking from the prospective Aboriginal owners of the land not to interfere with existing rights and the creation of necessary rights in connection with that mine would remove any likely detriment.

Miscellaneous lease No. 581-E. K. and M. J. Kerle

441. Areas 3 and 4 include land now held under miscellaneous lease No. 581 held by E. K. and M. J. Kerle, being sections 895, 991, 997, 2895, 2896 and 2897 in the Hundred of Goyder (Exhibit 91). A letter from the Department of Lands (Exhibit 16 item 8) states that Mr and Mrs Kerle applied in 1973 for additional land adjacent to their freehold; as an interim measure they were granted a grazing licence. The approval of the Lands Branch to the lease in its present form was given in June 1979. A lease was granted as from 1 July 1979 and was registered on 11 August 1980 (transcript pp. 2403, 2409-10). The original application on behalf of the claimants in this land claim was lodged at the Aboriginal Land Commissioner's office on 20 July 1979.

442. In my view, at the date of the application this land was alienated Crown land, that is land in which a person other than the Crown had an estate or interest. Section 3(2) of the Land Rights Act reads:

... a reference in this Act to an estate or interest in land includes a reference to an interest by way of a right against the Crown to a grant of an estate or interest in land ... ;

'grant' in relation to an interest in land is defined to include:

... the doing of any action by reason of which the interest arises.

In the case of miscellaneous lease No. 581, although the actual date of the grant of the lease did not emerge, approval was given by June 1979 so that at the least Mr and Mrs Kerle had a right against the Crown to a lease when the application under the Land Rights Act was lodged. They now have a registered interest.

Special purposes lease No. 453-Wairia Association Inc.

443. Special purposes lease No. 453 was granted to the Wairia Association Inc. to commence on 21 November 1978 and to run in perpetuity. It is an area of 19.67 hectares west of the Stuart Highway at Adelaide River, being section 124 in the Hundred of Playford. In the Borroloola Report, commenting on the situation of a special purposes lease held by an Aboriginal family, I said:

A curious situation arises here. A special purposes lease is ordinarily alienated land but s.50(1)(a) permits an application to be made for alienated Crown land in which all estates and interests are held by Aboriginals.

'Aboriginal' is defined by s.3(1) to mean 'a person who is a member of the Aboriginal race of Australia'. The Johnstons, I think answer this description, hence their special purpose lease may be claimed. It is unlikely that Parliament had such a situation in mind when framing the terms of s.50(1)(a), nevertheless the language of the statute is clear enough (para. 131).

The lease to the Wairia Association recites that the land is held for Aboriginal communal purposes (Exhibit 92) and so may be said to be held 'on behalf of Aboriginals'. In that case the land is available to be claimed even though it is alienated Crown land. There was no evidence of the membership of the Association but we visited the area during the hearing and it seemed to be a home for a number of Warai people including claimants. There has been no objection to a recommendation including that land.

Grazing licences

444. Grazing licences range extensively over the claim area as may be seen from the status map, Exhibit 13A. I have already held that they do not constitute estates or interests in land, so land over which they have been granted is available for claim. It is clear, however, that people holding licences may suffer detriment if the land is not available to them for grazing. I shall consider each of the licences affected, particulars and copies of which may be found in Exhibit 16 item 8. All current grazing licences are due to expire on 30 June 1981.

Area 1

GL2093 W. A. Townsend

445. The land under this licence covers an area of approximately 42 square kilometres and is the bulk if not all of Area 1. The uncertainty springs from the exact relationship between the claim area and the licence. The licence was previously held by Finnis River Cattle Co. but on 1 July 1980 was issued to Mr Townsend to graze 162 head of cattle. Mr Townsend owns freehold land to the south of Area 1, bought in May 1979. He gave evidence that this of itself would be insufficient for him to make a living by raising cattle. The land will take a maximum of 300 head in the dry season and 1500 in the wet season. The freehold land is on ridge country. The western half of the grazing licence land is swamp and provides the feed necessary during the dry season. Cattle can be run on the grazing licence land during the dry season then brought on to the freehold land during the wet when half of the former is under water. The present carrying capacity of freehold and licence is up to 1000 head of cattle all year round, and Mr Townsend expects to market 200 to 300 head of cattle each year.

446. Support was given to Mr Townsend's submission by Mr G. Hockey, senior pastoral inspector from the Department of Lands, who said that it would not be possible to run an economic operation on the 27 square kilometres of freehold land owned by Mr Townsend. With the addition of the 42 square kilometres of grazing licence land and a program of clearing and pasture improvement the land can carry well over 1500 head of cattle and be economic as a family concern. Mr Townsend presently has 1 000 cattle which he runs on land owned by relatives. This arrangement is a short-term one as much of that land is for sale and Mr Townsend gave evidence that he was not in a position to buy it. He said that there is no other land for agistment in the dry season and that he would not be able to afford to buy the thirty to forty square miles of that ridge country' (transcript p. 2617) to the south of his property necessary to run 1000 head of cattle. He presently lives at Stapleton Station where in the past he has been able to keep some cattle during the wet season. However he said it was not now possible to keep cattle there during the wet season and in any case there were difficulties in separating his stock from other stock on that land. The Wagait Reserve was not suitable for agistment because of its large area and the absence of fences. Mr Townsend has done some contract catching of buffalo and cattle on the reserve to supplement his income and anticipates doing so into the future. He has also done contract buffalo catching in the Point Blaze area.

447. Mr Townsend will suffer some detriment if this land becomes Aboriginal land. That loss can not be measured in terms of the cost of acquiring sufficient freehold land to run the same number of cattle as can be run on GL2093. Aside from the insecurity of tenure inherent in grazing licences, he knew of the land claim before being granted this particular licence. It should also be noted that in March 1979 Mr Thomason made an application for part of this land for tourist and safari purposes and a similar application was made by Milatos Holdings in April. Although these applications have proceeded no further because of the Aboriginal land claim, they show that more than one person is interested in developing this area, highlighting the insecurity of Mr Townsend's position. It does not necessarily follow that if the land becomes Aboriginal land Mr Townsend would be prevented from grazing cattle on it. He expressed a willingness to negotiate with Aboriginal owners for the use of the land (transcript p. 2621). If this land were totally closed to him he would need to reduce his stock considerably, though some cattle could possibly be run on land to the south owned by his father and presently used only for grazing horses. Any rent payable to a Land Trust would constitute a detriment to the extent that it exceeded rent payable for a grazing licence.

Area 2

GL2080 Finnis River Cattle Co.

448. Grazing licences have been held by the proprietors of Finnis River Pastoral lease since 1964. In 1971 the licence was reduced from 175 square miles to 165 square miles and has since been reduced to 153 square miles (398 square kilometres) to meet the land interests of others in the locality. Mr C. F. Reborse attended the opening session of the hearing and in a letter to the Commissioner dated 25 June 1980 stated that the company has the 'smallest Pastoral Lease in the Territory. We need the country to carry on our operation.'

449. No evidence was called on behalf of the company to show what effect a grant of land would have on the operations of the company. But the grazing licence is in that part of Area 2 not recommended so further comment is unnecessary.

GL2098 D. A. Hanna

450. This licence to about 1750 hectares of land was granted on 7 July 1980 and enlarged the area previously held by Mr Hanna under GL2075 granted on 25 October 1979.

451. No evidence was called as to the effect of a grant of land to an Aboriginal Land Trust on Mr Hanna's operations. But the grazing licence is in the south-eastern section of Area 2, not the subject of a recommendation for a grant.

Area 3

GL2100 E. K. and M. J. Kerle

452. Mr and Mrs Kerle have held this and other adjacent land under licence since 1972. Following an application in 1973 they were granted miscellaneous lease No. 581 on 1 July 1979 over part of the land formerly held under licence and a new grazing licence 2076 was granted over the residue. GL2076 is now GL2100 and is an area of 1165 hectares immediately to the west of ML581.

453. No evidence was called as to the effect, if any of a grant of land to an Aboriginal Land Trust. But this land is within that part of Area 3 not recommended.

GL2095 R. E. and A. Bright

454. This grazing licence covers an area of 20.5 square miles (52.9 square kilometres) and ties immediately to the west and east of freehold land owned by Mr and Mrs R. Bright. In June 1979 Mr Bright applied pursuant to s.25DAA of the Crown Lands Act for additional land to be worked conjointly with the freehold land. Processing of his application was suspended because of the Aboriginal land claim. On 9 October 1979 he applied for a grazing licence over a similar area and GL2089 was granted to 30 June 1980. A new licence was issued on 3 July 1980, GL2095.

455. Mr Bright's concern was that he had over-capitalised his freehold land by building dwellings, sheds and yards and by improving pasture and putting in irrigation on the assumption that he would eventually have title to the adjacent land. He said that he had been using that Crown land for the last ten years as if it were his, running and mustering cattle, and that without the other land his freehold property would not be economically viable.

456. Mr and Mrs Bright are not dependent solely on income from that area, 60% of their income coming from contracts to take cattle off the Wagait Reserve. Mr Bright is a shareholder in Meneling Station Pty Ltd, and a partner in a project to subdivide section 2106 into twenty blocks of freehold land. He also receives income from Meneling Abattoirs which operates on special purposes lease No. 62.

457. If this land were not available to them Mr and Mrs Bright would suffer some detriment. Mr Bright expressed willingness to negotiate for grazing rights to land with Aboriginal owners, expressing considerable reservations about the possibility of gaining permission from the Northern Land Council, but said that if he were not able to use the land presently under GL2095 he would have to dispose of most of his 1000 head of cattle as he could not run them all on 485 hectares of freehold land. Half of the land presently under GL2095 would fall within the catchment area of the proposed Finnis River-Bachelor Dam and half of that land would be inundated were such a dam to be built.

