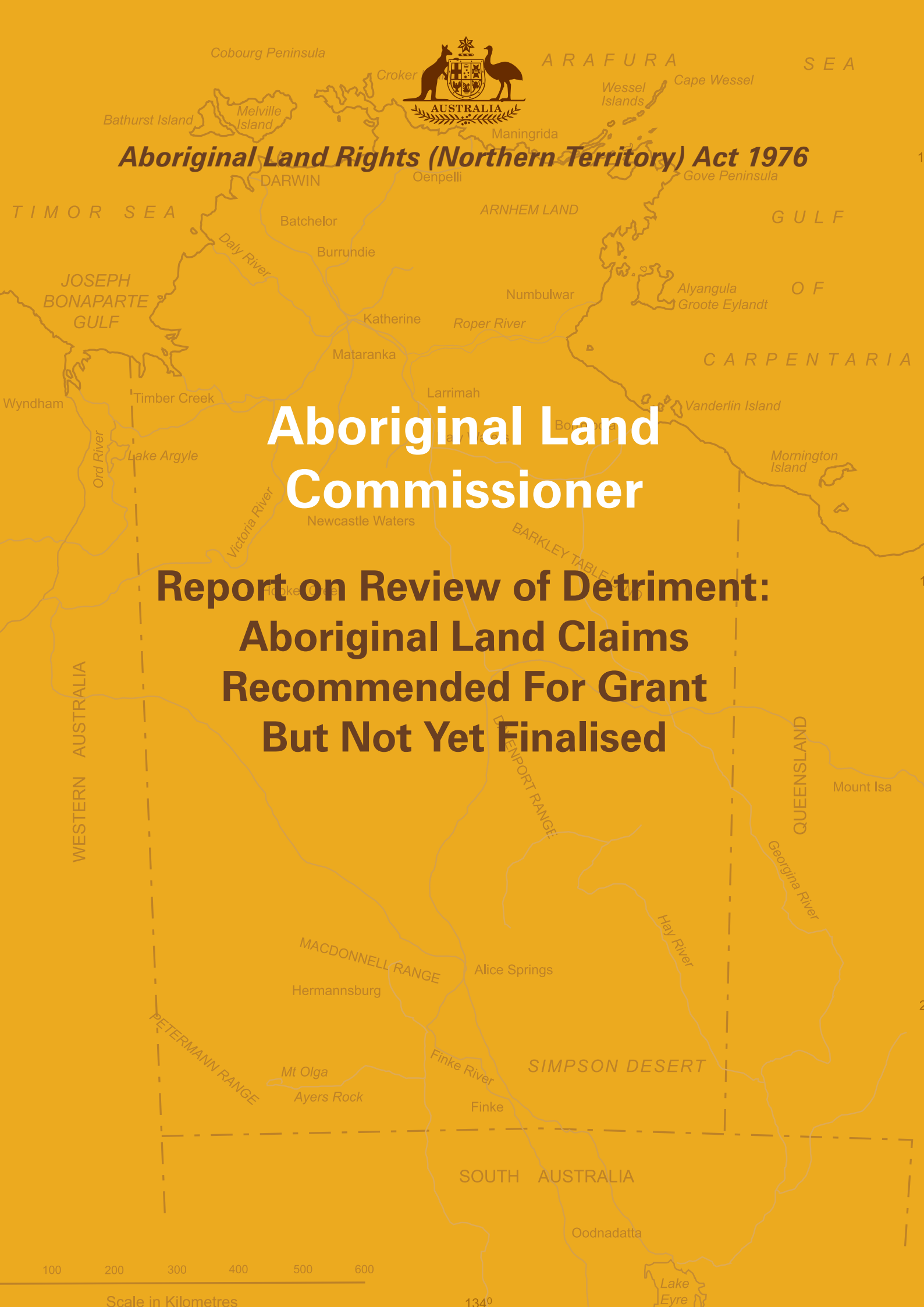




Aboriginal Land Rights (Northern Territory) Act 1976

Aboriginal Land Commissioner

Report on Review of Detriment: Aboriginal Land Claims Recommended For Grant But Not Yet Finalised

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Scale in Kilometres

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Australian Government

Aboriginal Land Rights (Northern Territory) Act 1976

**REPORT ON REVIEW OF DETRIMENT:
ABORIGINAL LAND CLAIMS RECOMMENDED FOR
GRANT BUT NOT YET FINALISED**

Senator the Hon Nigel Scullion

Report to the Minister for Indigenous Affairs

Senate, Parliament House

Canberra ACT 2600

The Hon John Mansfield AM QC

Aboriginal Land Commissioner

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24 December 2018

Senator the Hon Nigel Scullion
Minister for Indigenous Affairs
PO Box 6100
Senate, Parliament House
Canberra ACT 2600

Dear Minister,

On 6 July 2017 you requested me to undertake a Review of detriment issues relevant to 16 land claims previously recommended for grant but not yet finalised pursuant to s 50(1)(d) of the *Aboriginal Land Rights (Northern Territory) Act 1976*. The Review was to have been completed by 5 July 2018, subsequently extended to 31 December 2018.

I have now completed the Review in accordance with the Terms of Reference.

I have the honour to present my report of the Review to you with this letter.

The Review is in a report in one volume. As requested, with the report are the written submissions received in the conduct of the Review. I note that both the report and the submissions are in electronic form, and that a hard copy of the attachment will be provided to you at your request.

I would be pleased to meet with you to speak to the report of the Review at your convenience.

I seek your approval to make the report available to the stakeholders who participated in the Review, and also to the public via my Departmental website. As the report is to you, it is of course a matter for you whether you authorise me to release copies of the report, and if so at what time. You would be aware of the keen interest in the report of many of the stakeholders, and their awareness of the reporting date.

Again, I would be pleased to meet with you in the event you wish to discuss the matters raised in the letter.

Yours faithfully,

The Hon John Mansfield AM QC
Aboriginal Land Commissioner

Terms of Reference

Review of Detriment - Aboriginal land claims recommended for grant but not yet finalised

Background

Section 50(1) of the *Aboriginal Land Rights (Northern Territory) Act 1976* (ALRA) sets out the functions of the Aboriginal Land Commissioner (Commissioner) to inquire into and report his or her findings of traditional Aboriginal ownership in relation to land claim applications, and where required, make recommendations to the Minister for the grant of land. Under s 50(3)(b) of the ALRA, the Commissioner is also required to comment on the detriment to persons or communities including other Aboriginal groups that might result if the claim was acceded to in whole or part.

Section 11 provides for the Commonwealth Minister to proceed with the recommendation of the Commissioner for the grant of land, where he or she is satisfied that the land should be granted. Although not specified in the ALRA, it is accepted that “the Minister is bound to have regard to detriment in exercising his powers under s.11(1)”¹. In practice, the Minister is most likely to exercise his or her powers under s 11 upon agreement between parties to settle detriment matters.

There are 16 longstanding land claims recommended for grant but not yet finalised, and not currently subject to settlement negotiations, dating from 1981 to 2004. Ordinarily the Commissioner would not have a function to perform in respect of claims already recommended for grant. On 6 July 2017 the Minister requested the advice of the Commissioner under s 50(1)(d) of the ALRA in relation to the status of detriment issues associated with these claims. While all 16 land claims are the subject of this review, it is appropriate to focus in some detail on the group of 12 claims that relate only to land which comprises the beds and banks of rivers and/or the intertidal zone (ITZ)². Beds and banks and ITZ claims constitute the majority of longstanding claims recommended for grant but not yet finalised and present particular issues in relation to addressing matters of detriment.

A range of political, legal and procedural factors are likely to have contributed to the delayed resolution of detriment issues associated with the above land claims and therefore warrant consideration in this review. Notably, the 2008 Blue Mud Bay (BMB) case decision by the High Court has impacted on the consideration of detriment in relation to beds and banks and ITZ claims not yet finalised. Detriment identified in past land claim reports largely reflected the widely held understanding prior to the BMB decision, that members of the public could enter (but not ‘drop anchor’ on) Aboriginal land in the ITZ without authorisation pursuant to sections 70 and 73 of the ALRA. As a result of the BMB decision, entry to Aboriginal land in the ITZ and the beds and banks of

¹ *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24 Brennan J at [22].

² As defined under section 67A(14) of the *Aboriginal Land Rights (Northern Territory) Act 1976*

rivers, whether or not covered from time to time by tidal waters, is subject to such authorisation and administered by land councils under a permit system established under the *Aboriginal Land Act* (NT).

Settlement negotiations between parties, and the Minister's decision to proceed with recommendations to grant Aboriginal land will be substantially assisted by this detriment review, including an update of detriment identified in land claim reports in light of the BMB decision.

Terms of reference

- Commence an independent review into the status of detriment issues relating to the following Aboriginal land claims that have been reported on and recommended for grant by the Aboriginal Land Commissioner, but not yet finalised under the *Aboriginal Land Rights (Northern Territory) Act 1976*:
 - Finnis River Land Claim No. 39 (Report No. 9)
 - Mataranka Area Land Claim No. 69 (Report No. 29)
 - Lower Daly Land Claim No. 68 (Report No. 67)
 - Lower Roper River Land Claim No. 70 (Report No. 65)
 - Maria Island and Limmen Bight River LC 71 (Report No. 61)
 - Maria Island Region Land Claim No. 198 (Report Nos. 61 and 63)
 - McArthur River Region Land Claim No. 184 (Report No. 62)
 - Manangoora Region Land Claim No. 185 (Report Nos. 62 and 66)
 - Lorella Region LC 199 (Report No. 63)
 - Garrwa (Wearyan & Robinsons River Beds and Banks) Land Claim No. 178 (Report No. 64)
 - Seven Emu Region Land Claim No. 186 (Report No. 66)
 - Wollogorang Area II Land Claim No. 187 (Report No. 66)
 - Western Roper River (Beds and banks) Land Claim No. 141 (Report No. 68)
 - Roper Valley Area Land Claim No. 164 (Report No. 68)
 - Mataranka Area (NT Portion 916) Land Claim No. 129 (Report No. 68)
 - Elsey Region Land Claim No. 245 (Report No. 68)
- Establish direct communication with the following key stakeholders for the purpose of inviting them to participate in the review:

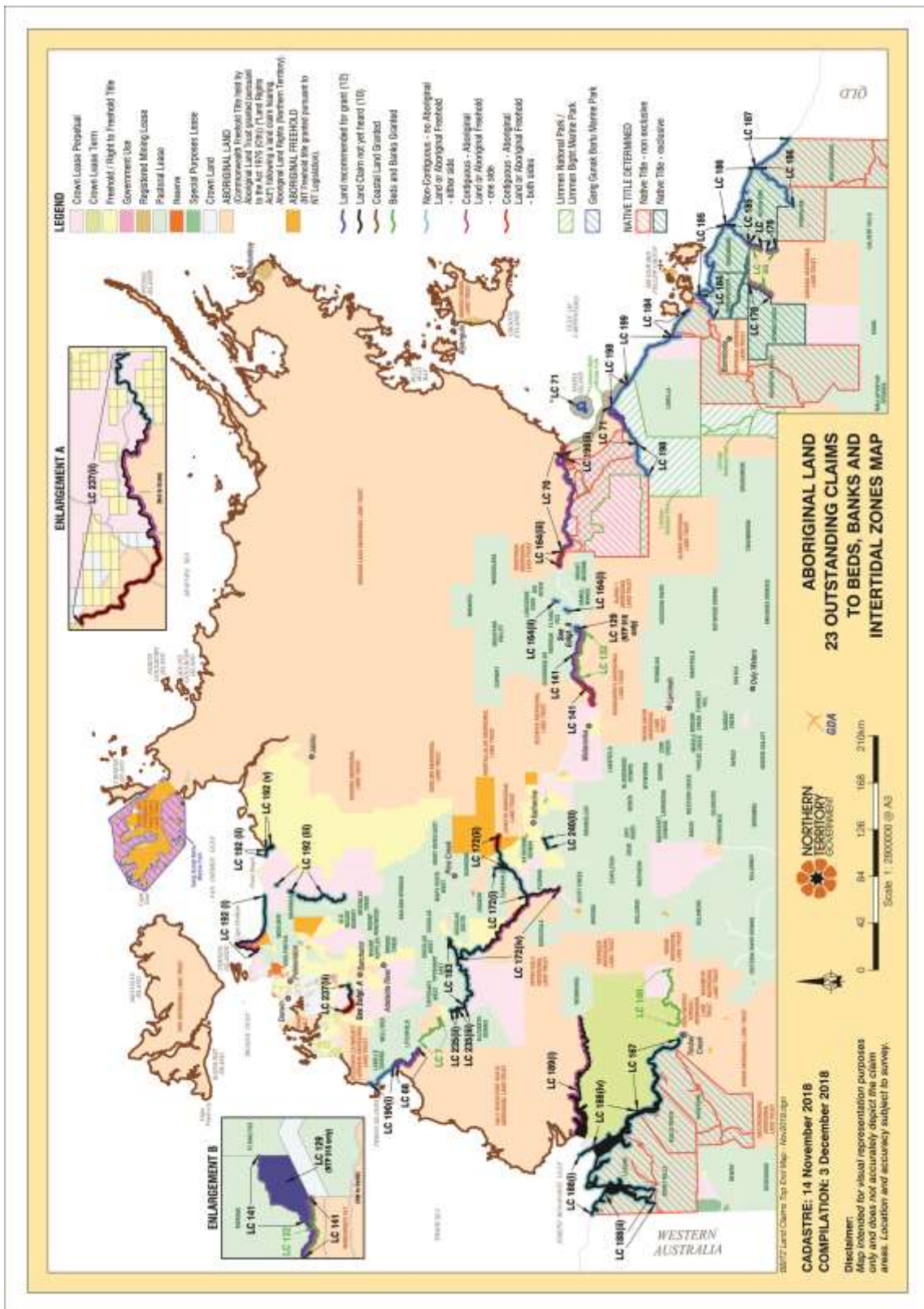
- Northern Land Council
- Northern Territory Government (in particular the Solicitor for the Northern Territory, the Department of Infrastructure, Planning and Logistics, and the Department of the Chief Minister)
- Commonwealth Government (in particular, the Department of Indigenous Affairs)
- NT Seafood Council, Amateur Fisherman's Association NT, NT Cattleman's Association and other interests as appropriate
- Review relevant land claim reports and related documents held by the Office of the Aboriginal Land Commissioner and the Indigenous Affairs Group, Department of the Prime Minister and Cabinet.
- Ascertain the views of stakeholders and seek relevant information relating to detriment issues associated with the land claims.
- Identify, review and where appropriate make recommendations with respect to relevant land claims in relation to:
 - Areas of progress and causes of delay to addressing/settling detriment matters to date;
 - Current opportunities and challenges to addressing / settling detriment matters;
 - New or updated detriment issues arising since the publication of land claim reports;
 - Such other matters as may be pertinent to the review.
- No later than 6 July 2018, provide to the Minister for Indigenous Affairs the Hon Nigel Scullion MP a written report and recommendations.

Review Report – Contents

- Record the terms of reference for the review and processes by which stakeholders were engaged in the review.
- Identify the key sectoral stakeholders with an interest in identification and resolution of detriment associated with relevant land claims.
- List the groups, individuals and representative organisations consulted during the review, and the nature of their interest in the identification and resolution of detriment associated with relevant land claims.

- Summarise the views and actions of key stakeholders with regard to progress and delays to settling detriment matters to date, and challenges and opportunities to progress settlement by June 2019.
- Comment on the impact of the High Court's 2008 Blue Mud Bay decision on the settlement of detriment in relation to relevant beds and banks and ITZ land claims, and where appropriate identify any new detriment arising as a result of the decision. Identify updated detriment issues relating to other claims as appropriate.
- In response to the review findings, and by reference to the Minister's powers under s 11 of the Land Rights Act, make recommendations to expedite the resolution of land claims recommended for grant but not yet finalised addressing, among other things, procedural matters and stakeholder actions to settle detriment matters.
- Attach and index any written submissions received in respect of the review.

Map



Source: Northern Territory Government

Abbreviations

AA	Access Authority
AFANT	Amateur Fisherman’s Association of the Northern Territory
AGS	Australian Government Solicitor
ALRA	<i>Aboriginal Land Rights (Northern Territory) Act 1976</i>
ASOC	Alice Springs Outback Anglers Club
AWC	Australian Wildlife Conservancy
BBLF	Bing Bong Loading Facility
BMB	Blue Mud Bay
Britmar	Britmar (Aust) Pty Ltd
CMU	Crocodile Management Unit (NT)
Commissioner	Aboriginal Land Commissioner
CSS	Carpentaria Shipping Services Pty Ltd
DENR	Department of Environment and Natural Resources (NT)
DIPL	Department of Infrastructure, Planning and Logistics (NT)
DK Pastoral	DK Pastoral Company Pty Td
DPIR	Department of Primary Industry and Resources (NT)
DTC	Department of Tourism and Culture (NT)
EL	Exploration Licence
ELA	Exploration Licence (Application)
ELR	Exploration Licence (in Retention)
EP	Exploration Permit
EPA	Exploration Permit (Application)
<i>Fisheries Act</i>	<i>Fisheries Act 1988</i> (NT)
FTO	Fishing Tourism Operator
Glencore	Glencore Pty Ltd
IBA	Indigenous Business Australia
ITZ	Intertidal Zone/s
KABFC	King Ash Bay Fishing Club Inc
LNP	Limmen National Park
MA	Mineral Authority
ML	Mineral Lease
MLA	Mineral Lease (Application)
MLN	Mineral Lease Northern
MIM	Mount Isa Mines Ltd
MRM	McArthur River Mines Pty Ltd

MSC	MS Stock Contracting
NLC	Northern Land Council
NRRP	Nathan River Resources Project
NTCA	Northern Territory Cattlemen's Association
NTIO	Northern Territory Iron Ore Pty Ltd
NTP	Northern Territory Portion
NTR	Northern Territory Resources
NTSC	Northern Territory Seafood Council
PL	Pastoral Lease
<i>Pastoral Land Act</i>	<i>Pastoral Land Act 1992 (NT)</i>
PPL	Perpetual Pastoral Lease
PWC	Power and Water Corporation (NT)
RBIOP	Roper Bar Iron Ore Project
SPL	Special Purpose Lease
TGS	Tipperary Group of Stations
<i>Water Act</i>	<i>Water Act 1992 (NT)</i>
WDR	Western Desert Resources Ltd

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1. Introduction

- 1.1.1. On 6 July 2017, the Minister for Indigenous Affairs, Senator the Hon Nigel Scullion, requested me pursuant to s 50(1)(d) of the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) (ALRA) to conduct an independent review into the status of detriment issues relating to 16 specified land claims that have been reported on and recommended for grant by the Commissioner, but not yet finalised under the ALRA.
- 1.1.2. The Terms of Reference and a map of the land claims the subject of the Review are included at the beginning of the Report at pages i-iv. As can be seen, the Terms of Reference incorporated certain background information, required certain procedural steps to be taken, and specified the material to be included in this Report. It was initially requested that the Report be completed by 6 July 2018. By reason of the procedural steps appropriately required, so as to ensure that all stakeholders were properly engaged in the Review and had sufficient time to prepare their respective submissions and supporting material, and the extensive nature of the submissions and supporting material, I requested an extension of time to complete the Report. The time to do so was extended to 31 December 2018. My letter of request to the Minister is dated 15 March 2018 and the Minister's response is dated 11 April 2018. Those letters are **Annexures 1** and **2** respectively to this Report.
- 1.1.3. It is also noteworthy that the Terms of Reference refer specifically to the BMB decision: *Northern Territory of Australia v Arnhem Land Aboriginal Land Trust* [2008] HCA 29; (2008) 236 CLR 24. That decision of the High Court determined that waters within the boundaries of Aboriginal land, including ITZs where grants of title are to the low water mark, were to be regarded as Aboriginal land for the purposes of s 70 of the ALRA and the *Fisheries Act* (NT) did not authorise entry to these waters. There had previously been some debate about whether that was the case.
- 1.1.4. Twelve of the 16 land claims the subject of the Review are limited to ITZs and the beds and banks of rivers. Associated recommendations for grants of Aboriginal land are understood to extend to the low water mark, insofar as they relate to ITZs. The High Court's BMB decision post-dated the relevant recommendations for grants of Aboriginal land. Consequently, the range of interests which it might be said (and has been said in submissions to this Review) might give rise to relevant detriment is significantly more extensive than might otherwise have been the case. The specific consideration below of the various claims of detriment readily illustrates that.

- 1.1.5. I have not sought to explore in detail why there have been no decisions to date by the Minister in relation to the recommended grants of Aboriginal land. However, it is clear that the uncertainty about the effect of a grant in relation to waters overlying Aboriginal land would have been a contributing reason in many instances. Indeed, the Commissioner in the reports in relation to Land Claim Nos. 70, 71, 184, 185, 198 and 199 (which are the subject of this Review) specifically referred to the issue about the exclusivity of waters above Aboriginal land to the low water mark as a matter to be resolved before the Minister made any grant.
- 1.1.6. The BMB decision has resolved that issue. In turn, it has prompted the assertions more specifically of detriment in relation to waters overlying Aboriginal land.
- 1.1.7. Of course, those issues are discussed in detail below.

1.2. Background

- 1.2.1. It is desirable that a little of the background to the ALRA and of the procedures prescribed by the ALRA for the Commissioner to report on land claims be noted.
- 1.2.2. The ALRA was the culmination, to one point, of the move to recognise Aboriginal land rights in the Northern Territory.
- 1.2.3. The referendum in 1967 to amend s 51(xxvi) of the *Australian Constitution* so as to enable the Commonwealth to legislate with respect to Aboriginal people was one step in that process. Together with the territories power in s 122 of the *Constitution*, it enabled the enactment of the ALRA. At about the same time, there was more significant movement by Aboriginal people for the recognition of land rights, evidenced by the walk-off from Wave Hill cattle station by the Gurindji People. The more immediate momentum for the ALRA was presented by the decision of the Supreme Court of the Northern Territory in *Milirrpum v Nabalco Pty Ltd and the Commonwealth* (1971) 17 FLR 141 (the Gove land rights case). In that case, it was held that the doctrine of communal native title rights was not recognised by the law of Australia. In effect that decision accepted that, for legal purposes, at the time of first European settlement of Australia, the land was terra nullius. Of course, that position has been exposed as erroneous by the *High Court in Mabo v Queensland (No 2)* [1992] HCA 23; (1992) 175 CLR 1. That decision in due course led to the enactment of the *Native Title Act 1993* (Cth).
- 1.2.4. By reason of the Gove land rights case, the Australian Government in 1973 commissioned Sir Edward Woodward to inquire into and report on how to recognise Aboriginal land rights in the Northern Territory. The Aboriginal Land Rights

Commission, Second Report (AGPS, Canberra, 1974) made recommendations which were to a significant degree embodied in the ALRA.