458. The land the subject of this licence is in Area 3 but most of it is outside that portion recommended for a grant.

GL2084 Meneling Station Pty Ltd

459. Meneling Station Pty Ltd was first granted a grazing licence over about 26 square kilometres of land in 1973. In 1978 it applied for better tenure but during investigations into that application the present land claim application was made and froze that activity. In November 1979 GL2084 covering an area of

2375 hectares was issued. That land adjoins special purposes lease No. 62 on which is an abattoir run by Meneling Station Pty Ltd, whose lease has been taken over by Batchelor Enterprises under a scheme of arrangement. Mr Bright gave evidence that the land under licence was necessary for the holding of stock over the wet season so that the abattoir could operate continuously through the year. Some of the stock slaughtered at the Meneling Abattoir is brought in from the Wagait Reserve. Some improvements have been made on this land over recent years including the erection of grids and gates on a road through the property. These were apparently made with permission of the government and may be protected by s. 107A of the Crown Lands Act, compensation being payable to Meneling Pty Ltd if it were not allowed to use the land in the future. Again it ought to be noted that all of the land within GL2084 falls within the catchment area of the proposed dam and some of that land would be inundated were that dam built.

460. All of GL2084 is in Area 3 and most is within that portion recommended for a grant. Loss of that land would constitute a detriment as would the payment of rent in excess of that payable for the grazing licence.

GL2101 G. W. McClelland

461. In December 1979 Mr McClelland applied for the grant of a miscellaneous lease over sections 1327, 1321 and 1322 in the Hundred of Goyder, to be worked conjointly with his freehold section 1326. The application was frozen when this land claim application was lodged. On 9 November 1979 he applied for, and on 30 November was granted, GI-2085. The current licence is GL2101 covering 338 hectares, being the sections mentioned to the east of his freehold land.

462. No oral evidence was given by or on behalf of Mr McClelland but in a letter to the Commissioner dated 29 June 1980 he stated that he needed the extended area of land to make his freehold unit a more viable one for himself and his family. GI-2 I 01 is in Area 3 but outside the portion recommended for a grant so no further comment is necessary.

Area 4

GL2102 D. J., L. A. and R. J. Mackay

463. This grazing licence lies to the north east of Batchelor, its northern boundary being the southern boundary of the Darwin River Dam catchment area. It covers an area of 21 square kilometres and was originally granted as GL2083 on 5 November 1979, expiring on 30 June 1980. The licence was later renewed as GI-2102. No evidence was called as to the effect that a grant of land to a Land Trust would have on the operations conducted by the Mackays.

Occupation licences

464. In the Borroloola Report paras 138-143 I held that occupation licences do not constitute estates or interests in land and so may be claimed. Two occupation licences have been granted within the claim area, both at Rum Jungle in Area 4.

465. On 1 October 1976 Gadon Diamond and Drilling Co. was granted occupation licence OL 1028 for the storage of equipment. The area of the licence is approximately half a hectare and the licence has been renewed annually. At the time of the hearing it was current until 30 November 1980.

No evidence was given as to the effect of a grant of land to a Land Trust on the use of this land.

466. On 1 February 1978 CRA Services Limited was granted occupation licence OL1030 for storage purposes. The area under licence is known as building No. 10 and the licence has been renewed annually and at the date of the hearing was current until 31 January 1981. No evidence was given regarding the effect of a grant of this land to a Land Trust.

Applications pending over land claimed

467. A letter of 8 August 1980 from Mr T. R. Lawler, Director, Land Administration, Department of Lands (Exhibit 16 item 8) briefly summarises the applications of persons seeking leases or licences in the claim area which were being investigated at the time this land claim was lodged. They include applications for land for tourist and safari purposes in Area 1, grazing land in Area 1, land for a cattle sale yard complex

in Area 4, the grant of a miscellaneous lease over land adjoining agricultural lease No. 727, and an application by R. J. Leal, currently living in Singapore, for a miscellaneous lease over land near to the Rum Jungle siding some of which is currently held under GL2095 by Mr and Mrs Bright. Mr Leal owns some freehold land in the area and further details of his proposals and applications can be seen from his correspondence with the Commissioner and the relevant government department (Exhibit 155).

468. Mr D. L. Ottens, the holder of agricultural leasehold land to the south of Meneling Station and below Area 3, gave evidence of the potential use by himself or others of unalienated land to the east of his property. He said that he had no present requirement for the land and any interest that he expressed in it was purely speculative. Again it might be noted that all of the leasehold land held by Mr Ottens falls within the proposed catchment area of the Finnis River-Batchelor Dam.

469. There was no evidence of direct financial detriment which would result to these people if a grant of land were made to a Land Trust. However it may be that some of those mentioned earlier who were granted grazing licences to land when their applications for leases were 'frozen' because of the land claim will suffer some detriment by not being able to use land for grazing or by having no greater interest than a lease or licence from a Land Trust.

M. Von Erwin

470. Mrs Von Erwin, a resident of Batchelor, expressed concern about the effect of a grant of land upon the prospects for a multiracial society in Batchelor and also upon the implications for use of the area. I have dealt with recreational and other uses elsewhere. The matter of a multiracial society is outside the scope of this report.

Northern Territory Cattle Producers Council

471. The Northern Territory Cattle Producers Council, now Northern Territory Cattle Council, supported the application for an early hearing of the claim but otherwise took no part.

Summary of findings, recommendations and comments

472. I now summarise the findings, recommendations and comments in this report.

- (1) Grazing licences within the claim area are unalienated Crown land.
- (2) The Northern Territory Government is not entitled to argue that grazing licences are alienated Crown land.
- (3) The extension to the Kangaroo Flats Training Area within the claim Area 1 is unalienated Crown land.
- (4) The land claimed as shown on the map Exhibit 13 is unalienated Crown land save as to that portion now the subject of miscellaneous lease No. 581.
- (5) Questions relating to the functions of the Aboriginal Land Commissioner under the Aboriginal Land Rights (Northern Territory) Act 1976 do not go to the Commissioner's jurisdiction to hear this claim.
- (6) Questions relating to the notion of detriment under the Act do not go to the jurisdiction of the Commissioner to hear this claim.
- (7) There are Aboriginals who are the traditional owners of Area 1, being the Maranunggu claimants whose names appear in para. 243.
- (8) There are Aboriginals who are the traditional owners of that part of Area 2 south west of a line drawn between Mount Bennet and Mount Finnis, being the Maranunggu claimants whose names appear in para. 243.
- (9) There are Aboriginals who are the traditional owners of that part of Area 3 east of a line drawn from the north-west corner of section 1168 to the south-west corner of section 1164, being the Kungarakany and Warai claimants whose names appear in para. 243.
- (10) There are Aboriginals who are the traditional owners of Area 4, being the Kungarakany and Warai claimants whose names appear in para. 243.
- (11) There are Aboriginals who are the traditional owners of Area 5, being the Kungarakany and Warai claimants whose names appear in para. 243.

- (12) The traditional owners so named are in each case entitled by Aboriginal tradition to the use or occupation of the land in question although that entitlement may be qualified as to place, time circumstance, purpose or permission.
- (13) I recommend that there be a grant to one Land Trust of the unalienated Crown land in Area 1 and of the unalienated Crown land in Area 2 south-west of a line drawn to include Mount Bennet and Mount Finnis thence due south, which line will be determined in part by the existence of alienated Crown land.
- (14) I recommend that there be a grant to another Land Trust of the unalienated Crown land in Area 3 east of a line drawn from the north-west corner of section 1 168 to the south-west corner of section 1164 and of the unalienated Crown land in Areas 4 and 5.
- (15) The number of Aboriginals with traditional attachments to Area 1 and that part of Area 2 recommended for a grant who would be advantaged if the claim were acceded to is about 70.
- (16) The number of Aboriginals with traditional attachments to that part of Area 3 recommended for a grant and to Areas 4 and 5 is probably in excess of 400.
- (17) The main advantage to the Maranunggu of a grant of the land in Area 1 and that part of Area 2 recommended is that recognising them as the owners of that land may serve to resolve disputes between them and others regarding that ownership.
- (18) The advantage to the Kungarakany and Warai of a grant of that part of Area 3 recommended and Areas 4 and 5 is mainly spiritual in helping to retain and bolster the identity of those people as Kungarakany and Warai. The economic advantages are small except through agreements for the grant of mining interests.
- (19) No detriment is likely to result to other Aboriginal persons and groups if the claim is acceded to.
- (20) No detriment is likely to result to the Commonwealth of Australia in regard to the Kangaroo Flats Army Training Area extension as that land is not the subject of a recommendation for a grant.
- (21) The route of the proposed Darwin-Alice Springs railway has not yet been defined. It may enter the claim Area 1 in the north-eastern corner of Area 2, run south through Area 4 and continue south close to the western edge of Area 5. To the extent that land may be required within any of the land recommended for a grant, the Commonwealth is likely to suffer detriment through the cost of compulsorily acquiring or of leasing that land.
- (22) The Commonwealth's right to occupy Snake Creek in Area 5 for the purpose of stockpiling uranium ore is protected by s. 14 of the Land Rights Act if that land became Aboriginal land. The only detriment to the Commonwealth would be any rent payable by reason of s. 15 of the Act.
- (23) The Commonwealth may wish to revive the use of an ammunition depot at Snake Creek in Area 5. If it does, the detriment to the Commonwealth if the claim is acceded to will be any cost of acquiring or leasing that land from a Land Trust greater than if the land had been acquired or leased from the Northern Territory Government.
- (24) The Department of National Development and Energy wishes to embark upon a project to rehabilitate Rum Jungle in Area 4. That work is likely to be completed within four years. So long as the Commonwealth has access to the land over that period, it is unlikely to suffer any detriment if the claim is acceded to.
- (25) It is possible that a solar energy project involving the Japanese, Australian and Northern Territory Governments may be sited in Rum Jungle within Area 4. The Commonwealth made no submission on the matter; presumably it is unlikely to suffer detriment if the claim is acceded to. The Northern Territory Government made a submission which is referred to later in this summary.
- (26) Any detriment that might result to the Northern Territory Government if the claim is acceded to is compounded by the inability of that government compulsorily to acquire Aboriginal land and by the limitations of the Commonwealth to do so for the Territory because of s.5AA of the Lands Acquisition Act 1955. Section 14(1) of the Land Rights Act provides some protection for existing facilities.
- (27) The making of a conditional recommendation for a grant of land is not appropriate nor is it likely to resolve any detriment arising from such a grant.
- (28) The only existing power line affecting the claim area runs south west from the Stuart Highway at the Batchelor turnoff and follows the road to Batchelor and then continues to Meneling Station. If any

of that line falls within Area 4, the continued use and occupation of that land is protected by s. 14(1) of the Land Rights Act. Power lines are proposed, to form part of a grid system bringing power from the Ord River project, from the proposed Mount Nancarrow scheme and to link Darwin and Katherine. The exact route of these lines is not known but they may cut across the southernmost part of Area 5. If the path of these lines, as established, passes through any of the land recommended for a grant, detriment to the Northern Territory Government is likely if the claim is acceded to. The government is not able compulsorily to acquire the land, its interests are not protected by s. 14 of the Land Rights Act and it would need to seek a lease or a surrender under s. 19 of the Act.

- (29) The northern edge of Area 4 falls within the catchment area of the Darwin River Dam but no submission was made that detriment would result to the Northern Territory Government from a grant of this land. In time additional water supplies will be necessary for Darwin, the most likely source being the Finnis River Batchelor Dam site, part of which lies within that portion of Area 3 recommended for a grant. If the claim is acceded to in that respect, detriment is likely to result to the Government of the Northern Territory, there being no power of compulsory acquisition. There will be a need for an additional water supply for Darwin and the potential exists for serious detriment if there is a grant of land in an area later required for a water supply.
- (30) There are a number of monitoring stations for the purpose of water resources, some of which fall within the claim area. The right to maintain those stations is protected by s. 14 of the Land Rights Act and access to them is protected by s.70.
- (31) The roads over which the public has a right of way and which should not therefore form part of any grant of land under the Land Rights Act are:

Stuart Highway - a national road and part of the National Highway System

Batchelor Road - the link between Batchelor and the Stuart Highway

Mt Mabel Road - an access road to Mt Mabel agricultural lease off the Eva Valley Road

Eva Access Road - an access road to Stapleton pastoral lease and freehold blocks north west of the lease

Wangi Road - an access road to Stapleton pastoral lease and freehold blocks north west of the lease

Finniss River Road - an access road to Finnis River pastoral lease

Hanna's Access Road - an access road to agricultural lease 527

Batchelor waterhole - an access road to the Batchelor waterhole, a recreation area

A 100 metre road reserve is reasonable in each case.

- (32) Within Areas 2, 3, 4 and 5 are a number of tracks. I am unable to conclude that any of these are roads over which the public has a right of way. In some cases, if they are not excised from any grant, people may experience difficulty in obtaining access to their land. On the evidence available it is not possible to be more precise than this.
- (33) Several owners and lessees of land in and around the claim area expressed concern about possible restrictions on access to their land in the event of a grant. In the case of M. R. and J. Brodribb, K. and C. Teague and M. Vance (Areas 3 and 4) and J. K. Holdings Pty Ltd (Area 2), detriment is likely to result from a grant of land unless adequate access is preserved. Access to Mrs Marson's land (Areas 2 and 3) is unlikely to be affected.
- (34) Any problems which may arise in recovering straying cattle from Aboriginal land can be met by amendments to the Aboriginal Land Act.
- (35) If the proposed solar energy project referred to in (25) proceeds, about 20 hectares will be required probably in Rum Jungle. In the absence of certainty regarding the site of this project, I can do no more than draw it to the attention of the Minister.
- (36) The Department of Mines and Energy's right to store drill core samples at Rum Jungle (Area 4) is protected by s. 14 of the Land Rights Act; the only detriment which it might suffer if the land became Aboriginal land is the possibility of rent being payable under s. 15 if the storage is not a community purpose.

- (37) The Northern Territory Government's right to occupy and use land at Snake Creek (Area 5) for the purposes of a spur line and an explosives storage centre is protected by s. 14 of the Land Rights Act.
- (38) None of the overland telegraph route appears to fall within any of the land recommended for a grant nor does any of the land proposed for a bridle path in the Southport area. There is nothing to suggest that Aboriginal owners would be uncooperative regarding any plans by the Department of Community Development to restore buildings of historical interest.
- (39) There is sufficient land within the town boundary of Batchelor to accommodate short and medium-term expansion. If additional land is required in the future, the Northern Territory Government lacks power compulsorily to acquire Aboriginal land and is likely to suffer detriment.
- (40) In the event of a grant of that part of Area 3 recommended, it would be reasonable to excise land for a future garbage dump if practicable. This should be done in consultation with the Northern Territory Government and the traditional owners.
- (41) If there is a grant of land surrounding the town of Batchelor, Batchelor residents will require a permit under the Aboriginal Land Act to enter upon that land. If a permit is granted, no detriment is likely to occur; if a permit is refused, detriment is likely.
- (42) Much of the claim Area 1s used for recreational purposes including fishing and camping. This is particularly true of the land close to the Finnis River (Areas 1, 2 and 3), land near Coomalie Creek (Area 4) and the land around Rum Jungle south lake (Area 4). There was no comprehensive submission identifying land used for recreation and no proposals as to how these might be maintained.
- (43) There was some suggestion that the risk of bush fires would be increased if any of the claim area became Aboriginal land. There was no evidence to support this.
- (44) No mining interest may be granted in respect of Aboriginal land unless either the Minister and the appropriate Land Council consent in writing or the Governor-General by proclamation declares that the national interest requires that such a grant be made. Existing mining interests are protected by s.70 of the Land Rights Act read with s.66. The holder of an exploration licence may not obtain a greater interest, except subject to compliance with s.40 of the Land Rights Act, unless before 4 June 1976 the holder had applied for another mining interest in respect of that land.
- (45) Messrs R. A. Smith and R. J. Stone hold or have applied for a goldmining lease and have applied for an exploration licence, both within Area 5. Any interest in existence at the date of a grant of that land will be protected by s.70 but in the case of the exploration licence no further grant can be obtained except in accordance with s.40. No evidence was given of any particular detriment likely to result but there is the possibility of denial of access to the goldmining lease in the event of a grant.
- (46) Marathon Petroleum Australia, Ltd holds exploration licences and has applied for two other exploration licences, largely within Area 3 as recommended and in Area 5. No evidence was called on behalf of that company to show that any detriment would result from a grant to a Land Trust.
- (47) CRA Services Limited holds mineral leases and CRA Exploration Pty Ltd holds mineral leases and an exploration licence, all with one exception partially or wholly within Areas 4 and 5.
- (a) The viability of CRA Services' Brown's leases depends upon holding additional land, not necessarily for actual mining but for dumps, a mill and storage. Land the subject of EL 1239 will provide that; refusal by a Land Trust to make that land available will cause detriment.
- (b) CRA Services holds Intermediate leases due to expire in January 1985. No direct evidence was given of detriment if this land becomes Aboriginal land.
- (c) CRA Services' leases in Area 55 are protected by s.70 of the Land Rights Act.
- (d) CRA Services' exploration licence in Brown's West is due to expire on 5 May 1981; no detriment was suggested in the event of a grant of this land.
- (e) CRA Exploration's Mount Minza-Waterhouse 2 lease applications are largely within the western part of Area 5. In the absence of definite evidence about the prospect of a viable deposit, it is not possible to say that any detriment is likely if there is a grant of that land. If those applications are granted before the land becomes Aboriginal land, s.70 of the Land Rights Act will preserve the right to continue work on the land and access to it.
- (f) CRA Exploration's Stapleton mineral lease application lies within Area 5. There was no

evidence of firm proposals to proceed with exploration or mining activity and if there is a grant of this land any detriment will be minimal.

- (48) Peko Wallsend Operations Limited and Electrolytic Zinc Company of Australasia Limited hold mineral leases in the north east of Area 4. Those leases are protected by s.70 of the Land Rights Act. The detriment which these companies are likely to suffer from a grant of that land is that it may preclude access to the leases from the Stuart Highway, preclude access between those leases known as Woodcutters L5 and those known as Woodcutters Area 44 and result in inadequate land for mining purposes. The provision of access from the Stuart Highway and of sufficient land to meet the companies' requirements will remove the likelihood of detriment.
- (49) Uranerz Australia Pty Ltd holds exploration licences in Areas 2, 3 and 4. Some are outside the areas recommended. There was no evidence of financial loss necessarily flowing to the company from a grant of land. Such money as has been spent already and may be spent on exploration will be lost in any case if no worthwhile deposits of minerals are found.
- (50) Mr J. C. Walton holds and operates a tin and tantalite mine in the southern part of Area 2. Six tenements have been granted or recommended. If they are all granted before the land becomes Aboriginal land, s.70 of the Land Rights Act will sufficiently protect his interests. If they are not, the project being only of five years' duration, an undertaking from prospective Aboriginal owners of the land not to interfere with existing rights and the creation of necessary rights in connection with the mine would remove any likely detriment.
- (51) E. K. and M. J. Kerle have at all relevant times held miscellaneous lease No. 581 or a right to a grant of that lease so that the land is alienated Crown land and cannot be claimed.
- (52) Special purposes lease No. 453 is held by the Wairia Association Inc. It is held on behalf of Aboriginals, is available to be claimed under the Land Rights Act and there was no objection to a grant of that land.
- (53) Mr W. A. Townsend holds grazing licence GL2093 covering most if not all of Area 1. In the event of a grant of that land, he will suffer detriment from his inability to make use of it unless he enters into an agreement with the Land Trust. The value of the land lies in the fact that the freehold land owned by him of itself is insufficient for economic purposes.
- (54) GL2080 held by Finnis River Cattle Co. is in that part of Area 2 not recommended for a grant.
- (55) GL2098 held by D. A. Hanna is in that part of Area 2 not recommended for a grant.
- (56) GL2100 held by E. K. and M. J. Kerle is within that part of Area 3 not recommended for a grant.
- (57) GL2095 held by R. E. and A. Bright is for the most part outside that portion of Area 3 recommended for a grant so no detriment is likely to result.
- (58) GL2084 held by Meneling Station Pty Ltd is in Area 3, most within that portion recommended for a grant. All of that land falls within the catchment area of the proposed Finnis River Batchelor Dam. Loss of that land would constitute a detriment as would the payment of rent to a Land Trust in excess of that paid for a grazing licence.
- (59) GI-2 I 01 held by G. W. McClelland is in Area 3 but outside that portion recommended for a grant.
- (60) GL2102 held by D. J., L. A. and R. J. Mackay is in Area 4. No evidence was called as to the effect that a grant of land to a Land Trust would have.
- (61) Gadon Diamond Drilling Co. has occupational licence OL 1028 in Area 4. There was no evidence as to the effect of a grant of land to a Land Trust on the use of this land.
- (62) CRA Services Limited holds occupation licence OL1030 in Area 4. There was no evidence as to the effect of a grant of this land to a Land Trust.
- (63) At the time of the hearing there were pending a number of applications for leases or licences in the claim area. There was no evidence of direct financial detriment likely to result if any of this land was granted to a Land Trust. Some detriment may result from persons not being able to use the land or by having no greater interest than a lease or licence from a Land Trust.
- (64) The matters mentioned by Mrs Von Erwin have been dealt with in this report or are outside its scope.
- (65) The only interest of the Northern Territory Cattle Council was in an early hearing of the claim.