- 1.2.5. The ALRA was introduced as a bill by the Whitlam Government in 1975, but lapsed because of the then federal election. Following the election, in 1976 it was reintroduced with some amendments by the Fraser Government. The primary purpose of the ALRA was one shared by both the principal political parties. It is not necessary to refer to them in detail.
- 1.2.6. It was clearly beneficial legislation, to enable recognition to traditional Aboriginal interests in land where the prescribed circumstances existed, and to give Aboriginal traditional owners secure title over such land and the control of the activities over such land. The ALRA also sought to achieve those objects after balancing the aspirations and expectations of Aboriginal communities with the competing interests of others, including adjoining landowners or lessees and the wider Australian community.
- 1.2.7. The balance requires the consideration of any DETRIMENT (the word used in s 50(3)(b) of the ALRA) which the Commissioner must report to the Minister, and which the Minister must consider when deciding whether to make a grant of land under s 11 of the ALRA.
- 1.2.8. The word or concept of “detriment” is not defined in the ALRA.

1.3. Acknowledgements

- 1.3.1. The principal entities which participated in this Review were the Northern Land Council (NLC), representing the claimants, and the Northern Territory, representing the Northern Territory Government and public, including individual and sectoral interests. Obviously, a very significant burden rested with the Northern Territory and the NLC, as their roles required consideration of each of the Land Claim reports, and related issues of detriment. In addition, as appears below, the issue referred to as cumulative detriment required consideration.
- 1.3.2. There is set out later in this Review at **Annexure 3** the list of all participants, including industry-based representatives, and individuals and corporations. The industry-based representatives also adopted a role on behalf of their members which crossed over issues common to many of the Land Claim Reports. They too undertook a considerable workload.

- 1.3.3. I record my appreciation of the cooperation of each of the participants in the provision of submissions and supporting material in a timely manner, and in particular the representatives of the Northern Territory and the NLC for the reasons given.
- 1.3.4. I refer to the detailed procedures for the conduct of the Review below. It was necessary to set timetables for the making of submissions and providing evidentiary material. This approach gave the NLC, on behalf of the claimants, the opportunity to respond to initial submissions. It also gave those who made initial submissions the opportunity to respond to the position adopted by the NLC. On occasions, supplementary material was specifically requested.
- 1.3.5. In all instances, it appeared that each of the participants to the Review genuinely attempted to meet the timelines set, and to provide the information requested.
- 1.3.6. In the conduct of the Review, I have been greatly assisted by my Executive Officer Ms Anna Gilfillan and by my Legal Assistant Ms Elena Zola. They worked tirelessly and effectively to ensure the course of the Review was both efficient and effective. They conducted the extensive informal communications with the participants to the Review to ensure that timelines were met, or meaningfully but sensibly adjusted. They assembled and analysed the very extensive submissions, collated them in a meaningful and helpful way, and provided sound counsel in the consideration of the issues raised by the various detriment submissions. They played a large role in drafting various sections of this Review Report. Without their considerable assistance, the Review could not have been completed within the time specified.

2. Executive Summary

2.1. Preliminary observations

- 2.1.1. This Section of the Review is intended to set out the principal findings, conclusions, and recommendations made to the Minister in accordance with the Terms of Reference.
- 2.1.2. As I have indicated, the starting point for the Minister to consider the exercise of powers under s 11 of the ALRA based upon a recommendation of the Commissioner in relation to each of the 16 Land Claims exists by reason of the relevant Reports.
- 2.1.3. In each instance, the land claimed, being the subject of the Commissioner's several Land Claim Reports, is unalienated Crown land. In each instance, the relevant Report of the Commissioner makes it clear that there is a strong basis for the finding of traditional Aboriginal ownership of the area claimed.
- 2.1.4. The claims of detriment are not said, in all instances, to arise from existing competing legal rights over the claimed area. In many instances they are said to arise by reason of an interest or interests in an area or areas adjoining or nearby to the claimed area, and where the claimed area has to date been used for the purposes of the activity authorised on the adjoining area. In some instances it is said to follow from activities undertaken on, or partly on, the claimed area, but without any legal right to have done so. That does not cover all the categories of detriment asserted, but a significant number of them.
- 2.1.5. It is a big step to routinely accept that claims of detriment in such circumstances should mean that the interests of those asserting detriment should displace the recommendations of the Commissioner that a grant of land should be made to the traditional owners. To do so would amount to little more than to reflect the attitude of many of the first European settlers. It would be to ignore the beneficial purpose of the ALRA, and the underlying theme of cases such as the *Mabo (No. 2)* case³.
- 2.1.6. The ALRA does not give any direction to the Minister as to how to proceed to the weighing or balancing exercise required by s 11 of the ALRA, in the case of detriment. That observation applies to the similar exercise in part required by the Terms of Reference for this Review.

³ *Mabo v Queensland (No. 2)* [1992] HCA 23.

- 2.1.7. But it is clear that the mere existence of detriment does not, and should not, mean that no grant of land should be made in accordance with the relevant recommendations of the Commissioner. Each set of circumstances should be addressed individually.
- 2.1.8. And, in doing so, it is important to bear in mind the purpose of the ALRA. Justice Gray as the Commissioner in Report on the *Malngin and Nyinin Claim to Mistake Creek Land Claim Report (No. 50)* said that, in addition to the obvious advantage to the traditional owners of a grant of unalienated Crown land:
- there will be considerable intangible advantage if the land becomes Aboriginal land under the Land Rights Act. A grant of land to a land trust is a recognition of the traditional rights of people whose forebears were dispossessed. Such recognition is at the highest level of Australian society. It carries with it an affirmation of the value of traditional rights and of places of cultural significance. It enables the traditional Aboriginal owners of land and others with traditional attachments to use the land as a focus for the further development of their community spirit and the maintenance and increase of their self-esteem. The importance of such an acknowledgement and such a focus for modern Aboriginal communities should not be underestimated.⁴
- 2.1.9. I also observe that, relevantly, the ALRA makes available for grant, upon the recommendation of the Commissioner, only unalienated Crown land: see s 50(1)(a), except where the land is alienated Crown land where the interests in that land are held by or on behalf of Aboriginals. It is a limited category of land available for claim. It does not provide for any interference in the rights and interests of the Crown in the case of alienated land (subject to the exception mentioned). In particular it does not provide for any interference in the interests of any other persons or entities to whom or to which the Crown has granted an interest, be it a pastoral or a mining or any other legal interest.
- 2.1.10. In light of Commissioner Gray's comments above, I note that the delay in finalising the relevant land claims has not only deferred the consideration of detriment under s 50(3)(b) of the ALRA, but is also likely to have caused disadvantage to recognise traditional Aboriginal owners, who have endured no less uncertainty than those with detriment interests. This Review does not address such detriment as may have been experienced by traditional Aboriginal owners, nor its potential degree. It is not known what has been lost by the grant of land not having been made, as recommended, to date.

⁴ *Malngin and Nyinin Claim to Mistake Creek Land Claim (No. 50)*, 18 June 1996, Gray J, 36 [6.2.3].

- 2.1.11. In this Review, I have endeavoured to identify and record all the persons or entities, including the Northern Territory, who or which have asserted detriment if a grant of land were to be made to the traditional owners. As the following sections of the Report indicate, certain common themes emerged, or there was some commonality between the holders of legal interests who asserted as a detriment their right, or more accurately their privilege, in their use of the unalienated Crown land because it has come to add value to their enjoyment or usage of their legal estates. The common themes are separately discussed.
- 2.1.12. It is convenient to note that the major submissions on detriment concerned the interests of recreational and commercial fishers and of pastoralists.
- 2.1.13. As appears, those concerns can be accommodated by adopting the proposals of the NLC on behalf of the traditional owners, so effectively allowing those activities to continue after the grants of the claimed areas.
- 2.1.14. In the case of recreational fishers, that is to be done by a permit management system with the details set out in the discussions below. It is my view that the proposed system is a satisfactory one, both in its ambit and in its procedures. One ongoing detriment will be the need to obtain the permit, but that is a minor matter where it can be obtained on-line, and there are a range of options to suit most fishing needs. The other ongoing detriment will be the fee payable for the permit, after a generous moratorium period. That too is a minor matter, not shown to be significant except in a general way, and which should not impede the significant majority of fishers. There is a contrast in the failure to complain of those pastoralists who presently charge a fee to fishers to pass across their leases to get access to fishing spots, and the complaint about a fee to be charged by the traditional owners for access to those fishing spots. That permit management system also removes the need to address the claim for 'cumulative detriment' by accretion of the restriction on fishing locations in relation to recreational fishing.
- 2.1.15. In the case of pastoralists, the NLC has proposed a licence to allow pastoralists to carry out the activities normally carried out by pastoralists in the use of the claimed areas that is the unalienated Crown land at a nominal rental. In other words, there are to be no changed restrictions on such uses. That proposal, in its scope again seems to me to be a satisfactory one. That is despite the pedantic, and in some cases ungracious, responses of some pastoralists participating in the review.
- 2.1.16. That observation also means that, in my view, it would be appropriate for the Minister, after such Departmental advice as the Minister considers appropriate, to

decide upon the adequacy of the proposed schemes without inviting further consultation on content and drafting with the various stakeholders, save perhaps for the Northern Territory. It would be a prolonged and unsatisfactory exercise, given the range of responses from those participants between acceptance, and hostility, and much in between.

- 2.1.17. Those two concessions by the traditional owners are significant. They must be taken into account by the Minister when deciding whether to make the grants recommended.
- 2.1.18. In the case of the pastoralists, there are additional claims to permit diversification of activities on their pastoral properties, both presently and in the unspecified future, which in essence involve unrestricted access to the presently unalienated Crown land for commercial profit-making purposes.
- 2.1.19. In many instances, those activities have commenced, without the approval required under the *Pastoral Land Act 1992* (NT) (*Pastoral Land Act*) and without any approval to undertake such commercial activities on the claimed land. In some cases, the pastoralist is specifically aware of the claim over the land and has proceeded nevertheless.
- 2.1.20. In no case is it said that the pastoralist would not have acquired the interest in the pastoral lease unless there was to be specific approval to carry out those activities on the leased and the adjacent claimed land. The obvious consequence is that the detriment claimed involves the assertion that whatever the pastoralist wants to do on the leased land taking advantage of the claimed land, whether in the present or in the future, should take priority over the interests of the traditional owners. Otherwise there is no relevant detriment. That proposition demonstrates its falsity, a matter pointed out by previous Commissioners from time to time.
- 2.1.21. In any event, having regard to the purpose of the ALRA, the priority in relation to such claimed detriment should be in favour of the traditional Aboriginal owners.
- 2.1.22. My recommendation is that such detriment claims should not stand in the way of the grant of the lands claimed.
- 2.1.23. In the case of commercial fishing, the position is more complex. The first point to make is that the grant of the claimed land is not said to preclude the Northern Territory from exercising its statutory powers to regulate fisheries management in the interests of the environment and fish stock management, and related purposes including reporting of commercial fishing catches and locations. The real issue is whether the claimed grants should be made, leaving the commercial fishers to

negotiate with the traditional owners about access to the waters of the claimed areas. It is the intent of the ALRA that the traditional owner should be able to take advantage of their traditional lands, and explicitly under ss 11A and 19 by making agreements of that character. The detriment to the commercial fishers is apparent, but difficult to quantify in many or most instances, because it is not made clear what other fishing resources are available to them or the economic consequences of engaging with the traditional owners as contemplated by the ALRA. The concessions by the traditional owners in relation to recreational fishing and in relation to pastoralists should also be taken into account. It is not the scheme of the ALRA that all persons who assert detriment should have that detriment accommodated before grants of the claimed land are made. Commercial fishing is conducted only under periodic licences issued by the Northern Territory.

- 2.1.24. Overall, I have come to the conclusion generally that it is appropriate for the Minister to make the claimed grants without requiring that the interest of the commercial fishers under their respective licences are further taken into account. There is no reason to think that the traditional owners who wish to take commercial advantage of their lands would not do so in a realistic way, so that the avenue of agreement with the commercial fishers is an acceptable one as contemplated by the ALRA.
- 2.1.25. The interests of miners are accommodated by Part IV of the ALRA. I do not think that their concerns about having to comply with the prescribed processes by the ALRA amounts to a detriment at all, and certainly not a detriment that would warrant a decision by the Minister to decline to, or to delay, the making of a grant of the claimed areas. That is a view which has firmly been expressed by past Commissioners. Particular projects associated with mining or construction and operating to support mining ventures are addressed in the individual claim reports in Chapter 7 of this Report.
- 2.1.26. There are other matters of concern raised in the detriment submissions which require individual attention for each claim: matters such as road access, access to boat ramps, the derivative interests of tourist facility providers (mainly accommodated indirectly by the preservation of recreational fishing), particular places of historical significance, and in the case of the Finnis River Land Claim the implications of rehabilitation of the mining site.
- 2.1.27. To make those summary recommendations readily accessible, I now include those sections of each of the 10 separate parts of Chapter 7 which contain the summary of

my comments and recommendations in relation to the land claims addressed in each of those Reports.

2.2. Summary of Recommendations

2.2.1. Finniss River Land Claim No. 39

- i. The central issue in respect of granting Section 2968 to traditional Aboriginal owners is the rehabilitation of the former Rum Jungle Mine Site.
- ii. The Commonwealth Government's Department of Industry, Innovation and Science (Commonwealth) and the Northern Territory are currently in the planning stages of a rehabilitation strategy to commence 30 June 2019. Any submissions relating to this strategy are not submissions of detriment, because it is accepted by the claimants that it is preferable that the rehabilitation process should be completed before the grant of the land.
- iii. At that time, the traditional owners are concerned about taking the land with the risk of the rehabilitation works leaving a legacy of problems. They seek indemnity from the Commonwealth against that risk. That is not so much a matter of detriment but about whether, whatever arrangements are made between the traditional Aboriginal owners and the Commonwealth, the traditional Aboriginal owners seek the grant. At that point, subject to such issues, there is no reason why a grant should not be made. The detriment claimed by mineral leaseholders is not detriment for the purposes of s 50(3)(b). Part IV of the ALRA and the agreement provisions account for these interests. Any detriment claimed in respect of complying with these provisions is not detriment but a quarrel with the ALRA itself. Moreover, it is possible that the existing mining interests in any event will have lapsed by that time.
- iv. The location of Rum Jungle Road is not agreed between the NLC and the Northern Territory. The survey prior to grant should resolve that issue. In any event, it will likely be considered by the Minister as a public road and thus excluded from grant by s 12(3) of the ALRA.
- v. In short, after the rehabilitation process, subject to the traditional owners wishing to receive the grant (having regards to concerns about the adequacy of rehabilitation or legacy risks associated with it), there should be no reason why the grant should not be made.

Mataranka Area Land Claim No. 69

- i. Brolga Tours is no longer in operation and therefore no longer holds a detriment interest.
- ii. Pastoral activities: In 1995, 7 years after Commissioner Maurice provided his land claim report to the Minister, the Roper Valley Station was subdivided into four separate parcels. In his report, Commissioner Maurice held that the Roper Valley Station lessees would suffer significant detriment if the land was granted and no accommodations for their pastoral interests were made. The Northern Territory was aware of this yet agreed to the subdivision, seemingly without an attempt to settle the detriment concerns, which were magnified when three additional pastoral lessees acquired a detriment interest in the land claim area.
- iii. Detriment would likely flow from a grant of Land Claim No. 69, if provision is not made for adjacent pastoral lessees.
- iv. The adjacent pastoral lessees should have been aware of the land claim upon purchase, and detriment suffered in the event of a grant of land might be said to have been a risk assumed by the purchasers of the leases. The Minister might, nevertheless, take the view that the detriment, as recorded at the time of the Land Claim Report, should be accommodated by the traditional owners by agreeing to access to the claim area for the pastoralists and their families for activities associated with the use of the pastoral lease for pastoral purposes. Elsewhere in this Report I have recorded the extent of such activities, as reflected in the submissions of the NLC.
- v. Diversification activities by pastoralists: The present and contemplated range of diversified activities by pastoralists should not be an impediment to the grant of land. Such activities or planned activities all arose well after the Land Claim Report. The traditional Aboriginal owners were not consulted about those activities. Even though the Northern Territory has authorised some non-pastoral related activities on Flying Fox pastoral lease (as noted, this is the only occasion in respect of the relevant land claims, in which such authorisation has been given), it has been assumed that the pastoralist may use the adjacent Crown land for profit making as part of those activities. It does not appear that there are any specific entitlements to access the unalienated Crown land for profit making activities. To accommodate such activities as a reason not to make a grant would effectively reflect the recognition or prioritisation of the informal (i.e. not

legally based) interests of the pastoralist over Aboriginal land at the expense of the traditional owners.

- vi. In any event, if a grant of land is made, there is no reason to believe the claimants will not be prepared to consider authorising such activities by agreement, with the so-called detriment being the payment of the access fees to the traditional owners. Resolution of any detriment by agreement is appropriate in light of the alternative: that is, that a grant of land is not made and traditional Aboriginal owners do not benefit from such a grant because the pastoralists rely on the land claim area to generate certain profits without any legal entitlement to do so.
- vii. Northern Territory Iron Ore Pty Ltd (NTIO) and other tenement holders' detriment concerns will be addressed by Part IV of the ALRA or by reason of ss 12(3) and (3A) of the ALRA.

2.2.3. **Lower Daly River Land Claim No. 68**

- i. In determining whether to grant the land as recommended, it is necessary to have regard to a number of interests where detriment has been asserted.
- ii. In the case of the pastoral lessee, notwithstanding that the then holder of the pastoral lease over Litchfield Station did not at the initial inquiry assert detriment, it is apparent that the lessee will experience detriment in the normal operations of the pastoral lease. The traditional owners, through the NLC, have indicated that those concerns may be met by a form of licence as indicated below, for a nominal rental. It is reasonable to conclude that the form of the proposed licence meets the reasonable concerns of the lessee in all respects. The Minister may wish to ensure that the licence has been, or will be, granted before making the grant of the land.
- iii. The pastoral diversification claims of detriment by Tipperary Group of Stations (TGS) (and supported by the Northern Territory and the Northern Territory Cattlemen's Association (NTCA)) are not claims which, upon analysis, should impede the grant of the land to the traditional owners. Those claims fall into the basket of unauthorised activities under the lease/unauthorised profit making activities over unalienated Crown land/ too non-specific/ not yet undertaken or potentially developed in the face of knowledge of the Land Claim Report. In any event, such activities, if the lessee wants to pursue them, might more properly be pursued by agreement with the traditional Aboriginal owners, thereby giving the traditional Aboriginal owners some benefit for the

commercial use of their land. As noted, the alternative really calls for the Minister simply to override the traditional Aboriginal ownership of the claimants because the pastoralist wants, or might want in the future, to take commercial advantage of the Crown land to which there is no present entitlement.

- iv. The claim area is closed to commercial fishing.
- v. The claim area is popular for recreational fishing and if the claimants do not enter into agreements for access or the NLC's proposed permit management system is not introduced, then recreational fishers will suffer detriment. This detriment may flow onto the regional and wider Northern Territory economy, in respect of its impact on tourism and visitation numbers. The material presented by the NLC indicates that the claimants will negotiate accommodating access agreements, or in the alternative, the NLC will develop an adequate permit management system that allows reasonable access to the claim area to recreational fishers.
- vi. If the land is granted, Fishing Tour Operators (FTOs) may suffer detriment in the absence of suitable agreements. There is a good history of the traditional Aboriginal owners of nearby land and waters entering into such agreements, and no reason to suspect that similar arrangements will not be made with FTOs if they choose to operate in the claim area and on terms that are mutually satisfactory. Consequently, the Minister could comfortably make a grant of the land on that assumption, having regard to the potential detriment to FTOs if otherwise they are not permitted to conduct their operations in the claim area. Such an agreement or agreements would reflect a proper balance between the traditional Aboriginal owners gaining some commercial benefit from the commercial use of their land and the FTOs similarly being able to continue their operations. Accordingly, this aspect of detriment should not impede the grant of the land.
- vii. No mining or exploration is currently undertaken in the claim area.

2.2.4. **Lower Roper River Land Claim No. 70**

- i. The submissions about general detriment common to all beds and banks and ITZ claims are discussed at Chapter 6. Each claim must, however, be considered in its own context and on its own facts.

- ii. Notwithstanding the detriment submissions from NTCA, there are no adjacent pastoral landholders to the land claim area. Acceding to the claim will cause no detriment to pastoral landholders or the pastoral industry.⁵
- iii. The land claim area is of high value for recreational and commercial fishers. In the event the claim area becomes Aboriginal land, these communities may suffer detriment. In the case of recreational fishers, the NLC's proposed permit management system, provided the Minister is satisfied that it is properly functioning and reasonable, is an appropriate way to alleviate that detriment. It will mean recreational fishers have access to the fishing areas under a permit, adapted to their needs and easily procured. It may, in future years, involve an appropriate small fee. Such a fee is appropriate as it is the traditional land of the relevant Aboriginal people. The detriment that may flow on to impact tourism and the regional economy will be alleviated also by the same process.
- iv. In the case of commercial fishing, which is of course subject to the regulatory supervision of the Northern Territory, the appropriate factor to accommodate the detriment is to anticipate that the traditional owners, once a grant is made (or the NLC on their behalf and with their approval prior to the grant) will agree to access to the commercial fishers under s 19 of the ALRA. There is some history of such agreements having been made in the past. The extent of this detriment would depend upon the outcome of the negotiations towards such agreements. That is not a conclusion which will entirely satisfy all the commercial fishers, or the Northern Territory. But it is not the function of the Minister to require all detriments to be fully accommodated as a condition of the making of the grant. To adopt that position places those who assert detriment in a much superior position to that of the traditional owners. That was clearly not intended by the ALRA. Rather the ALRA contemplates that in many circumstances, the grant of the land will enable the traditional owners to make such agreements, as specifically provided for in ss 12 and 19 of the ALRA.
- v. NTIO's Roper Valley Iron Ore Project has not yet received the necessary environmental proposals. The Project was also proposed and developed with the Northern Territory post 2003, after the Land Claim No. 70 was recommended for grant to traditional Aboriginal owners. The Northern Territory is and was

⁵ Pastoral detriment has not been discussed in the claim. I assume it was a mistake on NTCA and their legal representatives' part to include Land Claim No. 70 in their detriment submissions about related Roper River land claims.

clearly aware that the adjacent land claim area was recommended for grant and NTIO should have been aware the area was recommended for grant. The Project, therefore has been developed in the light of the recommended grant. For these reasons the Minister might consider it appropriate to treat NTIO's detriment claim as a potential detriment arising in the knowledge of the claim which, if the Project proceeds, subject to the traditional owners having the right (by reason of a grant), may be addressed through negotiations with those traditional Aboriginal owners for such access and other entitlement to use the claim area as are desirable for the Project. Otherwise, the balance would seem to be contrary to the intent of the ALRA, putting the traditional owners' rights as inferior to pretty much any future use of the land which emerges in the commercial interests of any corporate entity. The Northern Territory of course, and understandably, is supportive of development to the benefit of its citizens. But the citizens include the traditional owner interests, as provided in the ALRA, and the traditional owners of land in the Northern Territory have shown an appropriate interest in such development opportunities.