Darwin 22 May 1981

LEGAL REPRESENTATIVES

Mr C. P. Cameron and Mr D. A. Parsons for Kungarakany and Warai claimants

Mr T. F. Coulehan for Maranunggu claimants

Mr G. M. Eames and Mr P. J. Teitzel for the Northern Land Council

Mr P. D. McNab for the Commonwealth of Australia and Australian National Railways Commission

Mr I. M. Barker Q.C., Mr F. J. Gaffy and Mr G. E. Hiley for the Attorney-General for the Northern Territory

Mr P. W. Walker for Marathon Petroleum Australia, Limited, Uranerz Australia Pty Ltd, Mines Administration Pty Ltd, A.O.G. Minerals Pty Ltd and Northern Territory Association of Four-Wheel Drive Clubs Inc.

Mr J. P. Hamilton and Miss E. McCracken for CRA Services Limited and CRA Exploration Pty Ltd

Mr J. P. Hamilton and Mr P. W. Walker for Peko Exploration Ltd and Electrolytic Zinc Company of Australasia Limited.

Mr N. R. Halfpenny and Mr P. B. Bracher for Mr W. A. Townsend

Mr P. B. Bracher for Mr R. E. Bright and Meneling Station Pty Ltd

Mr T. I. Pauling, counsel assisting the Commissioner

CONSULTANTS

Professor B. L. Sansom, anthropologist

Dr D. T. Tryon, linguist

LIST OF WITNESSES

Abalak (George Havelock) Christopher Ford

Anmilil (Magdaline England) Raoul Ziani de Ferranti

John Benjamin Ayre

Jane Carter Goodale

Richard Thomas Baker Bobette Goodrern

Banjo Banderson Dudley Rogers Green

Kerry Stanton Batton

Bilawuk Bernard Havlik

Betty Maureen Bilawuk Pavalina Henwood

Ida Edwards Bishop Francis Xavier Herbert

April Bright Graham Hockey

Robert Edwin Bright Felix Holmes

Ada Calma Anthony Hunter

Rhonda Calma

Thomas Calma Andrew Jackaboi

Pandela Clayton Rose Jansen

Marie Ruth McGinness Corby William Henry Johnston

Robert Daly Tony Kenyon

Margaret Dayi

Nancy Dayi Bessie Laniyuk

Cathy Devereux John William Lawrie

Irwin Drewes Robert Hugh Layton

William Liddy

Margaret McGinness Edwards Patricia Jane Lloyd

John Noel Whiteford Elliston Sadie McGinness Ludwig

Wendy Ludwig

Dolly Mabul Fejo Henry Lungmirr

Joseph McGinness Valentine Bynoe McGinness
Anne Margaret McGrath Eddie McGregor
Eva McGregor Janey McGregor
Madeline McIntosh Mabel Mainbel
Audrey Majar Nugget Majar
Peter Melyen Kathleen McGinness Mills
Brandy Minggan Henry Moreen
Mildred McGinness Morley Dean Lynton Ottens
Johnny Panquee William Parry
Joyce McGinness Patullo Edith McGinness Ramsay
Margaret Rivers Basil Leon Sansom
Maurice George Sargent Peter George Simpson
Christopher Paul Smith Peter Gerald Spillett
Violet McGinness Stanton Peter John Sutton
Jimmy Tapnguk Tony Francis Tapsell
Dandy Tjunmurrun William Townsend
Darrell Trevor Tryon John Colin Walton
Arthur Hugh Wand Martin Warugul
Waditj Fred Waters John Waters
Sandra Waters Joy White
Lidawi Doris White Nancy Margaret Williams
Harry Wilson Roy Yarrowin
Roger Yates Don Oswald Zimmerman

List of Exhibits

1. Amended map and amended description of land claimed.
2. Map and two overlays showing categories of land claimed in original application.
3. Map showing roads within claim area.
4. Map and overlay showing approximate location of existing and proposed powerlines.
5. Map showing surface water resources potential in Darwin-Adelaide River Region.
6. List of mining tenements as at 15 October 1979.
7. E. A. Dwyer: An Outline of the Geology and Mineral Prospects of the Finnis River Aboriginal Land Claim Area, N. T.
8. Claim book.
- 8A. Map accompanying claim book.
9. Appendix to claim book (Restricted) and maps accompanying appendix.
- 9A. Additional site information.
10. Map showing mining interests within claim area.
11. Map of Finnis River and proposed Batchelor Dam catchment area and monitoring stations.
- 11A. Map of Finnis River-Batchelor Dam catchment area.
12. Map of existing Darwin and Manton Dams with catchment areas.
13. Map showing status of land in claim area.
- 13A. Supplementary status map of claim area.
- 13B. Map showing status of land within Finnis River-Batchelor Dam catchment area.

14. Batchelor Town Plan 1979.
15. Letter from Loftus and Cameron to Crown Solicitor dated 7 August 1980 and Crown Solicitor's reply dated 8 August 1980.
16. Reports and documents supplied by Northern Territory Government as at 12 August 1980.
- 16A. Letter from Northern Territory Electricity Commission to Department of Law dated 8 August 1980.
17. Extracts from Exhibit 175 in Warlpiri Land Claim.
18. Letter from Chief Minister to Chairman of Northern Land Council dated 24 August 1978.
19. Letter from Chief Minister to Chairman of Northern Land Council dated 20 December 1978.
20. Letter from Solicitor-General to Aboriginal Land Commissioner dated 15 January 1979.
21. Commonwealth's submission on Status of Kangaroo Flats Army Training Area.
- 21A. Extract from Commonwealth of Australia Gazette No. S I 19, dated 29 June 1979.
22. Map of Kangaroo Flats Army Training Area.
23. Letter from Loftus and Cameron to Cridland and Bauer dated 18 August 1980 and Cridland and Bauer's reply dated 19 August 1980.
24. List of Dr R. H. Layton's publications.
25. Letter from Prof. R. M. Berndt to Dr P. J. Ucko dated 7 March 1980.
- 25A. Letter from Dr P. J. Ucko to Prof. R. M. Berndt dated 27 February 1980.
26. Correspondence between Dr R. H. Layton and Prof. N. Tindale.
27. Map showing tribal boundaries.
28. Correspondence between Dr N. M. Williams and Prof. W. E. H. Stanner.
29. Letter from Prof. W. E. H. Stanner to Dr R. H. Layton undated, received 19 August 1980.
30. Genealogies.
31. Letter from Mr G. E. Hiley to Department of Law dated 15 August 1980 and letter from Department of Lands to Mr Hiley dated 20 August 1980.
32. Finniss River Station Report dated 13 March 1978.
- 32A. Map and index accompanying Exhibit 32.
33. Copy of topographical maps used by Messrs W. Ivory and A. F. Tapsell (copy of Exhibit 9).
34. Overlay relating to Exhibit 33.
35. W. Ivory and A. F. Tapsell: A Report On The Traditional Ownership Of The Wagait Reserve And North And South Peron Islands.
36. Map of the Northern Territory of Australia: Tribes of the Northern Territory.
37. A. N. McGrath and L. Coltheart: Brief history of non-Aboriginal activities in vicinity of Finniss River claim area with map and other material.
38. Letter from Department of Mines and Energy to Mr V. McGinness undated.
39. W. Ludwig: The changing role of women in Aboriginal society.
40. Letter from V. and J. E. Stanton and Co. to Department of the Northern Territory dated 21 September 1977.
41. Statement by Mrs V. Stanton.
42. Transcript of evidence given by Mrs V. Stanton to Ranger Uranium Inquiry.
43. Statement by Mrs I. Bishop.
44. 22 photographs of shade-laying ceremony, with captions. (Restricted)
45. Descriptions of shade laying ceremony by Mrs I. Bishop and others. (Restricted)
46. Photographs taken by Mrs V. Stanton of Kungarakany and Warai country.
47. Transcript of evidence given by Kungarakany and Warai claimants in closed session. (Restricted)
48. Report of President of Wagait Association for year ended May 1980.
49. Constitution of Wagait Association.
50. Amendment to list of claimants.
51. Photograph of Wuljurr, Noongoonjool and Miranda.
52. Photograph of Abalak, Leniook and Derrich Minna.
53. Diagrams of Kungarakany and Warai kinship systems.

54. Additional correspondence between Dr N. M. Williams and Prof. W. E. H. Stanner.
55. Additional correspondence between Dr R. H. Layton and Prof. R. M. Berndt.
56. T. A. Parkhouse: Native Tribes of Port Darwin and its Neighbourhood.
57. Correspondence from Department of the Northern Territory to Mr J. E. Stanton.
58. Report by Dr P. J. Sutton.
- 58A. Dr P. J. Sutton's Report Part 3. (Restricted)
59. Map accompanying Dr P. J. Sutton's report.
60. Extracts from historical material by Mulvaney, Lourandos, Mitchell and Sturt.
61. Photographs A E of Maranunggu ceremonies.
62. Submission by Uranerz Australia Pty Ltd.
63. Document entitled To the Marranunggu Tribe.
64. Transcript of two tapes of 1978 Bamboo Creek meeting regarding Wagait Reserve, original and revised.
65. Tape and transcript of Maranunggu men's secret evidence. (Restricted)
- 66A. Dr P. J. Sutton: Notes on some aspects of traditional Aboriginal land take-overs marked by conflict.
- 66B. Dr P. J. Sutton: Evidence of early northward migration by certain Maranunggu people, and their continued occupation of the Finnis River area.
- 66C. Dr P. J. Sutton: Additional material on men's secret/sacred ceremonies among the Finnis River Maranunggu.
- 66D. List of Dr P. J. Sutton's published works.
67. Map prepared by Mr E. P. Milliken, Department of Aboriginal Affairs File 73/5096.
68. Department of Aboriginal Affairs File 73/5096.
69. Prof. R. M. Berndt: Territoriality and the problem of demarcating sociocultural space.
70. Extract from Dr P. J. Sutton's thesis: Wik: Aboriginal Society, territory and language at Cape Keerween, Cape York Peninsula, Australia.
71. Material prepared by Miss P. J. Lloyd including three papers: Name bestowal of Marranunggu claimants; Supplement (2); and additional information on Maranunggu burial sites.
72. Information on Maranunggu woman making ceremony. (Restricted)
73. Submission by Department of Trade and Resources.
74. Submission by Department of Defence.
75. Submission on behalf of Department of National Development and Energy: Rum Jungle.
76. Rum Jungle Mine Site map: April 1974.
77. Extract from Parliamentary Paper 198/1977 pp. 16, 17.
78. Curriculum vitae of Mr W. H. Johnston.
79. Statement of evidence of William Henry Johnston.
80. Curriculum vitae of Mr J. N. W. Elliston.
81. Statement of evidence of John Noel Whiteford Elliston.
82. Woodcutters Project costs.
83. Woodcutters Prospect.
84. Woodcutters L5 Prospect Cross-section.
85. Woodcutters L5 Projected Longitudinal section.
86. Supplementary documents supplied by Northern Territory Government as at 1 October 1980.
87. Map of maintained roads within claim area.
88. Map of Finnis River Batchelor Dam catchment.
89. Supplementary notice of intention to be heard by Northern Territory Government.
90. Map showing location of Batchelor garbage dump.
91. Certified copy of miscellaneous lease No. 581.
92. Copy of special purposes lease No. 453.
93. Policy behind the Mining Act-paper prepared by Mr C. P. Smith.
94. Department of Treasury-Circular memorandum to Departments dated 30 May 1980.
95. Greater Darwin Area (including Acquisition Area) Estimated total housing demand.
96. Graph D.R.D. to McMinns Demand-Supply Curves.

97. Darwin Water Supply. Future sources Vols I and 2.
98. Letter from Mr A. H. Wand dated 23 April 1979 with telex attached and further telex.
99. Finnis River (Batchelor) Dam Studies. Interim environmental report.
100. Extract from Finnis River (Batchelor) Dam Studies. Phase 1, Part A Interim Report pp. 1.113.
101. Exploration licences held by Mr P. Purich.
102. Finnis River Land Claim: mining tenements as at 9 June 1980.
103. Letter from Tolhurst, Druce and Emmerson to Aboriginal Land Commissioner dated 27 June 1980.
104. Letter from Carol B. Marson to Aboriginal Land Commissioner dated 20 June 1980.
105. Submission by Northern Territory Association of Four-Wheel Drive Clubs Inc.
106. Impact of Recreation on the Top End, paper prepared by Environmental Council (N.T.) Inc.
107. Review of N.T. Barramundi Fishery: No. 1.
108. Letter from Treasurer and Minister for Lands and Housing to Mr R. T. Baker dated 30 April 1980.
109. Extract from the Northern Territory News dated 29 March 1980, p. 29.
110. Report of Board of Inquiry into Feral Animals in the Northern Territory.
111. World Conservation Strategy, prepared by International Unions for Conservation of Nature, United Nations Environmental Program.
112. Australian Academy of Science Report: A National System of Ecological Reserves in Australia.
113. Report by Miss P. J. Lloyd and Dr N. M. Williams on Maranungu Women's Ritual.
114. Standard form of easement by Northern Territory Electricity Commission.
115. Submission by Mr B. Havlik.
116. Petition by Batchelor citizens and covering letter.
117. Map of claim area marked by Mr M. G. Sargent.
118. Correspondence between Ms E. McCracken and Prof. R. M. Berndt.
- 118A. Prof. R. M. Berndt's notes to Prof. B. Sansom dated 29 September 1980.
119. Documents relating to Meneling Station.
120. Submission on behalf of Australian National Railways Commission with 4 maps attached.
121. A Review of the Alice Springs to Darwin Rail Link (July 1980).
122. Additional information on acquisition of Kangaroo Flats extension.
123. Dr D. T. Tryon: Statement on the Finnis River Land Claim.
124. Prof. W. E. H. Stanner: Aboriginal Territorial Organisation: Estate, Range, Domain and Regime in Oceania (1965) Vol. 36 No. 1.
125. Prof. B. L. Sansom: Statement on the Finnis River Land Claim.
126. List of Kungarakany and Warai claimants not presently residing in area of land claimed.
127. Summary of visit to Finnis River claim area, 7-8 October 1980.
128. Cycle of Life, Kungarakany and Warai Women's Ritual Responsibilities. (Restricted)
129. View of Maranungu traditional country, Wednesday 8 October 1980.
130. Corrected spellings listed by Dr D. T. Tryon.
131. Submission by Mr T. I. Pauling on the meaning of 'Aboriginal' in the Land Rights Act.
132. Submission by Northern Land Council on meaning of 'Aboriginal' in the Land Rights Act.
133. Material prepared by Mrs A. Bright and Mrs C. Devereux.
134. Statutory declaration by Boyne Litchfield made 30 October 1980.
135. Letter from Mr R. A. Fountain to Chief Property Officer, Department of Administrative Services dated 24 November 1978.
136. Letter from Department of Administrative Services to Deputy Crown Solicitor dated 14 November 1980 with attachments.
137. Composite map showing existing railway in relation to claim area.
138. Submission of Commonwealth of Australia.
139. Map of claim area showing tracks marked by Mr R. T. Baker.
140. Submission on behalf of Peko Exploration Ltd and others-Conspectus of the relevant provisions of the Aboriginal Land Rights (Northern Territory) Act 1976.

- 140A. Extract from Shorter Oxford Dictionary.
141. Kungarakany and Warai stories collected by Mrs V. Stanton.
142. Submission by Marathon Petroleum Australia, Limited
143. Life histories of Kungarakany and Warai witnesses.
144. Summary of evidence relating to spiritual affiliations to Kungarakany and Warai sites on the land.
- 144A. Summary of evidence given by Kungarakany and Warai witnesses in closed session regarding sites. (Restricted)
145. Overlay showing claim area and land subdivision.
146. Composite of Exhibits 4, 11A, 12, 13, 13A as modified, and 87.
147. Submission by Northern Territory Government.
148. Supplementary submissions on grazing licences on behalf of Peko EZ Companies, CRA Group.
149. Finnis River Land Claim, Index to Kungarakany Warai claim.
150. Finnis River land claim index of transcript.
151. Chronology of Maranunggu residence.
152. Document showing areas which Peko EZ Companies seek to have excised from claim-Woodcutters area.
153. Aboriginal Law and Politics: Submission by Kungarakany and Warai claimants.
154. Statement by Graeme John Neate.
155. Correspondence with Mr R. J. Leal dated 17 July 1980, 7 August 1980 and 4 November 1980, with attachments.
156. Summary of submissions on questions of detriment, on behalf of Peko Exploration Ltd and others.
157. Summary of submissions by Northern Territory Government on grazing licences.
158. Summary of submissions by Northern Territory Government on functions of Aboriginal Land Commissioner.