- vi. No detriment should be suffered by any mineral and/or energy tenement holders.
- vii. The power lines and water main which supply water to Ngukurr township should be considered a community purpose within s 15 of the Act and protected by s 14.
- viii. Carpentaria Shipping Services Pty Ltd (CSS) will suffer detriment if they are unable to exercise their drainage and water supply easements, as will the Northern Territory if they cannot access their water points to assist in the maintenance of roads in the area. The Minister may wish to ensure that any grant preserves those interests.
- ix. On the evidence available to me, I am not of the view that the power line sourcing the Munbililla/Tomato Island campground located on Northern Territory Portion (NTP) 819 is a community purpose under the ALRA. Rent may therefore be payable. The extent of the rent may constitute a detriment, but it is not likely to be a significant one.
- x. The status of public roads is accommodated under the ALRA, and the roads will be apparent from the survey which will be necessary.
- xi. Commissioner Olney, in his initial Land Claim Report, recommended the exclusion of the Roper Bar, St Vidgeon and Port Roper boat ramps from any

grant, so as to avoid any detriment flowing from their availability to the public. Despite the submissions of the NLC, I consider that there is sufficient reason to adhere to that recommendation. Accordingly, to the extent that those boat ramps are not part of public roads, I agree with his view.

2.2.5. **Maria Island and Limmen Bight River Land Claim No. 71 and part of Maria Island Region Land Claim No. 198**

- i. Recreational fishing occurs in the claim areas. There NLC proposes, on behalf of the claimants, the continued access to the claim area for recreational fishing pursuant to the permit management system discussed variously in this Report. The claimants stated that permits would be restricted around Maria Island, but provided no further information. Material was adduced by Amateur Fishermen's Association of the Northern Territory (AFANT) that suggested recreational fishing does occur around Maria Island. Recreational fishers would therefore suffer detriment if unable to access the Maria Island intertidal zone area. It is not apparent that such a restriction would materially be detrimental to recreational fishing in the claim area generally. Access and use of the other areas under claim is likely to be maintained by recreational fishers, by way of a permit. The claimants suggested a fee would be required. Recreational fishers may therefore suffer a minor detriment to the extent of the fees payable for a permit, but as discussed elsewhere that is an appropriate balance between the making of the grant and the interests of recreational fishers.
- ii. In relation to commercial fishing, on the slim evidence provided, the most that can be said is that in the absence of suitable agreements for commercial fisher access to the claim areas, particularly for mud crab fishing in the Limmen Bight River, commercial fishers may suffer detriment in the event of a grant of title. As elsewhere discussed, in the case of commercial fishers, the Minister may well consider that, having regard to the agreement processes contemplated by ss 11A and 19 of the ALRA, the appropriate step is to grant the land to the traditional owners and to enable those processes to be undertaken. Detriment may be suffered to the extent of any fees incurred by commercial fishers under an agreement. Of course, should the traditional Aboriginal owners decide to enter into an access agreement similar to that discussed in Chapter 6, such an agreement may also alleviate possible detriment to commercial fishers.
- iii. NTIO has 'interests' in the Land Claim No. 71 claim area. Whether these interests amount to detriment under the ALRA is questionable, considering that

NTIO has not yet received the requisite environmental approvals to undertake their Roper Valley Iron Ore Project. In this sense, the potential harm suffered by NTIO may be too remote to take into account, at least in such a way as to impede the grant of the land. There is the additional difficulty confronting this detriment that, if it is to be used as a reason for not granting the land, that is almost to the point of giving third party commercial interests, whether actual or potential, priority over the traditional land owners. In any event, the claimants expressed a willingness to negotiate an agreement with NTIO for access and use of the claim area.

- iv. Britmar (Aust) Pty Ltd (Britmar) may suffer detriment if Land Claim No. 71 is granted and no agreement is reached between it and the traditional Aboriginal owners. However, there is a strong likelihood that an agreement would be reached, especially considering Britmar has negotiated a number of other agreements with the NLC and respective traditional owner groups in relation to its Nathan River Resources Project. Regard should be had to s 11A of the ALRA. Consequently the Minister might conclude that it is appropriate to make the grant, leaving it to Britmar and the traditional owners to agree on the terms of Britmar's access to the claim area. Minor detriment may be suffered to the extent of any fees payable under agreement.
- v. No other mining or energy tenement holders are likely to suffer detriment.
- vi. Tourism in the claim area is not likely to experience any significant detriment provided that the recreational fishers are accommodated by the NLC's proposed permit management system.
- vii. In the event of a grant of title, it is likely that an agreement will be reached with the traditional Aboriginal owners for the continued operation of the Limmen Bight Fishing Camp. The material is positive about those prospects. This concern is, therefore, not of such significance as to preclude the grant of the land. Minor detriment may be suffered by guests, in respect of the permit fees proposed.

2.2.6. **Lorella Region Land Claim No. 199 and part of Maria Island Region Land Claim No. 198.**

- i. Due to the amount of crossover between submissions made in relation to these land claim areas and submissions made in regards to the Maria Island and

Limmen Bight River Land Claim No. 71 and part of Maria Island Land Claim No. 198, this section should be read together with the preceding section.

- ii. Lorella Station as a pastoral activity has not complained of detriment, but it is assumed that it has the same concerns as other pastoralists about access to and use of the adjacent waters in the unalienated Crown land. To that extent, any detriment it might experience by a grant of the land will be abated by the proposed licence which the NLC has referred to in its submissions. There is no reason why that licence would not be granted.
- iii. As to the tourist activities undertaken on Lorella Station and using the adjoining unalienated Crown land, there is a reasonable basis for treating that activity, as a profit-making business, as unauthorised on the pastoral lease itself and on the adjacent claim area. In that event, its detriment claims on the basis of its tourist activities should not be taken into account, and again the grant might promptly be made. However, the claimants recognise the expenditure on the tourist venture of the pastoralists, and have indicated a preparedness to accommodate those activities on their land, if granted, by an appropriate agreement to be negotiated. That is a fair and realistic step on the part of the traditional owners. Consequently, in any event, the Minister might make the grant promptly. It would be unfair to the traditional owners to require them to enter into such an agreement before a grant was made, because that would give to the pastoralists an unfair leverage – no agreement, no grant – when there is presently no entitlement of the pastoralist, at the least, to use the unalienated Crown land of the traditional owners for commercial profit making activities.
- iv. The number of recreational and commercial fishers accessing the claim areas are relatively small. In the absence of an effective permit system or access agreements, some detriment may be suffered. In this instance, in addition to the small recreational fishing numbers, there are apparently other accessible fishing areas nearby, so the Minister may decide to make the grant in any event. Otherwise, any detriment to them will be appropriately allowed for by the NLC's proposed permit management system. The interest of the small number of commercial fishers can properly be accommodated by allowing for the agreement processes under the ALRA to be undertaken following a grant of the land.
- v. No detriment should be suffered by any mineral or energy tenement holders.

- vi. This is one claim group which might be the subject of a grant in the proximate future, for the reasons given, without the putting in place of the permit management system, but the Minister may prefer to await that event.

2.2.7. **McArthur River Region Land Claim No. 184 and part of Manangoora Region Land Claim No. 185**

- i. The claim areas, especially the McArthur River claim areas, are of high value to recreational fishers. In the absence of the permit management system or an agreement, significant detriment would flow to recreational fishers if the claims are granted. These adverse effects would also be felt by the local economy in Borroloola and around King Ash Bay. In relation to commercial fishers, the proper balance is to recognise the agreement making powers and processes allowed for in the ALRA, and to make the land grants despite the concerns expressed. That does not impede the general powers of the Northern Territory to regulate or control fishing management in the Northern Territory in the public interest, but that would not extend to preventing the traditional owners from having such fishing entitlements as are permitted in the areas and to agree to permit others to have the direct benefits of exercising those fishing rights by agreement.
- ii. In relation to the concerns of the King Ash Bay Fishing Club Inc. (KABFC) and its members, and the service providers in King Ash Bay, and the concerns of the Northern Territory about tourist activities, the first step is to recognise that those concerns are largely derivative from the recreational fishing industry being permitted to continue. The above recommendation will secure that. It is not likely that the tourist numbers will therefore materially diminish as a result of granting the land.
- iii. The KABFC, on behalf of its members, has expressed concern about its financial viability if the land grants are made because of the level of its and its members' investment expenditure in King Ash Bay and its environs, unless it is given free and unrestricted use of the claimed land at the expense of the traditional owners. The opportunity to make out that claim was not taken up. It is an ambit claim with many assumptions, presumably including a significant drop in fishing numbers. Its claim is not a reason not to make the grants. First, the claim is not made out. Second, the claim arises from investments made in the face of the initial Land Claim Report, and with knowledge of the potential land grants. I have explained in detail in Chapter 5 why that is the case.

- iv. The submissions of Glencore Pty Ltd (Glencore) asserted that there is no part of the claim areas which impinges on the Bing Bong Loading Facility (BBLF) area. The review of the supporting material tends to confirm the accuracy of that submission. That was the clear understanding of the developer at the time of the port development. Even if the survey for the grant of the claim areas exposes some slight overlap, my recommendation in the circumstances is that the area of any overlap be excised from the land to be granted.
- v. The interests of the pastoral leaseholders in their normal pastoral activities should be accommodated, despite little interest being expressed by each of them to the Review. If no such accommodation was made in the event of a grant of title, then adjacent pastoralists would suffer significant detriment. However, I am of the opinion that the proposal by NLC to develop a pastoral licence, which reflects current pastoral usage, should sufficiently address the detriment concerns of adjacent pastoralists.
- vi. The King Ash Bay boat ramp, to the extent that after survey it falls within any part of the claimed areas, should be excluded from any land grant.

2.2.8. **Garrwa (Wearyan and Robinson Rivers Beds and Banks) Land Claim No. 178**

- i. The main detriment issues to consider in acceding to a grant of Land Claim No. 178 are the use and access of the claim areas by the pastoralists of Seven Emu and Spring Creek stations and the interests of recreational fishers.
- ii. Providing that the claimants propose a licence as proposed by the claimants generally in relation to normal pastoral activities in accordance with the NLC submissions, no relevant detriment should be suffered by the proprietors of Seven Emu Station or Spring Creek Station, nor should there be any impact on the existing or future proposed patterns of land usage in the region.
- iii. Recreational fishers might suffer detriment if the land claim areas are granted as Aboriginal land and no agreement or system for access to the parts of the rivers under claim is established. Again, provided the permit management system proposed by the NLC is in place and operating as intended, there is no reason not to grant the land to the traditional owners.
- iv. The other activities engaged in on the unalienated Crown land do not give rise to detriment which should impede the grant of the land.

Seven Emu Region Land Claim No. 186 and Wollogorang Area II Land Claim No. 187 and part of Manangoora Region Land Claim No. 185

- i. The primary recommendation to the Minister is that, upon the Minister being satisfied as to recreational fishers that the NLC's proposed permit management system is in place and operating satisfactorily, and as to the pastoralists (including Australian Wildlife Conservancy (AWC)) that the proposed licence to enable the range of normal pastoral activities to be carried out in relation to the claim areas will be put in place by the traditional Aboriginal owners, a grant of the claimed land should be made.
- ii. The other claims of detriment are not such as to lead to the conclusion that the grant of the claim areas should not be made or should be further delayed.
- iii. The particular reasons for that recommendation are:
 - a. In respect of adjacent pastoral operations, the detriment claimed by Pardoo Beef Company Pty Ltd (Pardoo) and the AWC in respect of its purchase of Pungalina should be considered in light of the fact that they acquired their interests well after the publication of the Land Claim Report. There is no basis for concluding that, if they had known of that Report and its recommendations, they would not have acquired those adjacent interests in any event. In addition, whether on the basis that they would have sought an agreement with the traditional owners under s 11A at the time, or would have chosen to take the risk of the land grants not being made, they would now be in the same position of having to negotiate with the traditional owners for agreements to carry out the non-pastoral or extended pastoral activities they now propose to carry out. In the case of AWC, for somewhat similar reasons, the now extended activities which it seeks to carry out in relation to the claim areas should have been, and will have to be, the subject of agreement with the traditional owners. The primary or normal pastoral activities of the pastoralists (including AWC) in relation to the claim areas will be preserved by the proposed licence. The respective lessees of Manangoora Station and Seven Emu Station both have connections with the claimant groups. In addition to NLC's proposed pastoral licence, it is therefore likely that the claimants will accommodate them by agreeing to their non-pastoral activities on the claim areas. However, I note that neither lessee appears to have a current non-pastoral licence under the *Pastoral Land Act* or has permission from the Northern Territory to use the unalienated Crown land for profit-making activities, so

there can be no issue that the claim to perform those activities on the claim areas would give rise to any legitimate detriment so as to defer the grant or to refuse the grant.

- b. On the material provided to me, and relative to other claims subject to the Detriment Review, it does not appear that recreational fishing is a significant detriment issue. In any event, the NLC's proposed permit system should mitigate any minor detriment that might flow to the recreational fishing community. If the proposed permit system does not allow for access or use of the areas under claim, then the local economy would also suffer detriment to the extent that recreational fishing decreases and impacts visitation to the areas. However, there is no basis for suspecting that the recreational fishers will not continue to use the claim areas and surrounding waters as they have in the past, at least to a significant extent once the permit management system is in place.
- c. The information provided to me in respect of commercial fishing was quite limited. On the limited information provided in respect of commercial fishing, it appears the area is used for mud crab harvesting. If that is correct, detriment may be suffered if the areas become Aboriginal land and the traditional Aboriginal owners make no provision for commercial fishing licence holders. There is really not sufficient material to conclude that the commercial fishing activities are of such a character as to amount to detriment to them warranting the refusal or deferral of the grant of the claim areas. The commercial fishers have the right to seek agreement with the traditional owners after the grant if they wish to continue their activities over the granted land. There is no reason why such agreement would be withheld on appropriate terms, giving the commercial fishers the right to fish and the traditional owners the opportunity to derive some revenue from their land.
- d. There are provisions of the ALRA that address the potential detriment suffered by mineral and mining tenement holders, including Armour Energy Ltd.
- e. There are two access roads in the claim areas that are most likely used by the proprietors of Greenbank and Seven Emu Stations and other persons visiting those stations. Given the claimants' relationship with the proprietors of Greenbank and Seven Emu Stations, it is probable that a

suitable agreement can be reached under s 11A or s 67B of the ALRA prior to a grant of the claimed area, or through s 19 of ALRA subsequent to a grant.

- iv. As noted in the Conclusion, the submissions of certain of the stakeholders in relation to this Report, and indeed elsewhere, make it desirable that the Minister, upon such Departmental advice as the Minister considers appropriate, should form the view about the adequacy of the documentation for, and the operation of, the permit management system, and also of the proposed terms of the licence proposed for the pastoral lessees. It would be inappropriate, having regard to the terms of some submissions, and to avoid unnecessary delay, to give stakeholders (perhaps other than the Northern Territory) the opportunity to negotiate with the traditional owners about the content of those documents or the drafting of those documents. Their purpose is to provide such concession as the NLC has identified to minimise any detriment to the classes of recreational fishers and pastoralists, and the content of the documents. The Minister, on advice, can be satisfied that the documents fulfil their intended function.

2.2.10. **Upper Roper River Land Claims comprising Mataranka Area (NT Portion 916) Land Claim No. 129, Western Roper River (Beds and Banks) Land Claim No. 141, Roper Valley Area Land Claim No. 164 and Elsey Region Land Claim No. 245**

- i. I agree with Commissioner Olney that in absence of appropriate arrangements between traditional Aboriginal owners and adjoining pastoralists, the operations of Goondooloo, Moroak, Flying Fox, Lonesome Dove and Big River stations would likely suffer detriment if not able to use the claimed areas for their pastoral use, as has occurred in the past. The appropriate arrangements can be found in NLC's proposed pastoral licence, which is to reflect current pastoral activities. So, that detriment can be satisfactorily accommodated.
- ii. However, the adjacent landholders who submitted detriment interests also mainly had the objective of securing an entitlement to develop post acquisition diversified activities on their pastoral leases and using the claimed areas to support those activities. There are a range of reasons why those claims should not impede the grant of the claimed areas, and the pastoralists left to negotiate with the traditional owners any entitlement to use the granted land for such purposes. Briefly, the proposed uses all evolved after the relevant Land Claim Report, so the pastoralists should be taken to have known of the claims. There

is, in any event, nothing to suggest that the acquisitions of the pastoral leases would not have occurred if the pastoralists had actual knowledge of the claims at the time of their acquisitions so no real detriment can flow by having to seek agreement for such further activities on the claim areas. To an extent, such activities at present are not authorised under the *Pastoral Land Act* or by any permission to use the presently unalienated Crown land for commercial profit-making activities. It is inherent in the detriment claims that any such activities, whether planned now or in the future, should take precedence over the recognised entitlement of the traditional owners reflected in the recommendation of the Commissioner. I refer to my comments at Chapter 5.

- iii. Finally, in respect of valid pastoral diversification interests, there seems to be no reason why future terms could not be negotiated to address these interests.
- iv. In respect of commercial and recreational fishing, I accept that it occurs in the areas subject to the Upper Roper River Land Claims. The NLC's proposed permit management system when introduced will accommodate recreational fishers, who will then only suffer the minor detriment to the extent of the fee payable for the permit. In my opinion this detriment will be slight and may be even further mitigated by what NLC has referred to as 'regional permits' and/or by the delegation of permit sales to local vendors. Such permits should also address the detriment claimed regarding the potential flow on impacts to tourism if the various areas of the Roper River are available to recreational fishers. On the other hand, to the extent that there is commercial fishing in the areas, it is not of such significance as to delay or decline the grant of the claimed areas, and the commercial fishers should be left to negotiate with the traditional owners agreements for access to their traditional land on terms to be agreed, having regard to their respective but probably complementary interests.
- v. The Northern Territory submitted that there are a number of roads in the claim areas and that detriment may be suffered in the event access to and use of the roads is restricted. When the areas of the claims are surveyed, it will be apparent what roads are public roads to be excluded from the grants and what roads are not public roads and which will require some agreement to accommodate their use. I do not anticipate any difficulty with those processes.

3. Scope of the Review

- 3.1.1. The Terms of Reference require certain procedures to be followed in conducting the Review. The procedures followed are detailed later in the Review. More substantially, the Terms of Reference involve consideration of the nature and extent of the current detriment which is identified by any of the persons or entities which assert it, and in addition
- To consider and report on any efforts to resolve the issues of detriment between the persons identified as the traditional owners of the relevant land and those asserting that detriment, including in relation to the impact of the BMB case; and
 - To make recommendations by reference to the Minister's powers under s 11 of the ALRA to expedite the resolution of the identified land claims.
- 3.1.2. Consequently, it is the balancing task referred to which is the task, or one of the tasks, required of the Review.
- 3.1.3. The task, having regard to s 50(1)(d) which is the statutory foundation for this Report, and to the Terms of Reference, is a wider one than that of the Commissioner when making a report to the Minister in relation to a land claim.
- 3.1.4. Section 50 of the ALRA sets out the functions of the Commissioner. Of immediate relevance is s 50(1)(d). It specifies that it is one of the functions of the Commissioner to advise the Minister in connexion with any other matter relevant to the operation of the ALRA that is referred to the Commissioner by the Minister. The Terms of Reference then describe the task required of the Commissioner in relation to this Review.
- 3.1.5. That is to be contrasted with what is generally accepted as the primary function of the Commissioner under s 50(1)(a), namely to address an application by or on behalf of Aboriginals claiming to have a traditional land claim (as defined) so as to ascertain if there are traditional Aboriginal owners (also as defined) of the land claimed.
- 3.1.6. The Commissioner is then to report to the Minister and to the Administrator of the Northern Territory of the findings made, and if there is a finding of traditional Aboriginal ownership, and if an affirmative finding is made to recommend to the Minister the granting of the claimed land or part of it in accordance with ss 11 and 12 of the ALRA. Section 50(3) requires the Commissioner to have regard to the strength or otherwise of the traditional attachment by the claimants to the land claimed.

- 3.1.7. Relevantly for the purposes of the comparison with the Commissioner's role under the Terms of Reference, s 50(3)(b) also requires the Commissioner to report on 'the detriment to persons or communities including other Aboriginal groups that might result if the claim were acceded to either in whole or in part' and s 50(3)(c) also requires the report to address 'the effect which acceding to the claim either in whole or in part would have on the existing or proposed patterns of land usage in the region'.
- 3.1.8. Hence, in the case of reports by the Commissioner to recommend the making of a grant in response to a land claim, the Commissioner is to identify in any report any DETRIMENT which might be experienced by another person or entity if the grant as recommended by the Commissioner is to be made. It is then for the Minister to have regard to that detriment or those detriments in deciding whether to make a grant over the whole or part of the land the subject of the recommendation: see s 11 of the ALRA and the decision of the High Court in *R v Toohey; ex parte Meneling Station Pty Ltd* [1982] HCA 69; (1983) 158 CLR 327 and *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* [1986] HCA 40; (1986) 162 CLR 24.
- 3.1.9. The Terms of Reference take the Commissioner's role further. They involve the Commissioner providing to the Minister recommendations on a range of matters which may include making findings about detriment claims and their significance, and for the assistance of the Minister in performing the Minister's functions under s 11 of the ALRA. That may therefore include the balancing exercise which in the case of reports by the Commissioner leaves to the Minister the task of balancing the recommendations of the Commissioner to make a grant of land to the traditional owners and the detriment issues.
- 3.1.10. In either context, plainly it is a balance to be struck having regard to the objects of the ALRA, and having regard to the terms of s 15AA of the *Acts Interpretation Act 1901* (Cth).

4. Procedure

4.1. Introduction

- 4.1.1. The Terms of Reference set out in some detail the processes the Review was to follow to identify the key stakeholders, and to ensure that all those who were or potentially were persons or entities who might assert detriment in relation to any of the 16 land claims were given the opportunity to participate in the Review. The following section sets out what steps were taken to ensure that all potential participants were given the opportunity to participate in the Review.
- 4.1.2. It is clear that the Review was to be conducted so as to accord procedural fairness to all those who then chose to participate in the Review. The following section sets out the steps which were taken to accord to each of the participants the opportunity to make submissions and to provide evidentiary material, to be aware of the matters which were raised in response to those concerns by the traditional Aboriginal owners (as determined by the Commissioner in the Reports concerning the 16 land claims), and to have an opportunity as appropriate to reply to those responses.

4.2. Land claim groups

- 4.2.1. As set out earlier and in the Terms of Reference, the Review addresses 16 land claims that have been subject to an inquiry and report by former Commissioners. Many of the land claims are in close geographical proximity. As evidenced in the Land Claim Reports, similar detriment concerns have been raised by the several ‘stakeholders’ in claims that are close in proximity. There are also a number of stakeholders with specific detriment interests that traverse multiple land claim areas. A fishing tourism operator who takes tourists on fishing day trips to different areas (and different claim areas) is one example. In order to expedite land claims more efficiently, Commissioners often inquired into land claims that were in close proximity at the same time, and then included their findings in the one report. As a result, the 16 land claims subject to this Review were the subject of only 10 Land Claim Reports.
- 4.2.2. The 10 Reports and the Land Claims which they addressed are as follows:
1. Finniss River Land Claim No. 39 (Report No. 9)
 2. Mataranka Area Land Claim No. 69 (Report No. 29)
 3. Maria Island and Limmen Bight River Land Claim No. 71 and part of Maria Island Region Land Claim No. 198 (Report No. 61)

4. McArthur River Region Land Claim No. 184 and part of Manangoora Region Land Claim No. 185 (Report No. 62)
5. Lorella Region Land Claim No. 199 and part of Maria Island Region Land Claim No. 198 (Report No. 63)
6. Garrwa (Wearyan and Robinson Rivers Beds and Banks) Land Claim No. 178 (Report No. 64)
7. Lower Roper River Land Claim No. 70 (Report No. 65)
8. Seven Emu Region Land Claim No. 186, Wollogorang Area II Land Claim No. 187 and part of Manangoora Region Land Claim No. 185 (Report No. 66)
9. Lower Daly Land Claim No. 68 (Report No. 67)
10. Upper Roper River Land Claims comprising: Mataranka Area (NT Portion 916) Land Claim No. 129; Western Roper River (Beds and Banks) Land Claim No. 141; Roper Valley Area Land Claim No. 164 and Elsey Region Land Claim No. 245 (Report No. 68)

4.2.3. Having regard to the timeframe for this Review to be completed and in the interests of an efficient process, in seeking submissions from stakeholders, I raised with the key stakeholders as identified in the Terms of Reference the prospect of dealing with the 16 land claims in the groups used in the Commissioners' Land Claim Reports, and also of grouping the 16 land claims further according to geographical proximity.

4.2.4. Having regard to the suggestions of the Northern Territory, it was proposed that the 10 report groups form six Review groups. After further consultation with the NLC, that proposed grouping was accepted.

4.2.5. That enabled the sequential focus of the groups, so as to maintain a steady flow of submissions and supporting material without requiring all submissions and all supporting material to be provided at the one time. In the case of the Northern Territory in putting forward detriment submissions and supporting material, and of NLC on behalf of the claimants in responding, that also enabled a degree of forward planning to maintain the progressive work commitments which I have commented about above.

4.2.6. The groups are as follows:

Group 1: Garrwa (Wearyan and Robinson Rivers Beds and Banks) Land Claim No. 178; McArthur River Land Claim No. 184 and Manangoora Land Claim No. 185.

Group 2: Lower Daly Land Claim No. 68

Group 3: Maria Island & Limmen Bight River Land Claim No. 71; Maria Island Region Land Claim No. 198 and Lorella Region Land Claim No. 199

Group 4: Seven Emu Region Land Claim No. 186 and part of Wollogorang Area II Land Claim No. 187

Group 5: Lower Roper River Land Claim No. 70 and the Upper Roper River Land Claims comprising: Mataranka Area (NT Portion 916) Land Claim No. 129; Western Roper River (Bed and Banks) Land Claim No. 141; Roper Valley Area Land Claim No. 164 and Elsey Region Land Claim No. 245

Group 6: Finniss River Land Claim No. 39 and Mataranka Land Claim No. 69

- 4.2.7. I invited submissions from stakeholders sequentially, per land claim group, so as not to impose too great a workload on those who represent sectoral interests, such as AFANT. I also varied the sequence of the groups so that submissions for land claims with more complex detriment interests were not requested consecutively.

4.3. Stakeholders

- 4.3.1. To identify stakeholders with potential detriment interests in the relevant land claims, it was necessary to refer to the several Land Claim Reports referred to so as to identify those entities and persons who participated in the land claim inquiries as well as those who were invited to participate in the inquiries, such as adjacent land holders to the claim areas. As a means of checking that work, the lists were then provided to the NLC and the Northern Territory to check accuracy and for updated contact details. Each was also asked for suggestions about other potential stakeholders they believed may have an interest in the relevant claims in the sense of wishing to assert a detriment if there were to be a grant of title in accordance with the Commissioner's recommendations. This process was also undertaken sequentially.
- 4.3.2. On 18 December 2017, the NLC wrote to suggest that it was not appropriate to invite participation from NLC constituents and constituent groups such as Aboriginal Ranger Groups in the Review at that point in time. It was indicated that their interests would be represented by the NLC in due course, following general consultations with traditional owners and groups that may be affected by a proposed action as required by s 23(3) of the ALRA. I accepted that proposal, so that it was left to the NLC, when responding to the detriment submissions and supporting material, to raise any particular matters of relevance on behalf of such Aboriginal interests. The NLC did not suggest any additional non-Aboriginal persons or entities which should be contacted as potential participants in the Review.

- 4.3.3. On 20 December 2017, the Australian Government Solicitor (AGS) was also directly contacted, requesting suggested contacts for those Commonwealth entities which may be affected by grants of title, or that may wish to make submissions on detriment in relation to any of the 16 land claims. On 20 December 2017 AGS responded with a list of contacts that, at that time, they were instructed to write to where there was a claim made for the recognition of native title brought under the *Native Title Act 1993* (Cth).
- 4.3.4. The persons and entities collated from the Land Claim Reports as well as those suggested by the Northern Territory and AGS were sent invitations to participate in this Review. At **Annexure 4** is a schedule of the persons and entities that were sent invitations to participate, per group.

4.4. Invitations to participate

- 4.4.1. The invitation to participate provided each recipient with an overview of the Review, a description of the land claim area, a website link to the relevant Land Claim Report and, if relevant, a summary of the recipient stakeholder's detriment as reported on by the previous Commissioner in the Land Claim Report. Where possible, a map of the land claim area was also enclosed via website link. The invitations to participate generally requested that submissions were provided within six weeks from receiving the invitation. Within those six weeks I also requested that the recipient provide notice of an intention to participate. These response periods varied when the period of time included public holidays, such as the Christmas/New Year period and Easter long weekend. The invitations to participate also notified the recipient stakeholders that if that recipient did not respond, indicating an intention to claim a relevant detriment within the response period, it would be assumed that that recipient did not have any relevant detriment concerns in relation to that particular Land Claim Report.
- 4.4.2. Throughout this initial process of stakeholder engagement, the invitations to participate evolved. For those stakeholders who indicated that they wished to participate in the Review, I requested that stakeholders provide an update on the detriment identified in the relevant Land Claim Report and their comments as to whether any steps had been taken in the period since the initial reports to address the detriment concerns which were identified at the initial inquiry stage by the Commissioner. For both stakeholders who had participated in the initial inquiries leading to the relevant Land Claim Report, and new stakeholders who wished to assert some relevant detriment but had not participated in the initial inquiries, I requested information about new or current detriment concerns and asked whether

there were any current opportunities or challenges to address the detriment concerns. Recipients were also asked about their current relationship with the relevant claimants and/or local Aboriginal communities in the claim area. I asked that all recipients provide evidentiary material to support their claims.

- 4.4.3. Many of the submissions that I received in response were disappointing. Such submissions were wholly speculative, or were lacking specificity, and/or were lacking detailed supporting material to demonstrate the real nature of the detriment concern. In some instances, the responses were not informative responses to the questions asked by the invitations to participate, but contained what appeared to be general and not very comprehensible and/or inflated claims of detriment.
- 4.4.4. Where there was not a satisfactory submission of detriment with supporting material, for one or more of the reasons referred to, initially there was a follow up letter sent to that stakeholder explaining the difficulty in giving weight to the submission and requesting further particulars and documentary material. The inadequacy of so many submissions at an early stage made it apparent that such a practice would be very time consuming and possibly would not be the best way to ensure timely and properly expressed claims of detriment, supported by relevant material where appropriate.
- 4.4.5. Consequently, on 20 April 2018 I provided participating stakeholders with a Memorandum and corresponding Schedule directed to ensuring that the detriment submissions were properly expressed, so that the participating stakeholders should not assume that a general and unsupported submission would be the most effective means of properly presenting their concerns. The Memorandum notified stakeholders that claims of detriment which were speculative or general in nature may not be able to be given much weight for the purposes of my report to the Minister. It invited stakeholders to provide further particulars by 30 April 2018. The Schedule set out several examples of matters that should be addressed in detriment submissions and examples of the particulars and material which may support a claim to detriment. This document was provided alongside the invitations to participate for new stakeholders. This document is enclosed at **Annexure 5**.
- 4.4.6. The quality of the submissions of detriment provided after that date were more focussed and so easier to understand and to assess.
- 4.4.7. Needless to say, such flaws in the earlier detriment submissions were not universal. There were many submissions of high quality in terms of the detriment expressed (or responded) and in terms of the supporting material provided.

4.5. NLC's approach

- 4.5.1. On 2 February 2018, I received a letter from the Chief Executive Officer of the NLC in response to the invitation to participate that I had sent to the NLC on behalf of the claimants relating to the Lower Daly Land Claim No. 68, dated 5 January 2018. He proposed that the NLC consult claimants about detriment matters after they received updated detriment information provided to the Review, so as to enable a more efficient allocation of resources. On 9 February 2018, I responded to the NLC's proposed approach, indicating that I would proceed on the basis suggested, but on the proviso that no significant detriment interests held by Aboriginal persons would be raised outside the timeframes given by the invitations to participate if such detriment concerns could have reasonably been communicated within those timeframes.
- 4.5.2. As it transpired, no such issues arose.

4.6. Invitations to comment on section 50(3)(c) of the ALRA

- 4.6.1. On 22 January 2018, the Solicitor for the Northern Territory wrote to enquire whether the Review would deal with the matters raised by s 50(3)(c) of the ALRA, that is, the existing and proposed patterns of land usage relevant to the land claim area and surrounding region. The Northern Territory pointed out that the former Commissioner, Commissioner Olney, had accepted submissions on s 50(3)(c) and s 50(3)(d) issues together and without distinction. The Northern Territory advised that consequently, it planned to continue addressing s 50(3)(c) matters together with matters of detriment under s 50(3)(d) in its submissions.
- 4.6.2. I accepted the Northern Territory's approach. On 29 January 2018, I wrote to stakeholders who had already provided submissions to indicate that I intended to consider both s 50(3)(c) and (b) of the ALRA in advising the Minister in relation to the current status of detriment issues and inviting any additional submissions on s 50(3)(c). Invitations to participate that were sent in respect of some of the later groups (as explained above) also made this approach clear.
- 4.6.3. There was no concern expressed on the part of any stakeholder about that approach. It seemed to me to be desirable that I should encompass consideration of the application and effect of s 50(3)(c) to ensure that the Review, as helpfully as possible, put the Minister in a position where his or her function under s 11 could be considered in relation to the 16 Land Claims where the Commissioner's recommendation had not yet been considered by the Minister. It is a topic clearly

within the intent of the Terms of Reference, and encompassed by the reference to:
Such other matters as may be pertinent to the review.

4.7. Newspaper notices

- 4.7.1. As a final step in ensuring all potential stakeholders were given the opportunity to engage in the Review, public notice of the Review was given inviting participation from any person or entity who wished to participate.
- 4.7.2. Newspaper notices were published in four Northern Territory newspapers inviting submissions from any persons and entities who may have an interest in the land claim areas subject to the Review. (It was made clear by the earlier correspondence referred to that any person or entity who or which had already engaged with the Review need not further respond by reason of the public notices). The intention was to ensure that any persons or entities who or which wished to participate in the Review, but had not been included in the direct notification process was given the opportunity to do so.
- 4.7.3. These notices were published in the following newspapers on the following dates:
 - 1. NT News on 19 May 2018
 - 2. Centralian Advocate on 18 May 2018
 - 3. Katherine Times on 23 May 2018
 - 4. Tennant & District Times on 18 May 2018
- 4.7.4. A copy of the newspaper notice is enclosed at **Annexure 6**.

4.8. Subsequent communication

- 4.8.1. On 6 June 2018, correspondence was sent by the Review to all participating stakeholders providing an update on the Review process, including a Schedule of all persons and entities that were provided with invitations to participate and those who responded. This update also invited stakeholders to provide any further information that they believed I should have regard to.
- 4.8.2. A copy of this update and corresponding Schedule is enclosed at **Annexure 4**.
- 4.8.3. It did not result in any expressions of concern about not having been given the opportunity to participate in the Review, or any suggestions of other persons or entities who or which might have wished to participate and had not been included to that point.

4.9. Timeframe for submissions

- 4.9.1. As indicated above, after the decision to proceed to investigate the claims of detriment sequentially and in the groups referred to, a timetable was fixed to enable those processes to be completed within the initial period fixed for the Review. The timetable allowed for three stages for each group: submissions and supporting materials from the stakeholders, submissions in response and supporting materials from the NLC on behalf of the claimants, and any reply to the NLC submissions and materials from the stakeholders.
- 4.9.2. The timetable was a tight one. I also had to take into account that the NLC on behalf of the claimants would have to consult separately with each of the claim groups who had been recognised as traditional owners in the Commissioner's Reports, and that that would involve on-country consultations, often in remote areas, and with restrictions on access to some areas due to the seasonal weather.
- 4.9.3. Despite the efforts to accommodate those stakeholders who had detriment interests, particularly those with interests in multiple claims, within the timeframes fixed, there were many requests for a more extended period to prepare submissions on detriment and the supporting materials, including from the representative organisations who also sought to take instructions from their members, sometimes remotely, and to consider all or most of the 16 claims. The requests in some cases included complaints that the response timeframes were unreasonable.
- 4.9.4. The concerns expressed were not unreasonable. I have mentioned the workload on the Northern Territory. Although much more focussed, each of the representative organisations – the NT Seafood Council (NTSC), Amateur Fisherman's Association NT (AFANT), and NT Cattleman's Association – had to address each of the claims through their members.
- 4.9.5. It was important for the Review to be conducted fairly, so that each of the stakeholders had a reasonable time to prepare submissions and provide relevant material. It was also important to the review that it should have the benefit of each of the stakeholders being able to provide such submissions and supporting material as that stakeholder wished.
- 4.9.6. Accordingly, on 15 March 2018, I wrote to the Minister requesting an extension of time for the completion of the Review. As noted above, on 13 April 2018, the Minister responded that he would grant an extension until 31 December 2018.

4.9.7. On 13 April 2018 I wrote to participating stakeholders advising of the extension of time. I also provided a series of timeframes to stakeholders, which provided the response date for submissions and the extended response date, that is, the final dates which the new timeframe allowed me to grant extensions to. This letter was provided alongside the invitations to participate for new stakeholders and is enclosed to this Report at **Annexure 7**. The revised timetables were generally complied with. In a few instances, a relatively brief extension of time was requested, and if it was supported with satisfactory reasons a short extension of time was allowed. In dealing with stakeholders and their representatives in the course of any such requests, it was clear that all stakeholders were aware of the need to adhere to the reporting date, and the need to allow the NLC on behalf of the claimants to have an adequate opportunity to address the detriment submissions and supporting materials.

4.10. Circulating submissions

4.10.1. Upon receipt of submissions for each land claim group, the authors' consent to the public disclosure of the submissions and supporting material was sought. Once public disclosure was confirmed and the submission response date for that group had passed, all the submissions and supporting material for that group of claims was circulated to the stakeholders participating in the Review for those claims. I also provided the submissions to the NLC, asking that the claimants respond to the submissions. This response was to include, though not limited to including, comments on:

- The claimed detriment interests
- The relevance of any timing issues in relation to when such detriment interests were acquired
- Proposals to address the claimed detriment interests

4.10.2. I requested that the NLC respond, on behalf of the claimants, within six weeks.

4.10.3. There were only a few occasions where some confidentiality was sought. After seeking reasons for such claims, I gave an indicative ruling to the stakeholder concerned with the invitation to accept the ruling or to withdraw the sensitive material. In all instances the claim for confidentiality was satisfactorily resolved, whilst ensuring that there was adequate disclosure of the material for the NLC to have a meaningful opportunity to respond to it.

4.11. Submissions on behalf of the claimants

- 4.11.1. The NLC was required to hold traditional Aboriginal owner consultations, ensuring that the claimants' interests were adequately represented in the NLC's communications with the Commissioner⁶. Due to the inherent practical and resourcing difficulties of undertaking those functions in a remote setting, the NLC understandably struggled to meet some of the response dates that were stipulated and several extensions were granted. The NLC was of course also aware of the need to have completed all its submissions on the several groups, with supporting materials, in sufficient time for stakeholders to be able to reply, if necessary, and for the Review report to be completed within the prescribed time.

4.12. Submissions in reply to the NLC on behalf of the claimants

- 4.12.1. Upon receiving the submissions on behalf of the claimants for each group, I sought clarification from the NLC that the submissions could be publicly disclosed. Once provided with confirmation, I circulated the submissions on behalf of the claimants with the stakeholders participating in the relevant groups and invited a response to the assertions made therein. I specifically invited stakeholders' comments on agreement making, in most cases asking whether the claimants' agreement proposals would be a suitable and workable arrangement for the stakeholder or, at least, whether the stakeholder was open to the prospect of agreement making in general. Due to the timeframe set for the Review, compounded with the significant number of extensions that I granted to stakeholders, I requested that the recipient respond within two weeks. There were some stakeholders again who complained about the time allowed for this process and some extensions were requested, and subsequently granted. However, having regard to the time allowed for the initial submissions and the limited time allowed for the claimants through the NLC to respond, in broad terms the 2 week reply period was not an unreasonable one.
- 4.12.2. On 22 October 2018, I sent a letter to participating stakeholders notifying them that the timeframe to provide submissions had concluded. This letter is enclosed at **Annexure 8**. I have separately provided the submissions to the Report as required by the Terms of Reference. An index of submissions is enclosed at **Annexure 9** of the Report.

⁶ *Aboriginal Land Rights (Northern Territory) Act (ALRA) 1976* (Cth) s 23(3).

- 4.12.3. In the Report itself, whilst I may not have referred in any detail to each and every detriment submission or each and every piece of supporting material, all of that material has been considered. Some of the material is very general in nature. Some of it is repetitive of other submissions. Some of it falls into the category of material on a common issue. All of the claims of detriment have nevertheless been considered and addressed as is evident in the following sections of this Report.

4.13. Conclusions

- 4.13.1. The intention of the procedures described in this section of the Review is twofold.
- 4.13.2. The first is to demonstrate that the Terms of Reference have been complied with in the requirement to notify the key stakeholders, and to engage with relevant stakeholders in relation to the matters to be addressed by the Review.
- 4.13.3. The second is to indicate the steps taken to accord to each of the stakeholders the opportunity to be heard. Each has had the opportunity to make submissions on detriment in a meaningful way, and to present supporting material. Each has been given the opportunity to see the submissions and material supplied by other stakeholders in the same group. Each has been given the opportunity to consider and reply to the submissions and supporting material provided by the NLC on behalf of the claimants. The NLC on behalf of the claimants has also been given the opportunity to see what submissions on detriment and supporting material has been provided to the Review by the stakeholders in each group of claims and to respond to it.

5. General Issues

- 5.1.1. In undertaking the Review, a number of legal issues and issues of principle arose from considering certain types of detriment asserted. As they traverse a number of the claims, it is appropriate to address them together.
- 5.1.2. One repeated theme which emerged from many submissions from stakeholders was the oppositional attitude adopted by a number of stakeholders to the prospect of the Review recommending to the Minister that a grant of land should be made by the Minister, based on the Commissioner's Reports. That is not typical of all or most submissions, but it was nevertheless a theme which underlay many of the submissions. As I have remarked earlier in this Report, put bluntly, the ALRA is not intended to prescribe that any detriment which might be experienced by a grant of unalienated Crown land should be superior to the traditional ownership of the Aboriginal people. Such an attitude emerged from stakeholders who submitted speculative, unsupported and seemingly inflated detriment concerns.
- 5.1.3. The concept referred to as 'cumulative detriment', which is an important concept addressed later in this Chapter, was used by a few stakeholders to argue that the potential detriment arising from the land claims, if granted, would be significant simply because there has been detriment already suffered by the 'Northern Territory public' because of other Aboriginal land grants. It was therefore contended that this be considered by the Minister when undertaking his or her functions under s 11 of the ALRA. A sort of 'enough is enough' detriment. This approach is at odds with the scheme of the ALRA and would not have been envisaged by Parliament.
- 5.1.4. Further, a number of stakeholders to the Review asserted detriment which arose from decisions that were made, or events that occurred, after the 16 land claims had been recommended for grant by a Commissioner and the Land Claim Reports provided to the Minister. The potential harm that is suffered by a decision to start or invest in a business which relies upon accessing/using unalienated Crown land that has been recommended for grant is arguably not a detriment of significance, because it is a reasonably foreseeable consequence of that decision in the light of the then state of affairs: that is, that the unalienated Crown Land has been recommended for grant, and the Minister may make the grant under s 11.
- 5.1.5. Finally, in this section of the Report, it is appropriate to discuss the Blue Mud Bay decision, in light of the language used by several stakeholders, who imply that the decision was contrary to public, political and legal opinion up until 2007.

5.1.6. Each of those topics is now considered in more detail.

5.2. Tenor of submissions

5.2.1. As I have said, a number of submissions received throughout the course of the Detriment Review indicated the cooperation of stakeholders who, by and large, adhered to the set procedures and responded to the matters to be addressed helpfully. Some stakeholder responses, however, were disappointing.