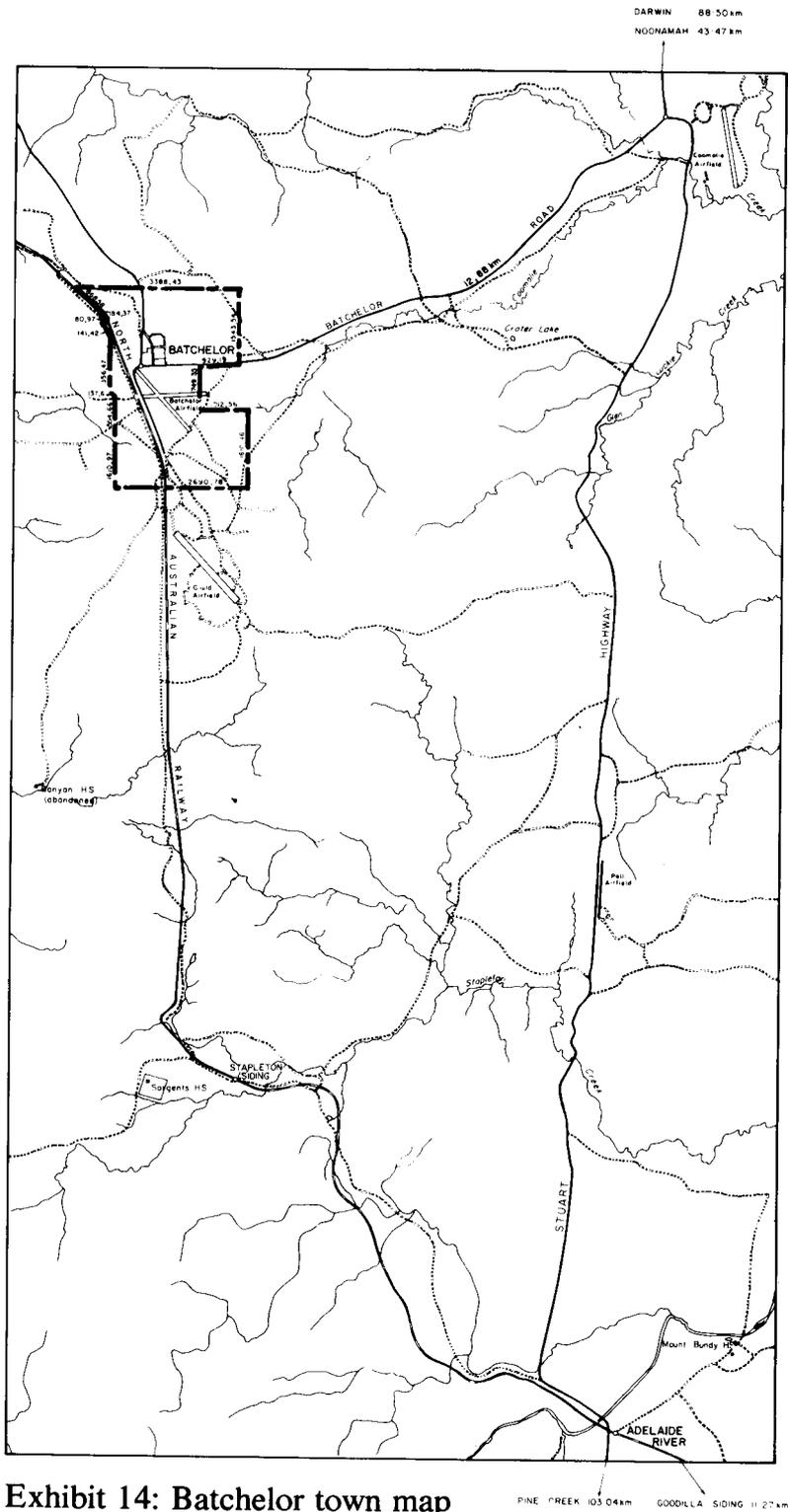


Exhibit 14: Batchelor town map

Exhibit 14: Batchelor town map

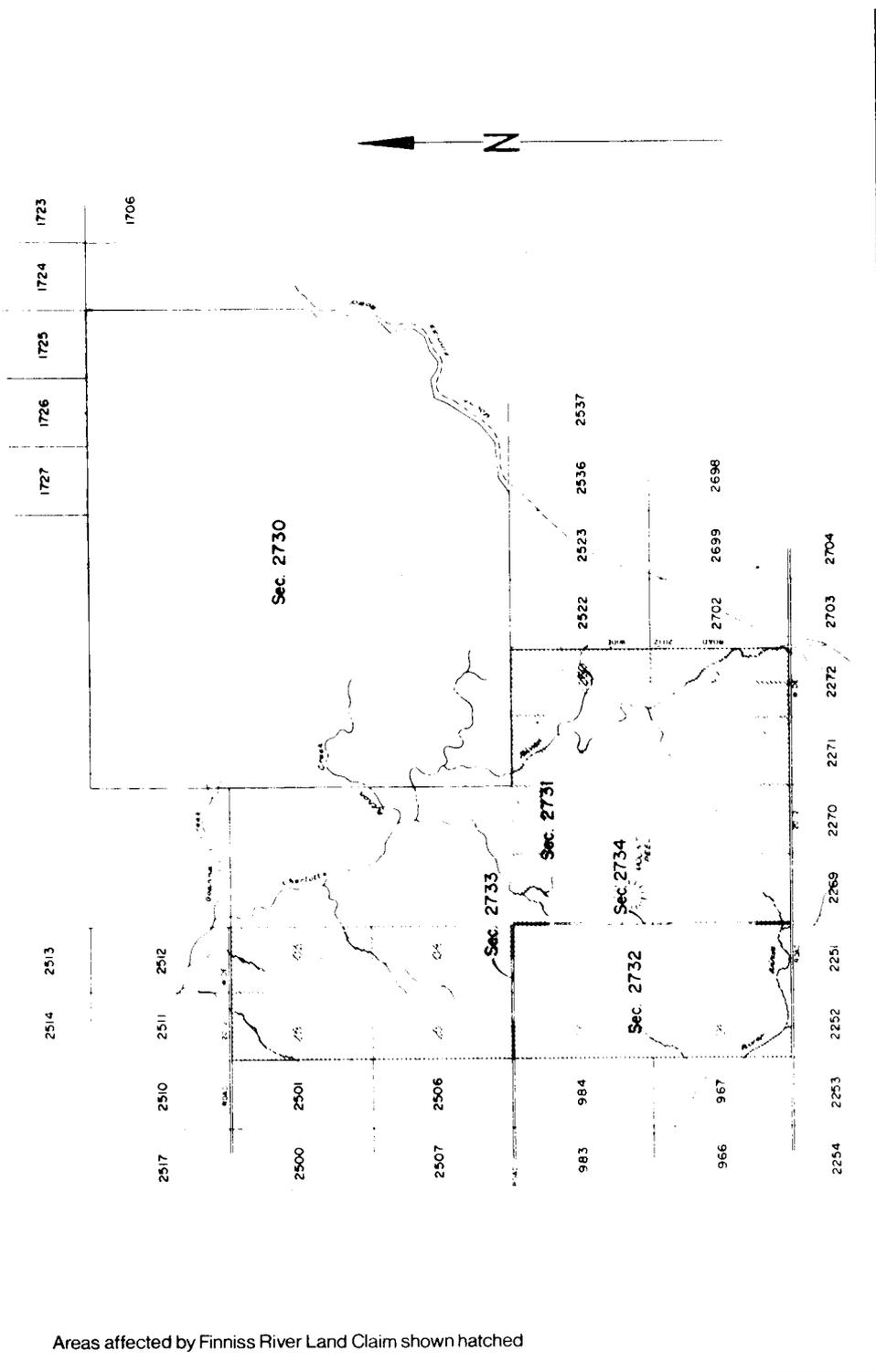


Exhibit 22: Map of Kangaroo Flats Army Training Area

Exhibit 22: Map of Kangaroo Flats Army Training Area

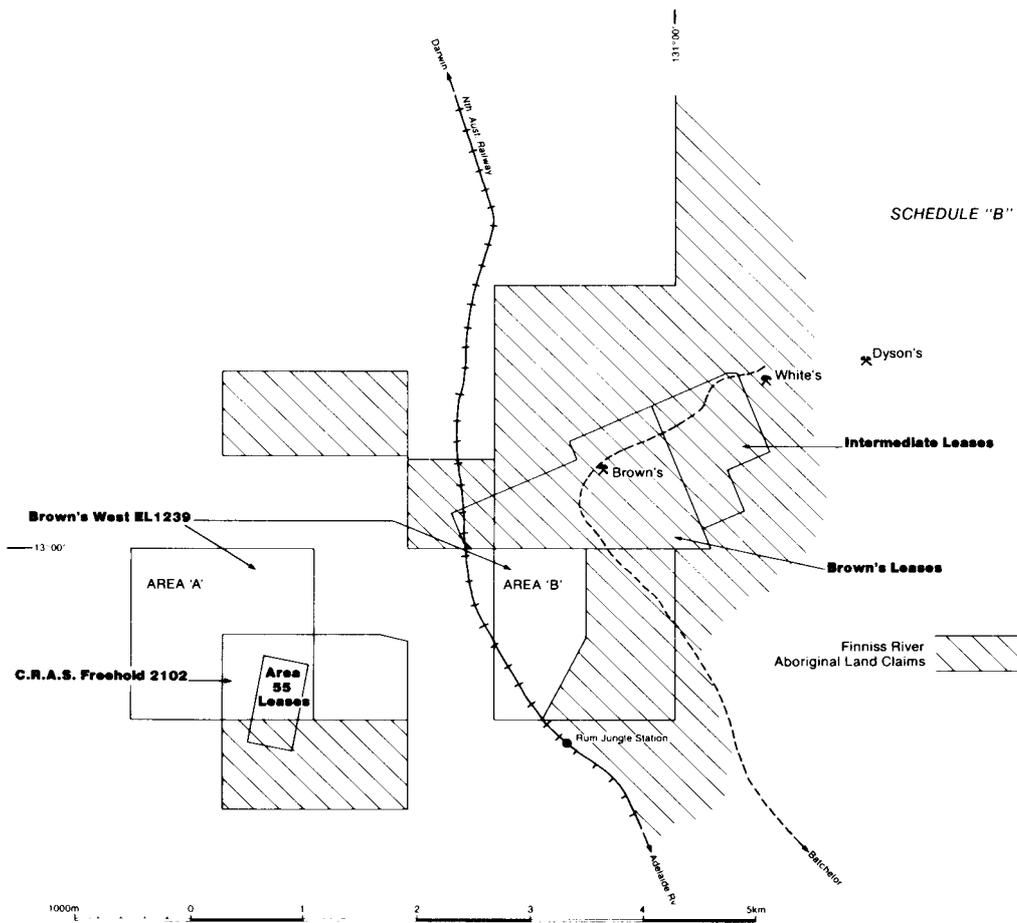


Exhibit 79: CRA Locality Plan

Exhibit 79: CRA Locality Plan

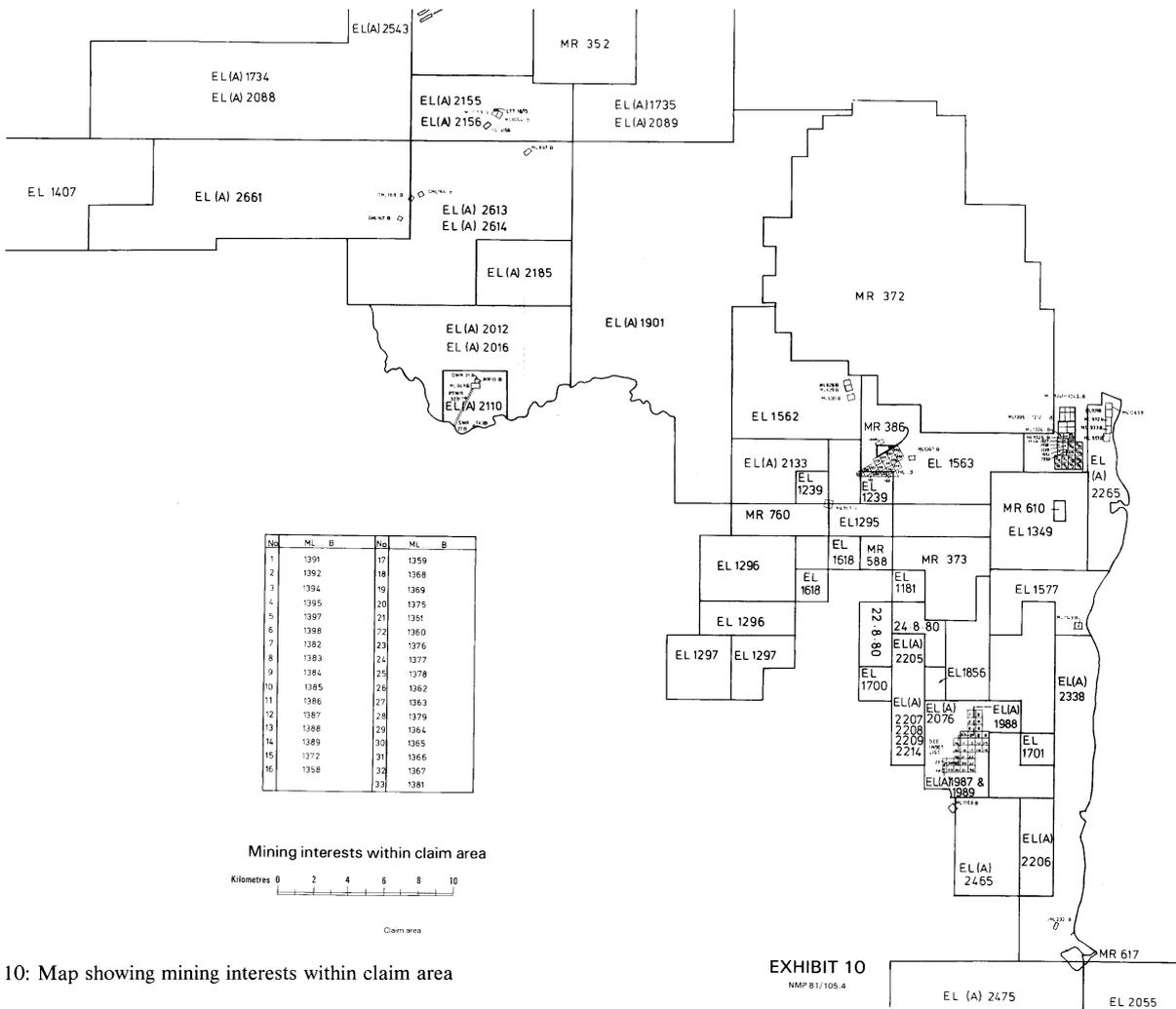


Exhibit 10: Map showing mining interests within claim area

Exhibit 10: Map showing mining interests within claim area

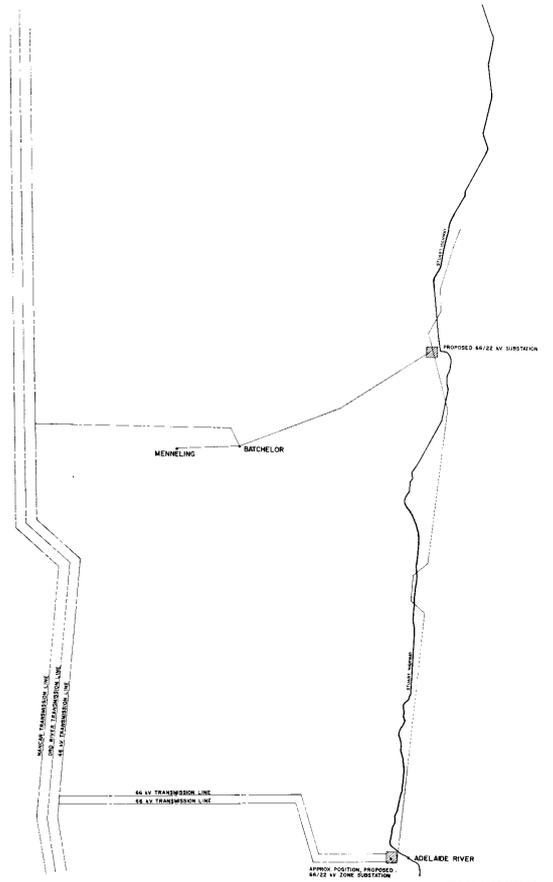