5.2.2. It was concerning that many responses to my questions about agreement making were not specific and focussed, and in many cases there was simply a lack of responses. That is significant because the issue of whether detriment concerns might be addressed or minimised by the traditional Aboriginal owners entering into agreements with those claiming to be subject to detriment if there were a grant of the land in question, was a matter raised for submissions. It was also a matter raised by the NLC in the proposals put forward on behalf of the claimants. There were a number of submissions firmly opposing grants of title, and expressing a firm unwillingness to attempt to negotiate agreements with the traditional owners or to take advantage of systems providing access for certain purposes upon certain terms. There is a history of the exercise of Aboriginal land rights which demonstrates a willingness on the part of some traditional Aboriginal owners and their advisory land councils to accommodate those with private and recreational ‘interests’ in Aboriginal land. Section 11A of the ALRA specifically provides for the making of agreements between the traditional owners of land (as recognised by the Report of the Commissioner) and a person or entity seeking access to the land if it is granted under s 11 to a land trust on behalf of the traditional owners. After the grant of land, there is also the capacity to permit access and usage of the granted land in certain circumstances, subject to the approval of the traditional Aboriginal owners under the ALRA. The submissions which ignored these possible avenues of diminishing the claimed detriment, where they exist, cannot on their face be taken as necessarily demonstrating material detriment, where such avenues exist. Indeed, it is one of the purposes of the ALRA to give to the traditional owners of unalienated Crown land the title to that land so that they may use and take advantage of the land. Their usage may include the economic exploitation of the land in certain circumstances, including by making agreements with those who might wish to have access to the land for commercial purposes. Rhetorically, one might ask why those seeking such access or usage should be entitled to that usage or access without payment (if it has a commercial value) as if the land in question was terra nullius.

- 5.2.3. Of a similar tenor were some submissions containing sentiments about how acceding to a land claim would cause an injustice to “the public”, or to private non-Aboriginal interests. These statements, in light of Australia’s past, bear an uncomfortable irony. There were also some submissions postulating that a grant of Aboriginal title may damage relations between Aboriginal members of the public and non-Aboriginal members. It is not necessary to comment upon such submissions. If it is said that the claimants should not have made a land claim over the particular area, the statement of the proposition demonstrates the submission is wrong. If it is said that no grant of land should be made to a traditional Aboriginal owner of the unalienated Crown land, again the statement of the proposition demonstrates its wrongness. If it is said that the ‘public’ would resist the recognition or grant of traditional ownership, the ALRA itself, in its terms, refutes that. If it is said that a relevant detriment is the prospect of some members of the public being disaffected, the short answer is that the concept of detriment does not encompass such disaffection as detriment per se.
- 5.2.4. I have deliberately not footnoted these comments to particular submissions as it may be that the submissions were more thoughtless than carefully thought out. The expressions of the views referred to obviously had degrees of forcefulness, and it might do an injustice to some to be included in the footnotes. All the submissions are enclosed with this Report and can be examined by those who choose to do so.
- 5.2.5. I should not leave this topic without noting that certain of the submissions of the Northern Territory conveyed a similar flavour. Of course, a grant of title benefits a comparatively small portion of the Northern Territory public, and the Northern Territory has a responsibility to the entire Northern Territory community. However, its submissions broadly reflect an approach of resisting the claims, rather than of putting forward the potential detriments and seeking a way to resolve them if they are deemed significant. They do not pay much heed to the agreement making power in s 11A of the ALRA. They do not pay heed to the interests of the traditional Aboriginal owners of the land under consideration. Rather they seem to reflect the view that no grants should be made unless and until all the concerns of the Northern Territory and of the individuals and entities concerned are accommodated. Such an approach is not really consistent with the ALRA itself. The approach the Northern Territory took is not novel to the Review. I echo the words of former Commissioner, the Hon Justice Maurice in the *Warumungu Land Claim Report (No. 31)*⁷.

⁷ See, also, Commissioner Olney’s comments in *North Desert Land Claim Report (No. 45)*, 29 September 1992, Olney J, 45, [16.9].

- 5.2.6. Whilst the Northern Territory has every right to test applications made under s 50(1)(a), it ought not to actively oppose them simply because of the detriment it considers may flow if they are successful, or the impact which the land becoming Aboriginal land may have on existing or proposed patterns of land usage.⁸
- 5.2.7. To put it plainly, the attitude common between the Northern Territory and a number of stakeholders seems to be based on the presumption that, because they are currently able to exercise certain rights or conduct activities/ventures in the claim areas, they have an entitlement to that land at the expense of the rights of the traditional Aboriginal owners. This misplaced entitlement is evident in the issues that this Chapter goes on to discuss.

5.3. What is ‘detriment’ under the ALRA?

- 5.3.1. The ALRA requires the Commissioner to comment on ‘the detriment to persons or other communities including other Aboriginal groups that might result if the claim were acceded to in whole or in part.’⁹ In this Review, I adopt the interpretation of Commissioner Toohey,

Detriment is not defined but must bear its ordinary meaning of harm or damage which need not be confined to economic considerations any more than the reference to ‘advantaged’ in [sub-section 50(3)(a)] need be so confined. And by speaking of detriment ‘that might result’ the Act invites the Commissioner to paint with a pretty broad brush rather than apply conventional standards of proof to the material before him. Nevertheless there must be some limit to the matters that may properly be the subject of comment. In practical terms it would be impossible to have regard to every consideration no matter how tentative. Furthermore where there is some proposal in relation to land...it is important to look at the practicality of a project and the length of time that may elapse before it gets off the ground. Failure to do this may lead to providing the Minister with a range of information so broad and tentative as to be of little use to him.¹⁰

⁸ *Warumungu Land Claim Report (No. 31)*, 8 July 1988, Maurice J, 247.

⁹ *ALRA 1976 (Cth)* s 50(3)(c).

¹⁰ *Borrooloola Land Claim Report (No. 1)*, 3 March 1978, Toohey J, [174]-[175]. See, also, *Murrarji Land Claim Report (No. 25)*, 7 October 1986, Maurice J, [126]; *Jawoyn (Katherine Area) Land Claim Report (No. 27)*, 6 October 1987, Kearney J, [190]; and *Upper Daly Land Claim Report (No. 37)*, 10 August 1989, Kearney J, [122].

- 5.3.2. Where the ALRA provides for protections of interests, such as mining interests¹¹ and certain Government interests¹², then detriment claimed in relation to those interests is not to be considered detriment for the purposes of ss 50(3)(b) and 50(3)(c). I do not consider the potential inconvenience that may arise from complying with those provisions and the procedures legislated as detriment either.¹³ As set out by former Commissioners, claims of this character are not to be considered a detriment that might result from the claim being acceded to, but rather a quarrel with the ALRA itself.¹⁴
- 5.3.3. I also do not consider the process of negotiating an agreement as a detriment for the purposes of ss 50(3)(b) and 50(3)(c). I adopt the words of Commissioner Toohey, 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....But I am not persuaded that s.40 [grant of an exploration licence] 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.¹⁵

5.4. Considering experiential detriment

- 5.4.1. Difficulties have arisen in this Report with considering detriment that is experiential, as no real or measurable evidence can be adduced. This is apparent in detriment claimed in relation to recreational fishing, where stakeholders have submitted that the loss of access to certain fishing areas, or any change to the current geographical access, would affect their lifestyle and their happiness.
- 5.4.2. That is not to say that the concern is not genuine. But the assertions must be tested by reference to the established facts. The relevant material is considered in the next Chapter of this Report. Without that analysis, the claim is general, and may have

¹¹ See, for example, *ALRA 1976 (Cth) Part IV-Mining provisions*.

¹² See, for example, *ALRA 1976 (Cth) ss 14, 15*.

¹³ See, for example, *Yutpundji-Djindiwirritj (Roper Bar) Land Claim Report (No. 15)*, 31 March 1982, Toohey J, [153]; *Nicholson River (Waanyi/Garawa) Land Claim Report (No. 17)*, 26 July 1984, Kearney J, [260].

¹⁴ See, for example, *Cox River (Alawa/Ngandji) Land Claim Report (No. 18)*, 30 November 1984, Kearney J, 41, [141]–[143]; *Finniss River Land Claim Report (No. 9)*, 22 May 1981, Toohey J, [278]–[283], [320]–[232].

¹⁵ *Finniss River Land Claim Report (No. 9)*, 22 May 1981, Toohey J, [283].

greater significance in one claim rather than another, or by reference to the proximity of each claim area to the place of residence of the person or persons asserting the detriment. Its significance may depend on the availability of other fishing resources also available.

- 5.4.3. As a starting point, previous Commissioners have said, uncontroversially, that detriment must be one which ‘may *reasonably* result’¹⁶ from the grant. I refer again to Commissioner Toohey’s interpretation of detriment referenced above¹⁷, and adopt his approach. Experiential detriment claims have been dealt with on a case-by-case basis, deciphering what can be reasonably expected of the claims provided. This is dealt with in Chapters 6 and 7.

5.5. ‘Cumulative detriment’

- 5.5.1. A significant issue that has arisen in respect of the claims subject to the Detriment Review is the consideration of a form of detriment labelled “cumulative detriment”. Cumulative detriment, as claimed, is detriment that flows from multiple grants of title to traditional Aboriginal owners. It is cumulative, as the detriment which may be caused by one grant of title is then said to be compounded by multiple grants of title, magnifying the original detriment.
- 5.5.2. The term has been used in respect of two broad themes of detriment. Detriment to pastoralists whose property abuts multiple claim areas, and detriment in respect of fishing, where it is said that detriment will be experienced by the closure of access to one particular area and be progressively more significant as access is closed to other fishing areas where fishing takes place.¹⁸
- 5.5.3. I will discuss cumulative detriment in respect of pastoral operations first.
- 5.5.4. The context, as discussed in this Review, is that the principal and understandable concerns of pastoralists whose leases extend to the high water mark of coastal and tidal areas and to the banks of rivers and creeks. Many of them access the unalienated Crown land, where now there may be a recommendation for the grant of Aboriginal land to that high water mark of coastal and tidal areas and the beds and banks of

¹⁶ See, for example, *Murranji Land Claim Report (No. 25)*, 7 October 1986, Maurice J, [126]; *Jawoyn (Katherine Area) Land Claim Report (No.27)*, 6 October 1987, Kearney J, [190]; and *Upper Daly Land Claim Report (No. 37)*, 10 August 1989, Kearney J, [122].

¹⁷ *Borrooloola Land Claim Report (No. 1)*, 3 March 1978, Toohey J, [175].

¹⁸ Cumulative detriment was also raised in respect of the pastoral industry more generally, where the land claims, if granted, may have a negative impact on future opportunities for pastoral diversification, and the economic sustainability of the industry as a whole. This matter is addressed further in Chapter 6.

rivers and creeks. Hence their access to water from those water sources, and to control noxious weeds and the like which impact on their usage of their pastoral lease might be cut off or restricted. There is a good history of the traditional landowners in such circumstances, in respect of other grants, being prepared to agree to the pastoralist's usage of their land for those purposes. There is no reason to think that, if the grants were made of the 12 land claims which are within the 'ITZ and beds and banks of rivers' category, the traditional owners would not equally accommodate the pastoralists interests to that extent.

5.5.5. Several detriment interests are common to multiple claims because of the close proximity of a number of the land claim areas. In submissions received by pastoralists whose property is abutted by two claims, the pastoralists asserted that the Minister ought to consider the cumulative effect of both land claims on their interests, as their detriment interest in each claim is magnified by the requirement that, if the land is granted, they negotiate with more than just one claim group. The premise underlying this cumulative detriment claim is that traditional Aboriginal owners' entitlement to an area of land should be compromised when that area of land is proximate to an area of land that a different group of traditional Aboriginal owners are entitled to. The agreement-making powers legislated for by the ALRA, as well as the history of Aboriginal acquiescence and the tendency for resistance by non-Aboriginal stakeholders, informs a process whereby traditional Aboriginal owners will generally accommodate parties' reasonable interests in the use of the claimed land. This cumulative detriment claim acknowledges this premise by complaining that agreements will have to be made with more than one traditional Aboriginal owner group, and arguing that that should be a consideration for this Review and for the Minister under s 11 when deciding whether to grant title. What follows on from this reasoning is the belief that grants of title should be denied or conditional if a different grant of title may already impact a stakeholder. That is, traditional Aboriginal owners should not be granted title, or unconditional title, because other Aboriginal people also have traditional affiliations in areas nearby.

5.5.6. I do not consider that Parliament envisaged such a "first come, first serve" approach to grants of Aboriginal land. Nor do I consider that the ALRA intended detriment claimed in inquiries to be considered as an addition to detriment claimed in previous inquiries in circumstances such as those now addressed. That approach would seriously prejudice the claimants of areas where an inquiry has been delayed, due to political factors, or other factors not attributable to them. Moreover, the need to enter into more than one agreement with the two or more traditional owner groups of land

abutting a particular lease, in any event, should not be considered a detriment. I have expressed the view that the opportunity/need to make an access/usage agreement with traditional owners is not a detriment. It is a process expressly provided for by the ALRA, and would equally apply where one pastoralist has to make agreements with more than one group of traditional owners through the relevant land trust.

5.5.7. I now turn to the issue of cumulative detriment as it relates to fishers' access to the land claim areas, should those areas be granted Aboriginal land.

5.5.8. AFANT, the Northern Territory Seafood Council (NTSC) and the Northern Territory have claimed cumulative detriment in that acceding to multiple land claims to beds and banks of rivers and/or ITZs will preclude fishing in the granted areas, and so restrict fishing effort to fewer areas, thereby negatively affecting fisheries management, anglers' solitary fishing experiences, sustainability of fishing stocks and commercial fisher flexibility.

5.5.9. The reasoning behind this form of cumulative detriment was summarised by the Northern Territory in its submission to a current inquiry, referenced in their submissions to this Review,

It would be appropriate for the Report to include the comment that because the immediate effect of a grant would be that access to the claim areas would not be permissible without the consent of the claimants, there is likely to be a corresponding increase in fishing effort in other areas with the effect that fish stocks may become depleted in other areas, those areas may become overcrowded with both recreational and commercial fishers, and there may be a negative impact on the recreational fishing experience.¹⁹

5.5.10. Submissions of this type are supported by Commissioner Olney's comments to the Minister about dealing with claims to beds and banks of rivers and/or intertidal zones on a 'regional or even a territory-wide basis', rather than a 'purely local' basis.²⁰ As I have noted, that is probably one reason why a number of the 16 land claims have not yet proceeded to grants.

5.5.11. Cumulative detriment, although presented by stakeholders as a relatively contemporary consideration, was discussed by Commissioner Maurice in 1983 in response to a Northern Territory submission,

¹⁹ Northern Territory, 'Final submissions of the Attorney-General for the Northern Territory regarding detriment', *Submissions in Legune Area Land Claim (No. 188) and the Gregory National Park/ Victoria River Land Claim (No. 167)*, 25 August 2017, 7, [28].

²⁰ *McArthur River Region and Part of Manangoora Land Claim Report (No. 62)*, 15 March 2002, Olney J, [169].

The Northern Territory expressed concern that, if access is denied to water courses and lagoons within the claim area, this will foreseeably lead to more intensive and potentially excessive use of other recreational areas and, particularly with barramundi fishing, would lead to excessive exploitation of stocks in neighbouring areas...In any event, I am not convinced that there are not ways of preventing these consequences: for example, fewer licences, appropriate licence restrictions, closed seasons, bag limits, and more effective fisheries law enforcement.²¹

5.5.12. He went on to say,

I do not wish to convey that the considerations raised by the Northern Territory in relation to tourism, recreation and fishing are not worthy of serious consideration; clearly they are. However, they have been presented in a perspective which hardly does justice to the interests of the Aboriginal constituency and I have endeavoured-no doubt clumsily-to redress that. As to whether a grant should be made conditional upon some accommodation being made for these competing non-Aboriginal interests, whether a grant of inland waters should be made at all, calls for very careful thought and, perhaps, further discussion with the protagonists.²²

5.5.13. The question whether such cumulative detriment should be considered detriment under s 50(3)(b) is a vexing one. It is a matter discussed in more detail in the next section of this Report.

5.5.14. It would appear to be unfair to the individual claimants in such land claims that their entitlement to a grant should be impaired by detriment in part as a consequence of an additional or earlier grant, perhaps well remote from their claim area. There is no element of “first-come first-served” apparent in the ALRA, especially as the sequence of dealing with claims made under the ALRA or timing of the reports of the Commissioner on those claims is not necessarily dictated by the sequence of lodging the claims.

5.5.15. The commercial fishing closures by the Northern Territory under the *Fisheries Act 1988* (NT) (*Fisheries Act*) in the Little Finnis River, Wildman River, Bynoe Harbour and Darwin Harbour, reduce the areas that commercial anglers may fish in, relocating commercial fishing effort elsewhere, affect fisheries management, anglers’ solitary fishing experiences and sustainability of fishing stocks. Policies aimed at drawing

²¹ *Mataranka Area Land Claim Report* (No. 29), 14 December 1988, Maurice J, [14.4.8].

²² *Ibid* [14.4.10].

fishing tourism to the Northern Territory, such as the Million Dollar Fish, work to increase the numbers of anglers on the rivers, in turn also affecting fisheries management, anglers' solitary fishing experiences and sustainability of fishing stocks. To my understanding, the entitlement of traditional Aboriginal owners may be adversely affected by the broader policy decisions in relation to fisheries management, and that affect may be random or 'whimsical' in the sense that it is not a direct consequence of policy directed to the particular area of the land claim.

- 5.5.16. As noted in regards to pastoral cumulative detriment, to consider cumulative detriment resulting from the relocation of fishing efforts as a factor which may preclude unconditional grants of title, is to not only deprive traditional Aboriginal owners of land rights because of previous or additional land grants, but it is also to deprive traditional Aboriginal owners of land rights because of policy decisions made by the Northern Territory.
- 5.5.17. As I have indicated, this issue is a difficult one. It is further considered in the next Chapter of this Report.

5.6. Timing issues

- 5.6.1. The 16 land claims subject to the Review were reported on and recommended for grant by the Minister between 14-38 years ago. That can readily be seen from the date of the Commissioners' Land Claim Reports listed above.
- 5.6.2. The elapse of time between the Reports and this Review, without a decision from the Minister, has meant that the claims for detriment, in many cases, has become more extensive.
- 5.6.3. In my view it is appropriate for the Minister, and hence for this Review, to consider the significance of the many claims of detriment in relation to the following time periods relevant to each separate claim:
1. Where the detriment existed at the time of the relevant Report, encompassing the changes in that type of detriment since the Report;
 2. Where the detriment arose after the time of the Report, in circumstances where the particular activity which is said to give rise to the detriment itself commenced after the Report (it may be that there is a distinction to be drawn between those instances where the stakeholder actually knew of the Report and where the stakeholder did not know of the Report, but – as should be the case in all instances in this category – had reason to know of the Report);

3. Where there was a material change in the common understanding of the significance of the Report by reason of the Blue Mud Bay case.
- 5.6.4. Clearly, instances within the first category merit consideration by the Minister under s 11 and hence by this Review.
- 5.6.5. There is much to be said for the proposition that a stakeholder who commences an activity on unalienated Crown land, knowing of the Report and therefore of the potential for a grant of the land to the traditional owners, although suffering a detriment for the purposes of s 50(3)(b), should not have that detriment weigh much if at all in the Minister's consideration under s 11, and equally for the purposes of this Review. Any disadvantage to the stakeholder in those circumstances should not be a relevant detriment to the Minister, because it should be assumed that the stakeholder took into account the potential for a grant of the land to the traditional owners in deciding to enter into the activity or to acquire the interest which might be affected by the grant. It is a classic case of "let the buyer beware", especially where the price or conditions of the undertaking may have taken account of that risk. Detriment interests of this nature arose because a person, entity, government or organisation acted with knowledge of the Report and so the potential that the Minister might make a grant.
- 5.6.6. There are no instances where a person or entity in that situation says that the activity was undertaken on the basis of some representation by the Minister that a grant would not be made. Indeed, when this Report turns to particular claims in Chapter 7, there will appear an instance where the Northern Territory specifically notified the pastoral lessees each taking a transfer of parts of a larger pastoral lease of the very risk, namely that a grant of the land abutting the leased areas might be granted to the traditional owners.
- 5.6.7. There is also much to be said, perhaps not quite so forcefully, that any stakeholder who had access to the records which would have disclosed the existence of the relevant Land Claim Report or Reports of the Commissioner equally should not be able to complain of detriment by reason of disadvantage caused when the grant is made. The reasons for such a view are similar: the ALRA and its purposes is well known in the Northern Territory. A professional conveyancer acting for a person or entity would be expected to understand that there are outstanding land claim reports where the Commissioner had made a recommendation of a grant of the land in issue, but the Minister had not to that time made the grant.

- 5.6.8. Indeed, the submissions about the state of uncertainty affecting grants of land adjacent to ITZ waters, and waters in rivers and creeks, until the BMB case was decided by the High Court, tend to confirm that general state of awareness, at least in respect of the 12 claims where a grant would encompass such waters. The publicity about the BMB case and its perceived consequences certainly must be taken to have been known by those whose activities commenced only after that case or whose interests in lands adjoining such waters.
- 5.6.9. Of course, in the case of the Northern Territory, it must be taken to have known of all those Land Claim Reports as s 50(1)(a)(ii) requires the Reports to be given to the Administrator of the Northern Territory at the same time as they are given to the Minister.
- 5.6.10. In relation to the significance of the Blue Mud Bay case itself, it is fair to say (as I accept) that it decided an issue of general importance about the effect of a grant of land to the traditional owners under the ALRA where the land included the waters of a river or creek or with a seafront aspect so that the grant extended to the low water mark. In the case of activities first undertaken after that decision, and after the relevant Report of the Commissioner, such activities unless there are special circumstances should be regarded in the same way as other activities. In the case of activities first undertaken after the Report of the Commissioner but before that decision, my provisional view was that it will be necessary to consider the particular circumstances to determine the extent to which the detriment asserted should be taken into account in the balancing exercise referred to above.
- 5.6.11. In the light of those provisional views, on 27 March 2018 I invited the NLC and Northern Territory to provide legal submissions on the approach I should take in considering and commenting on detriment interests that were acquired after the relevant Report of the Commissioner. In that request, I asked for their views on whether there should be any difference drawn where the relevant activity upon which detriment is asserted first occurred either after the land claim was lodged, or after the land claim inquiry commenced (with the public advertising of the inquiry and the invitation to participate in the hearing), as well as after the land claim Report of the Commissioner was published. Their submissions were valuable. I have carefully considered them. They are annexed to this Report at **Annexures 10 and 11** respectively. The Northern Territory's response to the NLC's submission is annexed at **Annexure 12**.
- 5.6.12. To summarise, the Northern Territory argued in their submissions that,

There is no warrant for treating such detriment differently depending on the stage at which exposure to it arose, or for inquiring into a person's state of knowledge about a land claim and the bearing, if any, which that knowledge had, or should have had, on their exposure.²³

- 5.6.13. The submissions did not address in any detail the point that this Review is made under s 50(1)(d) of the ALRA and the Minister's Terms of Reference, so it does not necessarily correspond with the role of the Commissioner in an inquiry under s 50(1)(a) and s 50(3). I have noted that distinction in discussing the task required of this Review in the Introductory section of this Report.
- 5.6.14. The submissions of the Northern Territory were based on the following four main arguments:
1. The distinction in language between s 50(1) and s 50(3) of the ALRA implies that on this Review I must not comment on the detriment submitted in a way that usurps the Minister's role to consider detriment matters in exercising functions under s 11 of the ALRA.²⁴
 2. Inquiries into the state of knowledge of stakeholders are long and complicated endeavours, potentially involving an application of the five categories of knowledge.²⁵ Parliament could not have envisaged Commissioners to make such inquiries and there is nothing in the ALRA which implies that the Minister (or the Commissioner conducting this Review) should consider such information when performing functions under the ALRA.
 3. Previous Commissioners have not generally undertaken such inquiries²⁶ and no Commissioner has ever commented to the effect that an affected person or entity is 'the maker of their own misfortune'²⁷, in regards to when their detriment interest was acquired.

²³ Northern Territory, 'Submissions of Northern Territory of Australia as to proper approach of Aboriginal Land Commissioner to detriment matters arising after a land claim', Submissions in *Detriment Review*, 17 May 2018, [7].

²⁴ *Ibid* 4 – 7.

²⁵ *Baden v Societe Generale put Favoriser le Developpement du Commerce et de l'industrie en France Sa* [1992] 4 ALL ER 161.

²⁶ See, for example, *The Kenbi (Cox Peninsula) Land Claim Report (No. 59)*, December 2000, Gray J, as set out in footnotes 22-23 of Northern Territory, 'Submissions of Northern Territory of Australia as to proper approach of Aboriginal Land Commissioner to detriment matters arising after a land claim', Submissions in *Detriment Review*, 17 May 2018.

²⁷ Northern Territory, 'Submissions of Northern Territory of Australia as to proper approach of Aboriginal Land Commissioner to detriment matters arising after a land claim', Submissions in *Detriment Review*, 17 May 2018, [31].

4. Whilst it may be appropriate to concede that there may be scope to question the fairness of giving much weight to a detriment interest which has arisen after the Land Claim Report is provided to the Minister²⁸, due to the significant time that has elapsed since the provision of the relevant land claim reports, it is not unreasonable for the public to expect that no grant of title to the claimed land would be made. On that basis, it cannot be considered ignorant or as displaying an appetite for risk to, for example, invest or start a business in or adjacent to a land claim area.

5.6.15. On the other hand, the NLC argued, in summary, that in undertaking the Review I should make inquiries into the time the claimed detriment interest arose and whether the person or entity asserting that detriment interest had actual or constructive knowledge of the relevant land claim. If the person or entity had actual or constructive knowledge of the land claim prior to the event(s) said to give rise to the asserted detriment then it is the NLC's submission that,

Any such harm or damage to the person [or entity] would not be the result of a grant of the land; rather [it] would be the result of decisions or choices made by the person [or entity] and would therefore not be detriment within the meaning of s 50(3)(b).²⁹

5.6.16. If the detriment interest was acquired after a land claim inquiry has commenced or after an area has been recommended for grant as Aboriginal land, it is the NLC's submission that the person or entity who is asserting that detriment interest should be expected to have known about the land claim, or at least made 'reasonable inquiries about the land claim status of the land'³⁰, and, 'Once, again, any harm or damage would not be detriment within the meaning of s 50(3)(b) because it would not be the result of the land being granted; it would be the result of the person's [or entity's] decision to take the risk.'³¹

5.6.17. The NLC's position was based on the following four main arguments:

1. My functions in the Review are determined by the Term of Reference and solely derive from s 50(1)(d) of the ALRA. They are broader than the Commissioner's

²⁸ Ibid 12, [33].

²⁹ NLC, 'Submissions on behalf of the Northern Land Council concerning legal principles in respect of detriment interests acquired post land claim', Submissions in *Detriment Review*, 25 May 2018, 3, [1](i).

³⁰ Ibid 24, [76].

³¹ Ibid 23, [74].

functions provided for by s 50(3) of the ALRA, and are constrained only by the subject matter, scope and purpose of the ALRA.³²

2. Potentially affected persons and entities should be taken to know about land claims to areas or be expected to make reasonable inquiries about the land claim status of the land because land claim inquiries are widely advertised, including publications in multiple newspaper notices and letters to adjacent landholders, governments and representative bodies. The NLC also assert that a ‘widespread consciousness’ about the potential existence of land claims should be expected generally, because of the long, political, publicised history of land rights in the Northern Territory.³³
3. If the Minister decided to not recommend land for grant based on detriment interests acquired by persons or entities who failed to make reasonable inquiries as to the existence of a land claim, yet assert such interests as detriment anyway, this would be at odds with the objectives of the ALRA.
4. The principles underlying such common law defences as *volenti non fit injuria* and the failure to mitigate should be applied in considering detriment submissions provided to the Review.

5.6.18. In reply, the Northern Territory re-affirmed its contention about the Review not being entitled to consider such matters. It said the Review could only be at the level required of the Commissioner for a report following an inquiry. It warned against inquiring into the state of mind of the relevant stakeholder (including possibly venturing into the realm of privileged information). It pointed out that, as I accept, members of the public would not have the nuanced understanding of a report of the Commissioner as would the NLC and the Northern Territory. It said that members of the public are entitled after the elapse of a significant period to assume no grant will be made. And, finally, it said that the traditional owners somehow had been remiss in not pressing for the grants of the subject claims, so their lack of pressure was a relevant consideration. Reference was also made to the delayed and unexpected result of the Blue Mud Bay case.

5.6.19. I have referred to the last mentioned topic elsewhere.

5.6.20. As to the other matters, I have explained my understanding of the scope of the Review. I have endeavoured to draw such conclusions as I have reached only upon clear evidence (e.g. where the Northern Territory said it had informed 4 recent

³² Ibid 2, (1)(a).

³³ Ibid 24, [76].

transferees of a pastoral lease that there was an outstanding land claim). In that particular case, the knowledge of the transferees has not altered the recommendation I have made. I have been mindful of the level of public knowledge of the fact of land claim reports and their significance. Deemed knowledge itself has not resulted in any specific adverse finding in relation to a stakeholder's detriment concerns. The fact of the request for the review indicates that the Minister has not refused to make the recommended grants, and that it was not appropriate to assume that the Minister had done so. No stakeholder actually asserted such an understanding in any event.

- 5.6.21. Importantly, as I have pointed out from time to time, no stakeholder claimed in the detriment submissions that the significance of the existence of the reports and the possible grant of the land would have made a difference to the decision of the stakeholder to acquire that stakeholder's relevant interest. I have assumed that activities existing at the time of the relevant report were assumed by the stakeholder to be able to continue. In the case of asserted detriment where the activity which gives rise to the detriment commenced after the relevant report, in my view the situation is different as explained below.
- 5.6.22. After considering the submissions, it is my view that the provisional views which I set out above are those appropriate to guide the content of this Report, including such comments and/or recommendations as may be made to assist the Minister in determining whether to make a grant of the land recommended by the several Reports of the Commissioner concerning the 16 claims.
- 5.6.23. It is reasonable to expect that inquiries would be made as to the existence of a land claim over an area which a planned business or investment relies on. Failure to make such inquiries when deciding to purchase or start that business or investment is a lapse in due diligence and risk assessment. Any such failure should be relevant to the decision under s 11 whether to make the grant having regard to the detriment asserted.
- 5.6.24. The 16 land claims subject to the Review have been inquired on by former Commissioners under s 50 of the ALRA and subsequently reported to the Minister and the Administrator of the Northern Territory. Upon commencement of inquiry, Commissioners provided public notice that the claim was to be heard and invited those who wished to be heard to register their interests. This notice is done via advertisements in local newspapers, letters to adjoining landholders, and letters to all other persons, organisations and governments whose interests might be affected if the land claim was acceded to. It is general practice that the notice provided contains

information about the claim, including a description of the land claim area. Once the land claim report is finalised and published, it is provided to the Minister, circulated to all those who participated in the land claim hearings and made publicly available. Information about the 16 land claims subject to the Review has therefore been accessible from a time shortly after each Report. The Northern Territory, the Commonwealth Government, Land Councils and representative bodies should all have knowledge of the claims and records detailing the land claim areas. Alternatively, in the case of representative bodies, at the very least, they should know where to direct an inquiry about the status of unalienated Crown land area.

- 5.6.25. In short, my view is that, whilst it is appropriate to treat all claims of detriment as presented to the Review as eligible “detriment”, where the activity which gives rise to the detriment (or the acquisition of the interest which gives rise to the asserted detriment) occurred after the Report of the Commissioner, in determining whether to make a grant the Minister (and for the purposes of this Review) such detriment should be given little weight. There were no particular circumstances which made it necessary to distinguish between the date of the claim and the date of the Report by the Commissioner.
- 5.6.26. I do not think that any basis has been shown to regard the lapse of time between the Reports and the undertaking of that activity or acquisition as being of much significance. As noted, there is nothing to suggest that any of the persons or entities which asserted detriment proceeded on the basis of any representation or conduct by the Minister to indicate that a grant would not be made. To the contrary, the fact that the Minister has required the undertaking of this Review points to the contrary, namely that the Minister regards each of the subject Reports and recommendations within them as matters which can properly be the subject of consideration for a grant under s 11 of the ALRA.
- 5.6.27. It is however incumbent on the Minister under s 11 to consider each of the recommendations separately and to decide whether to make a grant having regard to the detriment asserted. That task, for the purpose of this Review, is therefore considered separately in relation to each of the relevant claims in Chapter 7 of this Review. That section therefore will address each of the Reports and the detriment said to be likely to result if a grant of land is made to the traditional owners for the purposes of reporting to the Minister.

5.7. The Blue Mud Bay case: public rights to access water overlying Aboriginal land

- 5.7.1. A number of submissions to the Review refer to detriment arising from the High Court’s decision in the BMB case. There is a reasonable argument that detriment or effects on existing or proposed patterns of land usage, which arise out of a misunderstanding of the law, should not be considered within the scope of the ALRA. To allow erroneous understandings of the law to potentially impede a grant of unconditional land title to traditional Aboriginal owner groups might fairly be said to be at odds with the scheme of the ALRA.
- 5.7.2. In submissions to the Review³⁴, the NLC pointed to the following statement in the Terms of Reference,
- Detriment identified in past land claim reports largely reflected the widely held understanding prior to the BMB decision, that members of the public could enter (but not ‘drop anchor on’) Aboriginal land in the ITZ without authorisation pursuant to sections 70 and 73 of the Land Rights Act.
- 5.7.3. They argued that this interpretation is incorrect, referring to several earlier land rights cases that foreshadowed the BMB decision years prior.³⁵ The NLC also submitted that the High Court’s decision was one that confirmed an understanding that was implicit in the law already. For example, one basis for the High Court decision was that, ‘by necessary implication the *Fisheries Act* abrogated any public right to fish in tidal waters in the Northern Territory that existed before that Act was enacted.’³⁶ What follows, according to the submission, is that those who acted contrary to that necessary implication by acquiring interests or undertaking activities now giving rise to detriment, did so on an erroneous understanding of the law. Consequently, it is said, such persons or entities should not then be able to demand that their detriment interests be taken into account by the Minister in making his or her decision under s 11 (or in this Review).
- 5.7.4. In detriment submissions to the Review, AFANT on the other hand argued that the land rights context prior to the BMB case was one which clearly implied a contrary view to that which was adopted by the High Court in the BMB case.³⁷ They referred

³⁴ NLC, ‘Submissions on behalf of the Northern Land Council concerning legal principles in respect of detriment interests acquired post land claim’, Submissions in *Detriment Review*, 25 May 2018.

³⁵ Ibid 29, [98]. See, also, *Arnhem Land Aboriginal Land Trust v Director of Fisheries* [2000] FCA 165, (2000) 170 ALR 1; *Gumana v Northern Territory* [2005] FCA 50, (2005) 141 FCR 457; *Gumana v Northern Territory* [2007] FCAFC 23, (2007) 158 FCR 349.

³⁶ Ibid 29, [97], quoting *Blue Mud Bay* decision at [27]-[28], [59] (Gleeson CJ, Gummow, Hayne and Crennan JJ, with Kirby J agreeing generally).

³⁷ AFANT, ‘Statement of David Ciaravolo – Lorella Land Claim No. 199 and part of Maria Island Region Land Claim No. 198 and Maria Island and Limmen Bight River Land Claim No. 71’, Submissions in *Detriment Review*, 24 April 2018, [64]-[65].

to Commissioner Olney's consideration of fishing tourism operator, Mr Stephen Barrett's detriment interests,

Although a grant of title could give rise to restrictions being imposed on access to the Limmen Bight River, or parts of it, in practical terms it seems unlikely that this would occur particularly in view of the attitude of the claimants to the continued operation of Steven Barrett's fishing camp.

- 5.7.5. They argued that this demonstrated that at least that Commissioner regarded access over the riverbank (as unalienated Crown land) was available, as it was accepted that the public had the right to access and use waters overlying the riverbeds.
- 5.7.6. I agree with AFANT that Commissioners have generally considered detriment in light of the belief that the common law public right to fish would be retained in respect of waters overlying Aboriginal land.³⁸ Consequently, I do not consider that a person or entity which proceeded on that assumption for a time, perhaps even up to 2008 when the BMB case was finally decided should be regarded by the Minister (and in this Review) as an inappropriate risk taker, whose detriment should be given little weight.
- 5.7.7. More accurately, at least so far as the Northern Territory was aware, at least from 1997 the issue was contentious. That is the year in which the BMB case first commenced in the Federal Court of Australia, with the Director of Fisheries (NT) as the respondent. The Arnhem Land Aboriginal Land Trust at that time applied to have recognised the right which the High Court of Australia in 2008 did recognise. It is also apparent that from 2002, there was a clear acknowledgement that the legal issue about the effect of such grants was uncertain. Commissioner Olney included discussions about this uncertainty³⁹, acknowledging that the question of whether the public had a right to fish over Aboriginal land was currently before the High Court.
- 5.7.8. It is not so clear that the case at first instance, which was commenced in 1997⁴⁰, was significantly publicised amongst the non-legal community: however, from 2002, by reason the of Commissioner's comments of the character referred, it is appropriate to

³⁸ See, for example, *Alligator Rivers Stage II Land Claim Report (No. 10)*, 2 July 1981, Toohey J, [362]; *Daly River (Malak Malak) Land Claim Report (No. 13)*, 12 March 1988, Toohey J, [316], [377]; *Mataranka Area Land Claim (No. 29)*, 14 December 1988, Maurice J, (14.4.8); *Warnarrwarnaa-Barranyi Land Claim Report (Borrooloola No. 2) (No. 49)*, March 1996, Gray J, [6.4.5].

³⁹ See, for example, *McArthur River Region and Part of Manangoora Region Land Claim Report (No. 62)*, 15 March 2002, Olney, [82]; *Maria Island and Limmen Bight River Land Claim and part of Maria Island Region Land Claim Report (No. 61)*, March 2002, Olney J, [13], [76], [91], [97].

⁴⁰ See *Director of Fisheries (Northern Territory) v Arnhem Land Aboriginal Land Trust* [2001] FCA 98.

think that the issue became more public at least in the Northern Territory. It is likely that AFANT was aware of its existence, at least by that time. There is no assertion by AFANT to the contrary. It is necessary, however to consider the individual circumstances in relation to each claim (as is done in Chapter 7) to determine what should be made of the existence of the BMB case before the High Court decision in 2008. That is an assessment the Minister considering the exercise of the power under s 11 might take into account, and so it is relevant for the purposes of this Review.

5.8. The question of legal entitlement

- 5.8.1. It would be contrary to the scheme of the ALRA if the Minister under s 11, and hence of this Review, were to consider claimed detriment based upon the impairment of interests that arise out of actions which contravene legislation, or based upon the loss of benefits which rely on the claim areas that have been enjoyed by stakeholders, but are not founded in any valid interests or entitlements. Such a proposition is really self-evident. It would not be within the contemplation of the ALRA that the recognised traditional ownership of certain Aboriginal people to particular unalienated Crown land as reported by the Commissioner should be refused because of detriment flowing from interests or activities of another person or entity who has no legal entitlement to those interests or to undertake those activities. It would also follow that, in the event of a decision to grant title, the traditional Aboriginal owners would be unfairly prejudiced if they were required to accommodate the persons or entities who complain of detriment founded upon interests or activities which were not lawful. Even if those propositions should not be treated as absolute, at the least it would be a matter that the Minister could take into account under s 11 (and this Review could take into account) that the claim to detriment is not based upon the holding or exercise of any legal entitlement. Again, there may be shades of entitlement, or debatable entitlements which might colour that consideration, so each claim to detriment must ultimately be considered on its own circumstances.
- 5.8.2. This issue arises because a number of stakeholders to the Review have claimed detriment in respect of an action they currently undertake on Crown land, yet lack the legal entitlement to do so. The most common example in the Review were pastoral lessees claiming detriment for non-pastoral activities, such as activities relating to tourism or commercial accommodation on their lease. Section 86 of the *Pastoral Land Act* provides that a pastoral lessee is to apply to the Pastoral Land Board for a non-pastoral licence to undertake non-pastoral activities on the lease. The Northern

Territory Non-Pastoral Use Guidelines requires that pastoral lessees apply for a non-pastoral permit if undertaking the following activities:

- Tourism activities
 - o Tourism enterprises that require the establishment of infrastructure such as accommodation facilities.
- Forestry activities
- Aquaculture activities
- Agriculture activities
 - o The production of agricultural products that are not going to be utilised on the pastoral lease but used for off-lease consumption.
- Horticulture activities
- Station Store / Roadhouse catering for passing trade
- Commercial accommodation facilities⁴¹

5.8.3. A separate permit is required for different activity types and non-pastoral activities cannot be commenced until formal approval has been obtained from the Pastoral Land Board.⁴² Further, permit fees and annual charges are incurred if holding a non-pastoral use permit.

5.8.4. On the material provided to the Review, out of the seven pastoral lessees who provided detriment submissions relating to the income they receive from activities that are non-pastoral, only one has a current non-pastoral permit. The Northern Territory has not specifically taken a view on this matter in its detriment submissions. It has referred to non-pastoral interests or activities of pastoral lessees without the requisite permits as detriment to be considered by the Minister in making a grant of Aboriginal title.

5.8.5. Similar claims of detriment have been addressed by former Commissioners, but dealt with differently.

5.8.6. In *Yurrkuru (Brookes Soak) Land Claim Report (No. 43)*, the lessee of Mount Denison pastoral lease had bulldozed a site on a parcel of Crown land adjacent to the pastoral lease, to construct and maintain a soak. The lessee did not have any form of

⁴¹ Pastoral Land Board Northern Territory, 'Northern Territory Non-pastoral Use Guidelines', Version 1.0 (implemented 2016, following amendments to the *Pastoral Land Act 1992* (NT)), 4, https://nt.gov.au/_data/assets/pdf_file/0005/261950/npu-guidelines.pdf.

⁴² Ibid.

tenure over the soak or a licence under the *Crowns Land Act 1992* (NT) (*Crowns Land Act*) that enabled him to commercially benefit from the adjacent Crown land. The Central Land Council argued that the lessee was not able to assert a detriment in relation to the soak. Without explicitly addressing the jurisdictional issue, Commissioner Olney in his Land Claim Report commented that the lessee *would* suffer detriment in relation to the soak, as it was an integral part of Mt Denison's cattle enterprise. In fact, Commissioner Olney commented that the potential detriment suffered by the lessee would far outweigh any perceived advantage that the claimants may gain from a grant.⁴³ Commissioner Olney clearly did not consider the lack of entitlement leading to the detriment interest to be a factor which precluded the detriment from being considered by the Minister in making a decision under s 11 of the Act.

5.8.7. However, Commissioner Gray took a different approach when considering such detriment.

5.8.8. In *Warnarrwarnarr-Barranyi (Borrooloola No 2) Land Claim Report (No. 49)*, a group of block holders signed contracts for the purported grants of Crown leases to blocks at Camp Beach. The contract for the grants had the following clause:

Whilst the land is believed at the time of the execution of this contract by the Minister to be available for leasing under the Crown Lands Act the Minister gives no warranty that this belief is accurate and in the event of the belief proving to be inaccurate the purchaser shall not be entitled to any recompense by way of damages for breach of Contract or otherwise in any manner whatsoever other than refund of all monies paid by the Purchaser under this Agreement.⁴⁴

5.8.9. Accordingly, Commissioner Gray held that there were no valid legal interests in the Crown land. The detriment was claimed by the block holders in relation to how much money and time had been invested in building the houses on the blocks. In response, Commissioner Gray stated that,

I am compelled to report that none of the block holders would suffer any detriment in the event that the claim were acceded to in whole or in part. This is because they have already suffered whatever detriment they can suffer. The expenditure of money on the purchase of the blocks, which could not lead to the acquisition of any interest in them, and on the construction of buildings

⁴³ *Yurrkuru (Brookes Soak) Land Claim Report (No. 43)*, 10 April 1992, Olney J, [9.9.12].

⁴⁴ *Warnarrwarnarr-Barranyi (Borrooloola No. 2) Land Claim Report (No. 49)*, March 1996, Gray J, [6.1.1].

which have become part of the real estate, has already occurred. There is no suggestion in *Attorney-General for the Northern Territory v. Hand* that invalid interests, the subject of purported grants by the Crown in right of the Northern Territory during the pendency of a land claim, would spring into validity if the claim were to fail. Such purported grants are invalid altogether.⁴⁵

- 5.8.10. In *Kenbi (Cox Peninsula) Land Claim Report (No. 59)*, squatters had established dwellings and other improvements on various places within the land claim area, without any entitlement to do so. Notably, Commissioner Gray held that ‘squatters will not suffer detriment if the land claimed becomes Aboriginal land under the ALRA because they have no present entitlements’.⁴⁶
- 5.8.11. In the same Land Claim Report, Commissioner Gray reported on the detriment claimed by the Baumber Family, a family who lived within the claim area on an occupation licence, which was granted periodically. The Baumber family used part of the land for small-scale aquaculture projects. They claimed detriment that in the event that a grant of title was granted, they may lose the opportunity to obtain a more secure form of title from the Northern Territory. In response Gray stated that,
- The Baumber family will only suffer detriment, however, if they lose something to which they are entitled. If, as a result of the land claim being acceded to, they lose nothing to which they are entitled, then it cannot be said that any detriment would ‘result’....Baumber’s loss is limited to what he is allowed to do and occupy under the licence.⁴⁷
- 5.8.12. Commissioner Gray goes onto discuss how Mr Baumber had acted in constant breach of his licence and the relevant legislation, erecting improvements without formal approval, disregarding regulations and licence conditions and ignoring the physical boundaries of the area he was entitled to occupy.⁴⁸ To conclude, Commissioner Gray reports that,
- Mr Baumber would lose nothing if he were not permitted to do that which he is not entitled to do. It is irrelevant that the Northern Territory Government has apparently turned a blind eye to his unlawful behaviour. The fact that he

⁴⁵ Ibid [6.1.7].