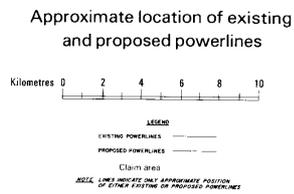
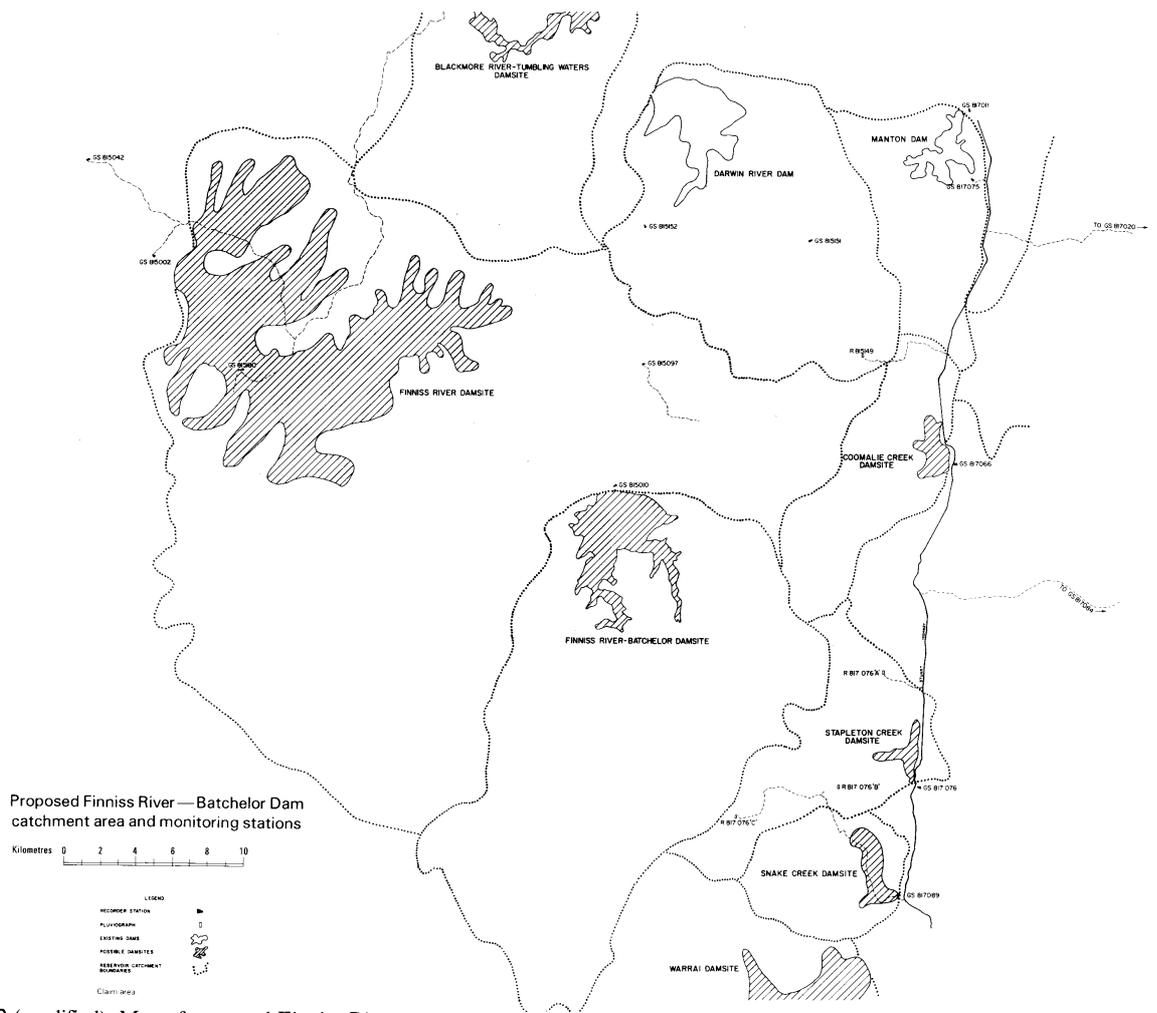


EXHIBIT 4
NMP 81/105.1

Exhibit 4: Map showing approximate location of existing and proposed powerlines

101

Exhibit 4: Map showing approximate location of existing and proposed power lines



Exhibits 11A and 12 (modified): Map of proposed Finnis River-Batchelor Dam catchment area and monitoring stations

EXHIBIT 11A and 12 (modified)
NMP B1/105.5

Exhibits 11A and 12 (modified): Map of proposed Finnis River-Batchelor Dam catchment area and monitoring stations