⁴⁶ *The Kenbi (Cox Peninsula) Land Claim Report (No. 59)*, December 2000, Gray J, [36].

⁴⁷ Ibid [11.10].

⁴⁸ Ibid [11.10.11].

has been able to enjoy his unlawful residence, activities and improvements does not equate to an entitlement to enjoy them.

- 5.8.13. Commissioner Gray obviously believed detriment interests that are not validated by any form of legal entitlement, be it legislative, contractual or in common law, or detriment interests which are contrary to the relevant legislation, cannot amount to detriment that is considered by the Minister when deciding whether to grant Aboriginal land under the ALRA.
- 5.8.14. I agree with Commissioner Gray. In addition to the reasons for his views, I revert to what is said at the commencement of this part of the Report: it is very unlikely that the ALRA contemplated that the traditional owners of unalienated Crown land should be vulnerable to not receiving a grant of that land because another person or entity has asserted rights over that land without any entitlement to do so, or because such a person or entity has undertaken activities on or in relation to that land without any legal entitlement to do so. Persons and entities which derive a benefit from Crown land, when that benefit is at odds with legislation, or when that benefit has no legal basis, cannot then claim detriment when that benefit is lost. Further, any money and time that was spent in developing that benefit was not money and time invested, but money and time gambled. The loss is suffered because the risk was taken.
- 5.8.15. Each individual claim and the detriment assertions which it has attracted will, however, have to be considered in its own particular circumstances.
- 5.8.16. Before turning to the individual Reports under consideration in accordance with the Terms of Reference, it is convenient to address a number of detriment issues, where the claim of detriment is one common to many of the claims made and the subject of the Commissioner's recommendations.
- 5.8.17. The common issues addressed in the next section of this Report can then be imported in to the consideration of the individual claims, subject of course to any particular circumstances that are applicable.

6. Common Claims of Detriment

6.1. Introduction

- 6.1.1. A number of detriment matters raised in the submissions demonstrated significant commonality between both stakeholders and land claims the subject of this Review. To a significant extent such detriment issues were addressed generally by the NLC, including in respect of any proposals put forward to mitigate the concerns raised. Accordingly, common claims of detriment and any relevant proposals to address those claims are considered in this Chapter together.
- 6.1.2. Of course ultimately, as noted above, each claim and the asserted detriment in relation to it being granted must be considered separately. But it is, in my view, a more efficient and a better way of addressing assertions of detriment if they are considered in this Chapter. The reference to such claims and assertions when considering the individual claims can then be addressed quite briefly and without undue repetition.
- 6.1.3. Detriment issues pertaining to specific stakeholders or to land claims that are not more generally applicable across claims and between stakeholders, and any relevant proposals for mitigating these issues, are addressed at Chapter 7 below.
- 6.1.4. This Chapter deals with common detriment on the part of the various sections of the fishing community, including the Northern Territory's concerns about its capacity to properly conduct fisheries management; detriment asserted by pastoral interests; detriment asserted by the tourism industry and its participants; issues arising in relation to boat ramps; and detriment concerns of the mining and petroleum interests.

6.2. Whole of fisheries management

Introduction

- 6.2.1. The Northern Territory's submissions raised broad fishing related detriment concerns for all beds and banks and intertidal zone claims in the context of whole of fisheries management. Such concerns, and the NLC's submissions in response, are helpful to broach at the outset in considering fishing related detriment due to their broad applicability to commercial and recreational fishing issues, and potentially FTOs. The matters of cumulative detriment and agreement making in particular, were referenced throughout the Northern Territory's submissions, and both the Government and AFANT submissions in reply to the NLC commented extensively on the negotiation

of access agreements. Detriment to FTOs is addressed in consideration of Tourism later in this Chapter, as it raises issues relevant to that discussion.

- 6.2.2. Where relevant, stakeholder replies to the NLC submissions are addressed in the following discussion.
- 6.2.3. There are two aspects to the ‘whole of fishery’ management idea as it emerged in the course of submissions.
- 6.2.4. The first is the entitlement of the Northern Territory to regulate its waters so as to preserve fish stocks, whether generally or in respect of particular species. That is referred to in the section of this Chapter dealing with cumulative detriment.
- 6.2.5. The second concerns the desire of the Northern Territory to secure fishing access for its citizens, focussed separately on commercial and recreational fishing.
- 6.2.6. Each of those concerns confronted the Northern Territory after the BMB case. It is not advanced that its consequence to date has impaired the regulation of fisheries under the *Fisheries Act*. Indeed the Northern Territory has, to date, continued to regulate commercial fishers by licence numbers and restrictions on fishing grounds and other regulatory means. The concern about fishers’ access to coastal fisheries in the ITZ has been relieved by agreement, although recent media reports indicate that the agreement will not persist indefinitely. It is not necessary for this Report to go into the details of that arrangement, apparently reached on a long term but ‘holding’ basis.
- 6.2.7. There is also some history of individual land trusts on behalf of the traditional owners entering into agreements under s 19 of the ALRA to permit access to waters upon certain conditions at a regional level.
- 6.2.8. The structure of this Chapter is to broadly identify the submissions on the common matter and then to provide such comments or recommendations as seem appropriate in the light of those submissions. I note that Chapter 7 deals comprehensively with submissions in respect of each land claim.

Agreement making

- 6.2.9. In its submissions, the Northern Territory raised concerns about future access agreements for recreational and commercial fishing under the heading “Scene Setting: access negotiations”. Preceding their discussion of whole of fisheries management, and pre-empting the NLC’s response to detriment claims relating to fisheries, the Northern Territory identified concerns about past negotiations over access to waters over Aboriginal land.

6.2.10. In the submissions, the Northern Territory contended that the grant of land to the ‘mean low watermark’ is ‘in a practical sense unenforceable’. It claimed that the negotiation of agreements is time consuming and resource intensive for Land Councils and that there is no certainty that agreements for the areas under claim will be reached.

6.2.11. Should agreement be reached, the Northern Territory stated that,

It may not be permanent and not provide certainty and security for commercial development in the areas. It will have an ongoing costs for the Territory Government and taxpayers, as well as resourcing implications for Government agencies and Land Councils to review and renegotiate agreements on an ongoing basis.⁴⁹

Cumulative detriment

6.2.12. The Northern Territory submissions stated that there is a strong risk proposed patterns of land usage associated with fishing will be detrimentally impacted upon if ‘widespread access is withdrawn or restricted’.⁵⁰ Its submissions considered such detriment in reference to the *Fisheries Act* and the “Northern Territory Harvest Strategy” (Harvest Strategy). The Harvest Strategy is described as a ‘policy document that integrates the ecological, social and economic dimensions of fisheries management into a single operational framework for decision making.’⁵¹

6.2.13. The Northern Territory submitted that ‘in carrying out the objectives of the *Fisheries Act* and the Harvest Strategy, it is critical that the impacts of reduced or modified access is understood as it relates to overall management of fisheries as a natural resource’.⁵² It acknowledged that although the *Fisheries Act* and the Harvest Strategy would continue to apply regardless of tenure, detriment may arise from any limitations placed on access to the claim areas through a permit system or by way of an agreement for commercial activity.⁵³ It noted,

Historically, impediment or obstruction towards an aquatic resource (whether through regulatory, access or environmental factors) has served to displace fishing effort rather than remove it. This displacement has the more than likely effect of concentrating commercial fishing effort. It also remains at

⁴⁹ Northern Territory, Submissions – Group 1 in *Detriment Review*, 23 April 2018, 12, [q].

⁵⁰ Ibid 12, [p].

⁵¹ Ibid 12, [s].

⁵² Ibid 13, [v].

⁵³ Ibid 13, [x].

odds with the overall aims and goals of the *Fisheries Act* and the Harvest Strategy, which aims to promote and enhance informed, evidence-based fisheries management decisions.

- 6.2.14. The concerns raised by the Northern Territory relate to an increase in fishing effort in areas outside the claim areas, as well as the possibility that any displaced fishing effort

may very well be displaced to further areas where access may be conditional or denied altogether – creating, in effect, regional level disruption of fisheries management (i.e. the Harvest Strategy) rather than localised.

- 6.2.15. Detriment raised in respect of displaced fishing effort and regional level disruption of fisheries management is framed largely, but not exclusively, in terms of the sustainability of commercial fisheries.⁵⁴ The Northern Territory acknowledged that such sustainability issues could be addressed through a reduction of commercial fishing licences through Government funded buyback, as has occurred in the past. AFANT and NTSC expressed similar concerns regarding displaced fishing effort specifically in relation to recreational fishing and commercial fisheries which are addressed in the relevant discussions below.

- 6.2.16. The Northern Territory submissions relied substantially on comments made by Commissioner Olney in the *McArthur River Region Land Claim Report (No. 62)* regarding the need to treat river and sea access and the issues arising therefrom on a global basis. The following comment, repeated in Commissioner Olney's subsequent Reports in respect of other beds and banks and ITZ claims, was also referenced in the Northern Territory's submissions,

If by reason of a grant of title access to waters of the ocean and rivers by commercial and / or recreational fishers is prohibited or restricted, there is likely to be a corresponding increase in fishing effort in other areas.⁵⁵

- 6.2.17. In their submissions to Group 2 land claims, the Northern Territory raised a separate concern in respect of whole of fisheries management, relating to the potential for sea closure applications under s 12 of the *Aboriginal Land Act* (NT) to be pursued. If successful, such applications may result in the closure of seas adjacent to Aboriginal land extending 2 kilometres seaward from the mainland grant. The Northern Territory

⁵⁴ Northern Territory, Submissions – Group 3 in *Detriment Review*, 4 June 2018, 8, [gg-kk].

⁵⁵ *Lower Roper River Land Claim Report (No. 67)*, 7 March 2003, Olney J, [112].

later conceded that they did not consider the potential for a sea closure to be detriment for the purposes of the ALRA.

Whole of fisheries management – NLC’s response on behalf of the claimants

- 6.2.18. The NLC’s response to “whole of fisheries management” detriment responded to concerns raised by the Northern Territory in respect of agreement making and cumulative detriment. Although not accepting claims of cumulative detriment, the NLC submissions responded to any fisheries related detriment that might occur, claiming ‘there is a genuine prospect that access could be provided through agreements or a permit system on acceptable conditions’.⁵⁶ The NLC’s submissions addressing access agreements are outlined below, while their proposal for a permit management system is addressed separately in relation to recreational fishing.

Proposed access agreements

- 6.2.19. In their combined submissions in respect of Groups 1 and 4 the NLC provided general comments on agreement making as a means of ameliorating detriment issues. These comments were subsequently adopted in all submissions in respect of claims relating to the beds and banks of rivers and ITZs.⁵⁷ In their submissions, the NLC contended that this Review should comment on the likelihood of agreements being reached before or after land is granted as a means of accommodating the detriment to a party that might arise in the absence of an agreement. To this end, the NLC outlined a number of ‘developments’ since the relevant land claim reports were published, including numerous agreements made over Aboriginal land which support the prospect of such future agreements, should the claims be acceded to. The NLC offered:

There is a considerable body of evidence in a more general sense to support a view that groups of traditional owners in the Northern Territory have consistently recognised the broader economic implications when called upon to make decisions that will enable land to be used for significant projects.⁵⁸

- 6.2.20. In a number of their submissions the NLC identified where claimants have already entered into agreements under the ALRA and the *Native Title Act 1993* in respect of adjacent areas of land,⁵⁹ including agreements that address recreational and commercial fishing access, issues arising from the High Court’s BMB case. In their

⁵⁶ NLC, Submissions – Group 2 in *Detriment Review*, 8 June 2018, 9, [38].

⁵⁷ It is noted that the NLC’s Submissions to the Lower Daly River Land Claim No. 68 separately raised the prospect of agreement making, having been provided to my office prior to the abovementioned submissions.

⁵⁸ NLC, Submissions – Group 1 and 4 in *Detriment Review*, 16 July 2018, 3, [8].

⁵⁹ Ibid 3, [9]; NLC, Submissions – Group 5 in *Detriment Review*, 1 September 2018, 1, [3-5].

submission for the Lower Daly River Region Land Claim No. 68, the NLC observed the goodwill demonstrated by claimants in making previous access agreements, and advised that the same claimants are comfortable making a similar agreement that would permit access to and fishing in the current claim area.⁶⁰ The NLC described aspects of an existing agreement, known as the Anson Bay Deed, which includes the following arrangements:

- The Licence Deed grants licences for recreational use such as fishing, snorkelling, boating etc, fishing tour operators, and commercial fishing;
- The licences permit access while waters over lie the Aboriginal land and to take fish from those waters;
- The licences are non-exclusive but provide for the Land Trust to notify the Territory prior to the grant of a third party interests to allow the Territory to reject or consent to the interests;
- The Settlement Deed provides for general review of the deed at regular intervals during the term, and for specific review on notice in years that do not include a general review;
- The Deed provides for a term of 20 years, but also provides for parties to negotiate in good faith for a further agreement or other appropriate arrangements to commence on expiry of the term;
- The Deed provides for compensation to be paid to the Land Trust as consideration for the grant of the licences.⁶¹

6.2.21. I observe that agreement making is put forward in the NLC's submissions as a general proposal, and that 'proposed agreements may need to be evidenced in some circumstances by the Minister to consider the decisions he must make in response to the recommendations'.⁶² With reference to the Minister's role, the NLC caution that detriment parties may refuse to participate in good faith negotiations towards an agreement on the basis that they are 'opposed to the grant of the claim areas as Aboriginal land under any circumstances'. By way of illustration, the NLC highlighted the detriment submissions of some stakeholders which have not considered agreements or other options to address purported severe risks, should the

⁶⁰ NLC, Submissions – Group 2 in *Detriment Review*, 8 June 2018, 2, [5].

⁶¹ *Ibid* 1, [3].

⁶² NLC, Submissions – Group 1 and 4 in *Detriment Review*, 16 July 2018, 3, [10].

land be granted to traditional Aboriginal owners, and despite currently benefitting from such agreements.⁶³

- 6.2.22. Finally, the NLC submissions raised the matter of government policy to ‘normalise’ Aboriginal land tenure since the ‘Intervention’⁶⁴ which has resulted in ‘The exposure of traditional owners to much greater levels of agreement making than hitherto, due to the Commonwealth’s insistence that tenure be provided for funded developments on Aboriginal land including housing’.⁶⁵ They contend that this policy approach supports an “appreciation of land value beyond the traditional sense” which should be taken into account in detriment claims about possible future costs under any access agreements.⁶⁶ In other words, it would be consistent with Commonwealth government policy for access under any future agreements to incur a cost to those who benefit commercially from that access, although many such users currently access the relevant Crown land free of charge. The NLC submissions concluded that to deny claimants a “normalised” ownership of their land would strip from them virtually all such future value of the land, reduce their capacity to protect the cultural values of the land and entrench a detriment to them.⁶⁷

Agreement making

- 6.2.23. The NLC’s submissions for Groups 1 and 4 claims not only asserted the case for agreement making as a means of mitigating detriment, but also responded to claims raised primarily by the Northern Territory that the process of agreement making itself constitutes a form of detriment.
- 6.2.24. The NLC responded to the Northern Territory’s criticism of agreements as being of limited duration, noting that all but one of the agreements referred to are of 20 years with provision for review and negotiation of further agreements. The NLC accepted any time and resource demands incurred, on the grounds of it being a core function of Land Councils to consult with traditional owners and negotiate agreements concerning third party use of Aboriginal land.⁶⁸ It was suggested that with basic terms already agreed, future such agreements should be documented more readily.

⁶³ Ibid 3-4, [11-12].

⁶⁴ Formally, the Commonwealth Government’s *Northern Territory National Emergency Response*

⁶⁵ NLC, Submissions – Group 1 and 4 in *Detriment Review*, 16 July 2018, 1, [1].

⁶⁶ Ibid 4, [13].

⁶⁷ Ibid.

⁶⁸ NLC, Submissions – Group 2 in *Detriment Review*, 8 June 2018, 3, [6].

- 6.2.25. The NLC's submissions contended that any costs to the Northern Territory and taxpayers⁶⁹ arising from the negotiation of agreements should be considered in light of the choice of the Northern Territory to forgo revenue to defray as least some of those costs through licencing of recreational fishing, fees for registration of powered boats used for recreational fishing and fees of recreational boat operator licences. The NLC offered by way of example, the current arrangements in Australian states where the average annual cost of a recreational fishing licence across four states is \$35.20;⁷⁰ short term or visitor licences are available for a lower fee; licenses are not required for fishers under 14, and concessional licence fees may be applied for pensioners. Further, the NLC noted that all states require powered recreational boats to be registered at variable rates, ranging from \$106 to \$249.80. The NLC estimated that, based on NT Survey on Recreational Fishing 2009-2010 data, the Northern Territory is almost certainly forgoing approximately \$4-\$5 million per year by not requiring licences or boat registration.
- 6.2.26. It is appropriate to comment at this point on the suggestion that the policy of the Northern Territory not to raise revenue (whether for agreement making or for other purposes) by licence fees for recreational fishing is relevant to its concern about the costs of agreement making under the ALRA. I do not accept that. The taxing and revenue raising policies of the Northern Territory are a matter for it. It is not appropriate to suggest that it adopt a particular revenue raising policy as a response to a perceived detriment. In any case, as I have commented elsewhere in this Report, the process of an agreement is a process prescribed by the ALRA itself. In short, it is hard to see why the Minister might refuse to make a grant because of the cost of doing something which the ALRA contemplates should or might be done by or on behalf of the traditional owners under the ALRA. Consequently, that is a position which I propose to take on this Review.

Cumulative detriment

- 6.2.27. The NLC's response to the Northern Territory detriment claims relating to whole of fisheries management are dealt with primarily in its submissions for Group 2. In responding, the NLC referred to both the Harvest Strategy and a closely related document titled the "Guidelines for Implementing the NT Fisheries Harvest Strategy

⁶⁹ The NLC questioned whether NT taxpayers bear much of these costs, arguing that taxpayers in other parts of Australia provide two thirds of Northern Territory Government revenues and therefore a similar proportion of the costs of any agreements.

⁷⁰ Excluding the high fee for the Tasmanian inland fishery.

2016” (the Guidelines). The NLC noted that the preface to the Harvest Strategy says that it should be read in conjunction with the Guidelines.

The NLC submitted a summary of their response to the cumulative detriment claims as below:

- (i) Access is a factor that must be incorporated into a Harvest Strategy not a detriment to development of the strategy or fisheries management;
- (ii) Displacement of fishing effort per se should not be regarded as detriment – something more that is quantifiable should be required;
- (iii) The alleged effects of displacement should be seen in light of the increased fishing effort being promoted by the Northern Territory, the tourism industry and amateur fishing bodies; and
- (iv) On the basis of current agreements, including an agreement approved by the claimants in this land claim (the Anson Bay Agreement) there is a genuine prospect that access could be provided through agreement or permits on acceptable conditions.⁷¹

6.2.28. Additionally, the NLC referenced the “Northern Territory Recreational Fishing Development Plan 2012-222” (the Plan) which ‘anticipates increased fishing pressure and how it will need to be dealt with in the future’, providing for strategies that will in effect address the cumulative detriment concerns raised by the Northern Territory and relevant control measures.⁷²

6.2.29. The NLC noted that a sea closure under s 12 of the *Aboriginal Land Act* (NT) could only be effected by a decision of the Administrator of the Northern Territory under Northern Territory legislation, and is therefore not a detriment matter.

Whole of fisheries management – Discussion

6.2.30. This section addresses agreement making detriment and cumulative detriment claims in respect of whole of fisheries management, and the NLC’s proposed agreements as a means of mitigating fishing-related detriment. It is intended to assist in framing my separate consideration of detriment claims more specifically relating to recreational and commercial fishing and FTOs.

Agreements

⁷¹ NLC, Submissions – Group 2 in *Detriment Review*, 8 June 2018, 9, [38].

⁷² NLC, Submissions – Group 1 and 4 in *Detriment Review*, 16 July 2018, 9, [38-39].

- 6.2.31. As noted, agreements are offered by the NLC as a key means of addressing access issues raised in respect of commercial fishing, FTOs and to an extent recreational fishing. The permit management system is also raised by the NLC as a mechanism for specifically managing recreational fishing (i.e. non-commercial) access to the claim areas, and is addressed separately in this Review.
- 6.2.32. In their submissions in reply, the Northern Territory and AFANT referenced past and current negotiations about existing Aboriginal land, claiming that current NLC policy regarding access agreements appears inconsistent with the NLC's submissions proposing agreements in respect of the outstanding claims the subject of this Review. The submissions question whether the NLC intends to negotiate agreements in respect of the current claim areas. The Northern Territory provided the NLC's document "Information Sheet – Access to Tidal Waters on Aboriginal Land", dated 15 November 2017, in support of its proposition. AFANT stated that the NLC submissions 'create the impression that permit-free open access agreements would be a realistic possibility if a land claim is granted' but also comment that the submissions 'appear to suggest an unwillingness on NLC's part to provide permit-free open access agreements as an option in consultation with Traditional Owners'.⁷³ Both AFANT and the Northern Territory drew on evidence provided by Mr Kane Bowden in current land claim inquiries to support their submissions.
- 6.2.33. I accept that for the purposes of the Review the NLC submissions have not sought to provide either a policy position or claimant instructions with respect to addressing any particular detriment arising as a result of a possible grant of Aboriginal land. It is reasonable to consider that seeking such instructions would be premature and inappropriate given the history of the claims, the further significant steps required before grant, and the possibility that the Minister may not take such steps. The NLC have provided a response to updated detriment claims including proposals that may be implemented should the Minister proceed with any recommendations to grant the relevant land. If there is an apparent "disconnect" between NLC approaches regarding existing Aboriginal and the current claims, I do not take such a state of affairs as indicating whether or not agreements are a likely means of addressing detriment where a claim is not yet finalised, as suggested by AFANT and the Northern Territory. Based on the NLC's submissions, and the past history, I consider that the prospect of a suitable access agreement or agreements is an appropriate matter for the Minister to take into account. Comments by the Northern Territory and

⁷³ AFANT, Submissions in reply to the NLC – Group 1 and 4 in *Detriment Review*, 8 July 2018, 2.