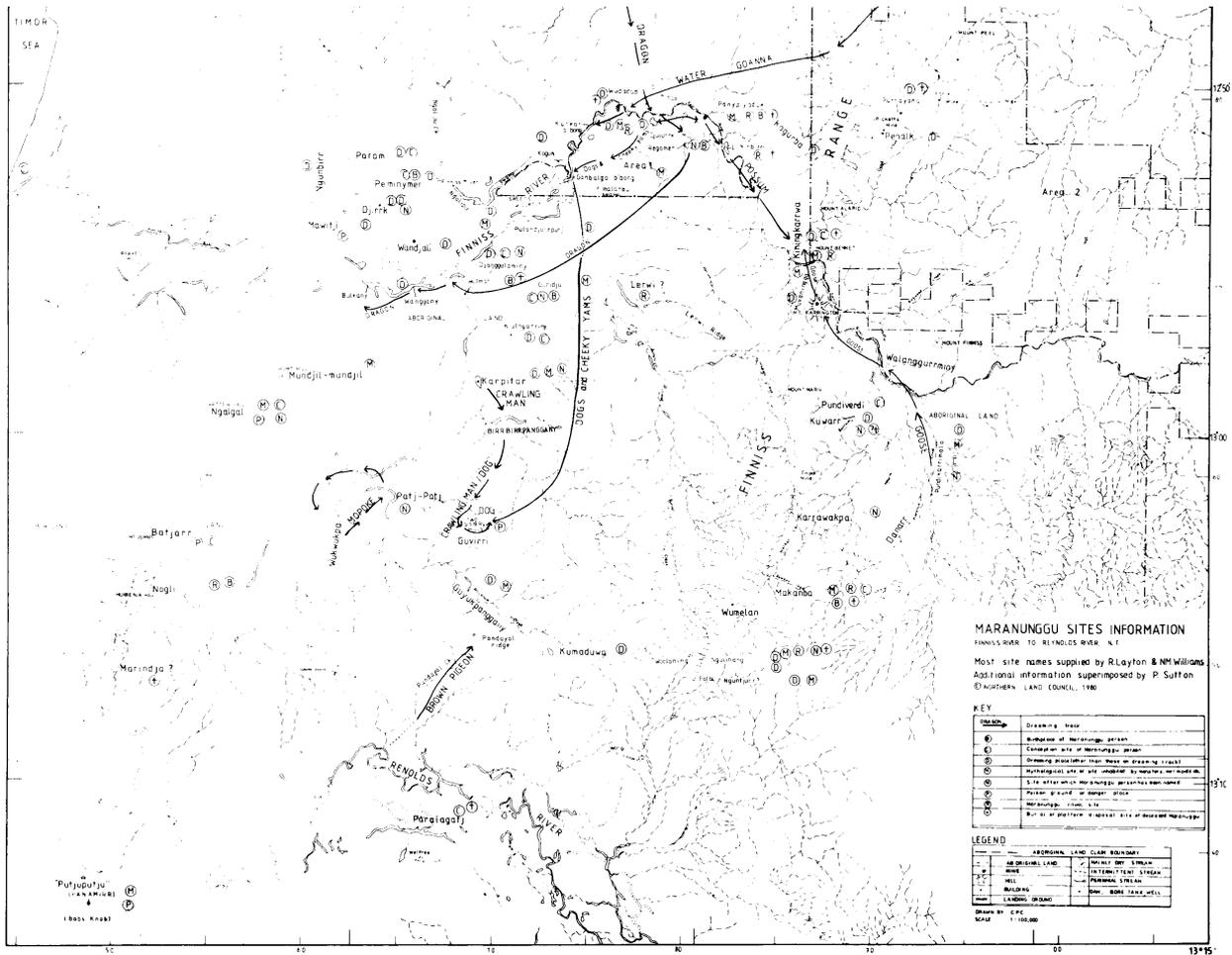


Exhibit 59: Map of Maranunggu sites accompanying Dr P.J. Sutton's report

Exhibit 59: Map of Maranunggu sites accompanying Dr P. J. Sutton's report

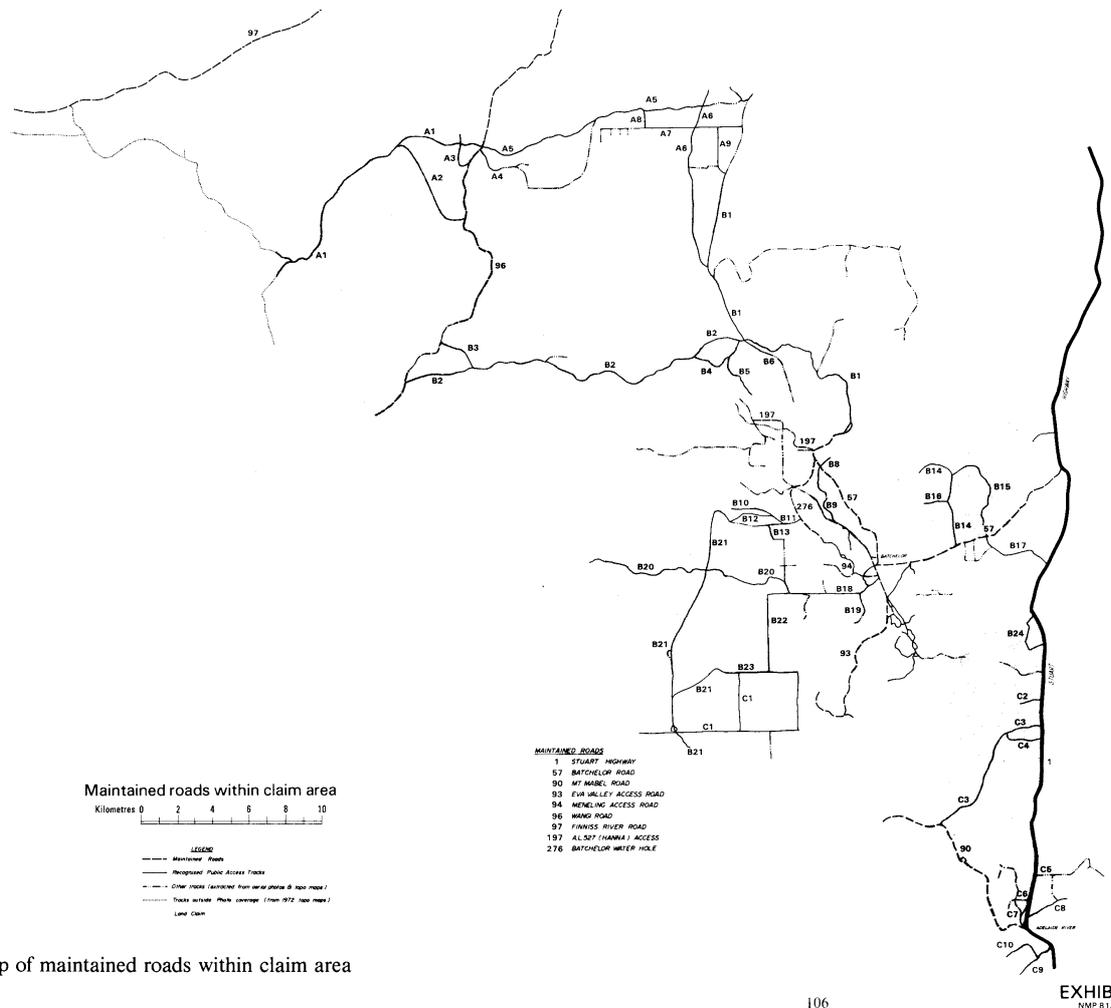


Exhibit 87: Map of maintained roads within claim area

Exhibit 87: Map of maintained roads within claim area

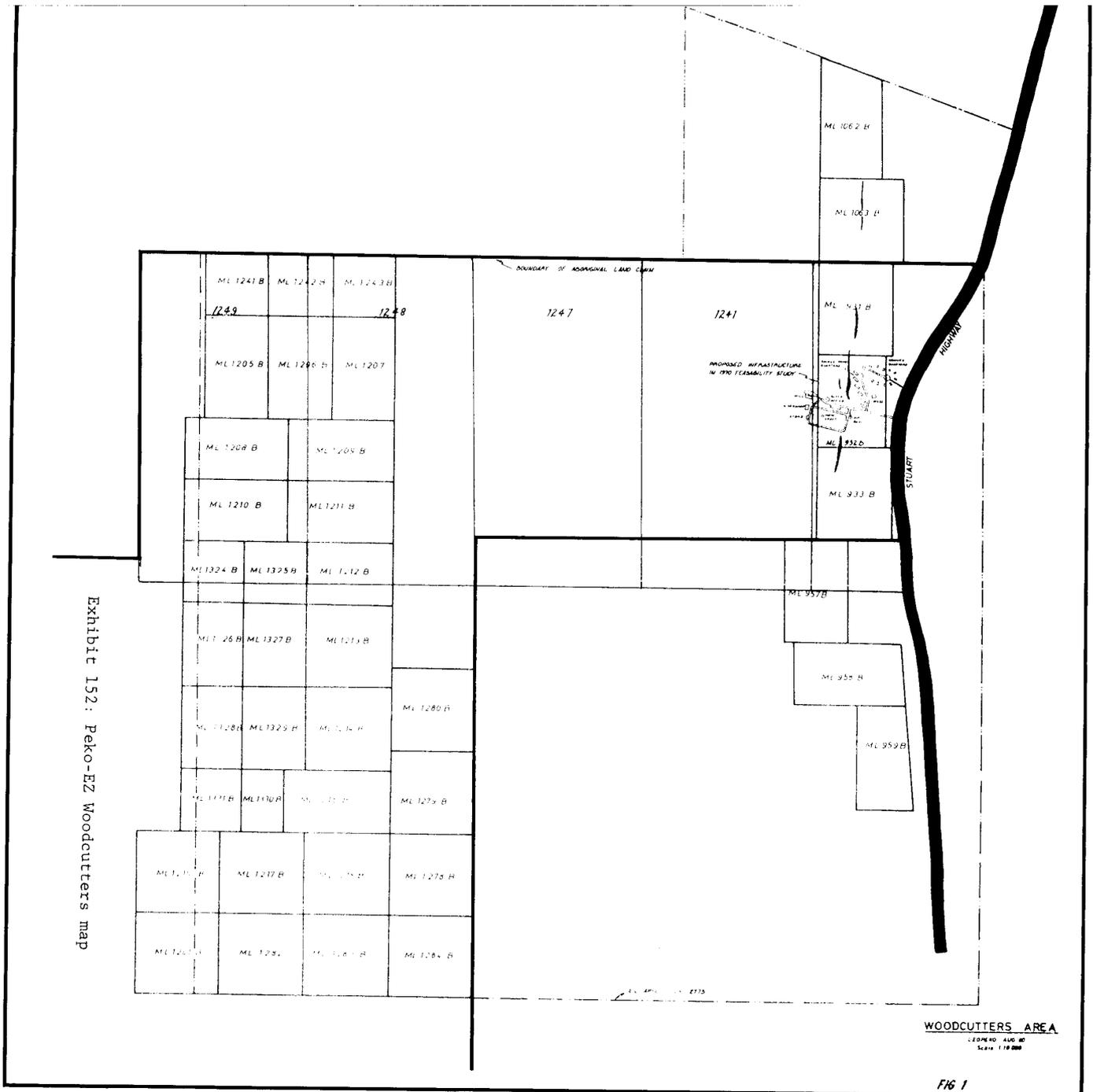


Exhibit 152: Peko-Ez Woodcutters map

Exhibit 152: Peko-Ez-Woodcutters map

Exhibit 152: Peko-Ez Woodcutters map