AFANT do not have substance in establishing whether or not agreements will or will not be reached, or whether they are a likely option. It is impossible to know the negotiating positions of those who, apparently recently, have come to some roadblock in relation to extending the Blue Mud Bay access arrangements. I make no assumption on that matter.

- 6.2.34. The NLC's proposal of an agreement such as the Anson Bay Deed for the claim areas relevant to this Review is obviously not a commitment, ahead of the Minister's consideration of any recommendations to grant. However, I am of the opinion that the Minister, in considering any recommendations to grant, should take the NLC's general proposal into account on the basis that access agreements may offer a real means of addressing detriment issues in this context. It follows that such a consideration is one for consideration in this Review. I do not consider that, routinely, the Minister should wait for such agreements to be reached before proceeding with a recommendation to grant. There are two reasons for that. The first is that it removes from the traditional owners the capacity to make such agreements as they consider appropriate in terms that they consider appropriate, when the object of the ALRA is to restore to traditional owners that capacity, at least in respect of unalienated Crown land. It is not desirable to exercise a form of patronage or paternalism by insisting on the terms of such an agreement to be reached before making a grant, once it is accepted that the traditional owners will be open to such an agreement on reasonable terms. The second is that, as a condition of a grant, the Minister is removing from the traditional owners the opportunity of being in an equal bargaining position with those who seek access to their traditional land, and (as is the history with the presently unresolved recommendations, and illustrated by the very lengthy negotiations in relation to the consequences of the Blue Mud bay case) it is likely that the claims will remain unresolved for a further indeterminate period of time.
- 6.2.35. Should a broad access agreement not be reached in respect of the claim areas, the potential detriment to those who presently use/access the claim areas for fishing purposes may be considered in light of alternative mitigating measures such as the proposed permit management system and s 19 of the ALRA. These are addressed separately in this Review.
- 6.2.36. With respect to the time and financial costs of negotiating agreements raised in the Northern Territory's submissions, I agree with the NLC's response that these costs are not a matter of significant detriment for the reasons already given. Agreement making is central to the core functions of the NLC, and within the remit of the

Northern Territory. Negotiating third party agreements is a function of Land Councils provided for in the ALRA, and any complaint of delay or complexity is, in reality, a quarrel with the terms of the ALRA.

- 6.2.37. It is reasonable to expect that that there would be payment for the commercial use of privately owned Aboriginal land, even where commercial users do not currently pay for the use of the relevant Crown land. I broadly accept the NLC's contention that the claimants should not be denied the opportunity to benefit economically from their land.

Cumulative detriment

- 6.2.38. I have discussed in Chapter 5 the difficulty of accepting generally that cumulative detriment arising from multiple land claims is contemplated by the ALRA. However, it is arguable that the concerns on the part of the Northern Territory might properly fall within the scope of s 50(3)(c) concerning existing or proposed patterns of land usage "in the region". There has been no focus on the significance of that geographical restriction in that subclause. For present purposes, I am prepared to accept that the responsibility of the Northern Territory for fisheries management generally within the Territory is encompassed within that expression.
- 6.2.39. The development of overall fisheries management strategies is evidenced by the relatively recent Harvest Strategy in 2016 and its supporting Guidelines. There is no suggestion that the Northern Territory is not entitled to develop such a strategy or guidelines. On the other hand, it has not been suggested (and I assume would not be suggested) that the Northern Territory, in the exercise of such functions – whether in relation to fisheries management or other environmental considerations – is entitled to ignore or to override completely the traditional interests of Aboriginal people in land in the Northern Territory. To do so would be to fail to have proper regard for the provisions of the ALRA where it may apply.
- 6.2.40. In this instance, there is nothing to indicate that the Northern Territory, when developing the Harvest Strategy and Guidelines had regard to the particular consequences of the existing recommendations of the Commissioner now the subject of this Review, or the potential for the Minister to make grants of all or some of the land he subject of the recommendations. There is no clear evidence that it would be impossible for the Harvest Strategy and Guidelines to be refined, if necessary, to accommodate such grants. There is no suggestion, on the other hand, that in relation to fisheries management more broadly, the grants (if made) would mean that the areas the subject of the grants would not in any event be addressed by the Harvest

Strategy and Guidelines. So, whilst I accept that the Northern Territory may develop and enforce an appropriate Strategy and Guidelines, I do not think it has been shown that the potential grants of the relevant claims areas or some of them or of any particular one of them would materially impede the effective performance of that governmental function.

- 6.2.41. I also note that the Harvest Strategy and Guidelines were published in 2016, eight years after the Blue Mud Bay case. While the implications of that decision obviously were and are a matter of significance to the Northern Territory, and have been the subject of extensive discussion with the NLC on behalf of the traditional owners (I assume both as granted and as potentially granted) its significance does not appear to have been taken into account in the development of the Harvest Strategy and Guidelines. Whether those documents would be materially different if they were taken into account is speculative.
- 6.2.42. I conclude that the detriment claimed by the Northern Territory in relation to the policy documents and their implementation is not shown to be significant. More to the point, it has not been shown that a decision to accede to the relevant beds and banks and ITZ land claims would materially impair the performance of the relevant functions of the Northern Territory.
- 6.2.43. Notwithstanding the above, the Harvest Strategy is guided by ‘higher level...international obligations, national and jurisdictional legislation, and broad policy frameworks’.⁷⁴ The Guidelines explain that ‘It is important at the beginning of the process to identify the high level over-arching legislative and policy objectives that will influence and shape the nature of the harvest strategy for each fishery’.⁷⁵ Among these high level over-arching objectives is relevant Commonwealth legislation, including the ALRA. It is clear that legislation such as the ALRA sets the framework within which the Harvest Strategy is to operate.
- 6.2.44. It is a different issue as to the effect of that Strategy and those Guidelines, whether as they stand or as refined, upon those who fish within the areas of the beds and bank claims and the ITZ land claims. That is a question as to who is permitted to fish within those areas, rather than the regulation of the fishing stocks within the Northern Territory including those areas.
- 6.2.45. Considering the above, I accept the NLC’s proposition at [30] that,

⁷⁴ Northern Territory, *Northern Territory Fisheries Harvest Strategy Policy*, December 2016, 3.

⁷⁵ Northern Territory, *Guidelines for Implementing the Northern Territory Fisheries Harvest Strategy Policy*, March 2016, 3.

The development of objectives and Harvest Strategies pursuant to the Guidelines and Policy should to a substantial extent meet the concerns of Commissioner Olney at page 82 paragraph 169 of the McArthur River Region Land Claim Report.

- 6.2.46. As a policy document which aims to ‘identify clear objectives of how a given fishery resource is to be used to optimise benefit’,⁷⁶ the Harvest Strategy and Guidelines together seem an optimum tool for managing fisheries in a way that ‘will also provide for adaptability to social, economic and ecological change and create a level of transparency and reporting that will foster greater community confidence in the way fisheries are managed’.⁷⁷
- 6.2.47. I also note the NLC’s comment that the alleged effects of displacement should be seen in light of the increased fishing effort being promoted by the Northern Territory, the tourism industry and amateur fishing bodies. The comment provides an interesting perspective on the Northern Territory and AFANT cumulative detriment claims. AFANT’s responses suggested that promotional efforts to increase fishing effort should be considered differently from cumulative detriment arising from the grant of Aboriginal land, because the former results in economic benefit.⁷⁸ I note that overall economic benefit (or otherwise) is not the basis of its cumulative detriment complaint. It is of course important to consider AFANT’s concerns.

6.3. Recreational fishing

Introduction

- 6.3.1. This section addresses detriment matters relating to recreational fishing raised in respect of all 12 beds and banks and ITZ claims and the NLC’s response to the detriment claims including any proposals to mitigate such detriment as may arise.
- 6.3.2. Concerns about prohibited, restricted or conditional access to waterways for recreational fishing were raised in respect of relevant claims by the Northern Territory and AFANT. Potential social, economic and ‘cumulative’ impacts of restricted access were key detriment matters raised in the review. A small number of other stakeholders raised similar concerns as individual claims. Additional detriment that might arise as a result of possible mechanisms for mitigating recreational fishing detriment – primarily a permit access system – were also raised in submissions.

⁷⁶ Northern Territory, Submissions – Group 5 in *Detriment Review*, 22 June 2018, 3, [g].

⁷⁷ *Ibid.*

⁷⁸ AFANT, Submissions in reply to the NLC – Group 2 in *Detriment Review*, 19 July 2018, 7.

Costs, delays and possible refusal of permits, and in particular long-term certainty and guaranteed access to waterways were key matters raised in this regard.

- 6.3.3. Stakeholder replies to the NLC's responsive submissions are considered in the Discussion below.

Access to and use of claim areas

- 6.3.4. Data collected for the 'Survey of Recreational Fishing in the Northern Territory 2009-2010' was provided by the Northern Territory as evidence of the estimated fishing effort by non-Indigenous Northern Territory residents and visitors in the claim areas. At the time of the Survey 32,000 non-Indigenous Northern Territory residents were estimated to fish for recreation or subsistence in the Northern Territory.⁷⁹ I note that the survey areas from which the data was drawn do not correlate precisely with the land claim areas.⁸⁰ It is therefore highly possible that at least some of the fishing effort in any given survey area occurred outside the relevant claim areas. Further, the Northern Territory acknowledges that no relevant data exists for some of the land claim areas under review.⁸¹ I note too that most of the survey data relates to the fishing effort of non-Indigenous Northern Territory residents and that visitor fishing effort data is limited to 'key catchments where visitor populations could be isolated' (i.e. at accommodation establishments).⁸²
- 6.3.5. It can be inferred from the data that some land claim areas are likely to be more heavily utilised by recreational fishers than others. For example, the McArthur catchment, which incorporates part of the McArthur River Region Land Claim No. 184, had significantly higher levels of use than any other relevant land claim areas, with an estimated total of 36,816 days fished by NT residents and visitors from April to November 2009.⁸³ Data provided by the Northern Territory for the Lower Daly River Land Claim No. 68 estimated 12,026 days fished in the Daly River catchment⁸⁴ over the same 8 month period. By comparison, Northern Territory residents spent an estimated 2,067 days within a 12 month period fishing the Lower Roper River, an area the Northern Territory contends is within the boundaries of the Lower Roper

⁷⁹ Northern Territory, Submissions – Group 4 in *Detriment Review*, 4 June 2018, 6, [o].

⁸⁰ Northern Territory, Submissions – Group 3 in *Detriment Review*, 4 June 2018, 4, [n]; The exception was Land Claim No. 70, where the Northern Territory claimed that it can be assumed that all fishing effort recorded in the Lower Roper River occurred within the claim area as the latter includes all of the Lower Roper. Refer Northern Territory, Submissions – Group 5 in *Detriment Review*, 22 June 2018, 6 [v].

⁸¹ Northern Territory, Submissions – Group 1 in *Detriment Review*, 16 March 2018, 11 [k]; Northern Territory, Submissions – Group 3 in *Detriment Review*, 4 [o].

⁸² Northern Territory, *Survey of Recreational Fishing in the Northern Territory 2009-2010*, 80.

⁸³ Northern Territory, Submissions – Group 1 in *Detriment Review*, 16 March 2018, 10 [i].

⁸⁴ Northern Territory, Submissions – Group 2 in *Detriment Review*, 8 March 2018, 2 [g]; also Northern Territory, *Survey of Recreational Fishing in the Northern Territory 2009-2010*, 80.

River Land Claim No. 70. Three survey regions in the area of Group 3 saw recorded fishing effort by Northern Territory residents in the order of 242, 265 and 12 days respectively, presumably within the 12 month survey period. Other claim areas were noted as ‘important for fishers to access and travel through when visiting other fishing areas’.⁸⁵

- 6.3.6. AFANT submitted additional information about fishing activity in the claim areas obtained via member and online community surveys, with the intention of complimenting the Northern Territory Survey of Recreational Fishing 2009-2010 (Survey).⁸⁶ As noted elsewhere, my comments regarding the methodology of the AFANT surveys may be the subject of some technical criticism. However, the material provided appears generally to support the Northern Territory’s submissions that fishing activity occurs to varying degrees in areas of the beds and banks and ITZ land claims subject to this Review. The Northern Territory drew on the Survey and a previous national survey conducted in 2000-2001 to claim that visitor fishing effort had more than doubled in some catchments over the 10 year period.

Social detriment

- 6.3.7. AFANT’s detriment claims in respect of all beds and banks and ITZ claims emphasised recreational fishing as an important social and cultural component of the Northern Territory lifestyle. Some of the land claim areas were variously described as ‘iconic and special’ fishing locations, a ‘widely celebrated NT recreational fishing area’ and an area ‘known for the size and quantity of Barramundi, it’s rugged natural values and the coupling of fishing and camping experiences’ where ‘the remote experience and isolation is undoubtably (sic) an important part of the experience’.⁸⁷ AFANT maintained that qualities such as these highlight the ‘potential social impacts (detriment) that would accompany a loss or restriction of access’. It drew on responses to its community survey to substantiate claims of social detriment, which found that respondents’ enjoyment of fishing in the NT (as a whole) would suffer if they could not go fishing in the claim areas.⁸⁸

⁸⁵ AFANT, Submissions – Group 2 in *Detriment Review*, 8 March 2018, [50].

⁸⁶ AFANT, Submissions – Group 1 in *Detriment Review*, 16 March 2018, [18].

⁸⁷ AFANT, Submissions – Group 1 in *Detriment Review*, 16 March 2018; AFANT, Submissions – Group 5 in *Detriment Review*, 4 June 2018.

⁸⁸ AFANT, Submissions – Group 5 in *Detriment Review*, 4 June 2018, [27]; AFANT, Submissions – Group 1 in *Detriment Review*, 16 March 2018, [28].

Economic detriment

- 6.3.8. Recreational fishing detriment was also characterised in economic terms. The Northern Territory referenced the 2009-2010 Survey which estimated that the economic contribution per annum by Territory residents who engaged in recreational fishing at \$51 million⁸⁹. The Recreational Fishing Development Plan, provided as an attachment by the Northern Territory, estimated that expenditure by all recreational fishers during 2010 was \$80 million.⁹⁰ It was also noted that there are potential economic costs in the form of jobs supported by, and possibly lost by reduction in, recreational fishing. While “thought to be significant”, no evidence of the number and economic value of such jobs was provided.⁹¹ I note that the above amounts do not provide a precise indication of the economic contribution of recreational fishing in each or all of the relevant claim areas, and that based on the significant variation in use of the respective claim areas by recreational fishers, the relative economic value of fishing in these areas to the NT economy is likely to also be varied.
- 6.3.9. AFANT referenced the Plan which states that ‘70% of recreational fishing in the Northern Territory occurs in regional areas, where it is often the primary economic and development driver’.⁹² I note that the above reference relates to economic development in places with higher rates of use such as King Ash Bay on the McArthur River, and the Daly and Roper Rivers. I also note that the Plan separately acknowledges recreational fishing as an impetus for regional development on Aboriginal land,⁹³ a point not raised by the Northern Territory or AFANT in their submissions on economic detriment. AFANT also contended that, based on their community survey in respect of the McArthur River Region Land Claim No. 184, ‘It is reasonable to conclude that fishing visitation contributed economically to this region through fees for accommodation and that this in turn supports employment (grounds keeping etc.)’⁹⁴. The Northern Territory identified the Lower Daly Land Claim area in particular as being a high value area for competitive fishing, in part due to two “commercially and regionally valuable” fishing competitions each year.⁹⁵
- 6.3.10. AFANT submissions noted that a number of boat ramps currently used by recreational fishers are located adjacent to pastoral lease tracks, and that access

⁸⁹ Northern Territory, Submissions – Group 5 in *Detriment Review*, 22 June 2018, 5, [q].

⁹⁰ *Ibid* [s].

⁹¹ *Ibid* 6, [t].

⁹² Northern Territory, *Recreational Fishing Development Plan 2012-2022*, 1.

⁹³ *Ibid*.

⁹⁴ AFANT, Submissions – Group 1 in *Detriment Review*, 16 March 2018, [34].

⁹⁵ Northern Territory, Submissions – Group 2 in *Detriment Review*, 8 March 2018, 2, [j].

through these stations can come at a fee.⁹⁶ AFANT asserted that while fishers pay camping or access fees at private properties which “vary and may be set by market forces” any increase in cost as a result of a grant of Aboriginal land may cause recreational fishers to ‘suffer financial detriment through increased access fees’.⁹⁷

- 6.3.11. AFANT made further claims of economic detriment in respect of the cost of permits, addressed below in relation to the permit management system and cumulative detriment.

Permit management system

- 6.3.12. In its submission to Group 5 land claims, AFANT put forward its position on a permit system for managing access to Aboriginal land, stating that the cost and time taken to apply for and receive a permit may result in detriment, and that refusal of a permit would certainly result in detriment to recreational fishers.⁹⁸ AFANT highlighted that detriment could arise due to delays in receiving a permit in areas where fishing trips are planned with short notice.⁹⁹
- 6.3.13. In a later submission, AFANT claimed that so far the NLC have been largely unable to effectively consult with traditional owners and where desirable organise standing orders to enable a reasonable and reliable permit system for access.¹⁰⁰ However no evidence supporting this contention was provided.

Access agreements

- 6.3.14. Concerns relating to negotiating access agreements were raised by the Northern Territory in its submissions on “whole of fisheries management”. These, and AFANT’s similar concerns as they relate to recreational fishing, have been addressed previously.

Cumulative detriment

- 6.3.15. AFANT contended that ‘cumulative detriment may occur should a system of permits be introduced resulting in the need for fishers to expend time and money to obtain permits for different areas’.¹⁰¹
- 6.3.16. AFANT further claimed that a requirement to obtain permits to access the claim areas, or the closure of areas to recreational fishing, could amount to disruption or

⁹⁶ AFANT, Submissions – Group 4 in *Detriment Review*, 4 June 2018, [19].

⁹⁷ AFANT, Submissions – Group 3 in *Detriment Review*, 24 April 2018, [51].

⁹⁸ AFANT, Submissions – Group 5 in *Detriment Review*, 4 June 2018, [40].

⁹⁹ AFANT, Submissions – Group 2 in *Detriment Review*, 8 March 2018, [48-49].

¹⁰⁰ AFANT, Submissions – Group 5 in *Detriment Review*, 4 June 2018, [41].

¹⁰¹ AFANT, Submissions – Group 1 in *Detriment Review*, 16 March 2018, [40]

dislocation of the current fishing effort, resulting in increased pressure in other fishing areas. Such detriment was labelled “cumulative (effort related) impacts”.

- 6.3.17. It claimed that by extension, fishing experiences in other areas could also be impacted. AFANT described ‘cumulative (social) detriment’ as the potential for increased competition / the presence of others and the impact this would have on ‘social and amenity values (the availability of a valued experience)’¹⁰². In areas less visited by recreational fishers, the above claims are also made where the ‘valued quality’ of remoteness and isolation ‘has the potential to be impacted should the pattern of fishing access in the broader areas change’.¹⁰³
- 6.3.18. All beds and banks and ITZ claim areas were considered by AFANT to raise potential issues of cumulative detriment associated with increased fishing effort and related social impacts, irrespective of any variations in current levels of use. Responses to AFANT’s community surveys were relied upon to substantiate such claims: respondents overwhelmingly agreed with the proposition that ‘fishing in other areas would be likely to be impacted through increased fishing pressure’.¹⁰⁴ No further evidence was provided. It may be remarked that a question put in such a form almost inevitably produces an affirmative answer, as the proposition contains the suggested answer. Nevertheless, as a general basis for asserting the interest of recreational fishers in the Northern Territory, the survey has some use and, as noted, broadly reflects the Survey of the Northern Territory.
- 6.3.19. The Northern Territory also raised concerns about cumulative detriment in respect of both recreational and commercial fishing under the heading “whole of fisheries management” which have been addressed previously.

Recreational fishing – NLC’s response on behalf of the claimants

- 6.3.20. The NLC responded to claims of recreational fishing detriment in its submissions on behalf of claimants for all 12 beds and banks and ITZ claims. The NLC’s submissions acknowledged, either implicitly or explicitly, access and use of the claim areas for recreational fishing as a benefit enjoyed by the public.
- 6.3.21. The NLC’s comments on access agreements and cumulative detriment claimed in respect of ‘whole of fisheries management’ are pertinent to recreational fishing and addressed previously in this Review.

¹⁰² Ibid.

¹⁰³ AFANT, Submissions – Group 4 in *Detriment Review*, 4 June 2018, [35]; AFANT, Submissions – Group 1 in *Detriment Review*, 16 March 2018, [39].

¹⁰⁴ AFANT, Submissions – Group 1 in *Detriment Review*, 16 March 2018, [42].

- 6.3.22. This section is focussed on matters raised by the NLC that are specifically relevant to the detriment claims of recreational fishers. In particular it provides a description of the NLC's proposed permit management system, and the NLC's response to claims of detriment in relation to such a system. The NLC's response to claims of social and economic detriment made by the Northern Territory and AFANT are also addressed below.

Proposed permit management system

- 6.3.23. The NLC's submissions on behalf of the claimants in respect of Groups 1 and 4 provided general comments about the permit management system currently under development by the NLC to manage access to Aboriginal land. These comments were relied upon in their subsequent submissions. The Attachment 1 to the above submissions is the statement of Kane Bowden, Permit Reform Manager dated 29 May 2018 and the transcript of Mr Bowden's evidence in the Fitzmaurice River Region Land Claim No. 189 and other land claims dated 25 June 2018. The statement describes the updated permit management system as an online self-service permit application system with the following features:

- a. A user-friendly interface accessible via the NLC website and a downloadable app;
- b. Ability for automated permits where traditional Aboriginal owners have nominated areas as open for public access via permits. An automated permit is one where a visitor can register and apply on-line, and can download (and print if required) a permit immediately once eligibility criteria are met;
- c. Some areas nominated as open for public access via permits will licence additional visitor activities such as camping and fishing;
- d. Capability to efficiently process permit applications for areas that require special permission, or for more complex activities;
- e. Options to apply for different types of permits including a single use permit, a permit for multiple zones, family permits and seasonal permits. This will avoid duplicate applications;
- f. Permits that provide useful additional information to assist permit holders accessing Aboriginal land; and

- g. Capacity for visitors to communicate feedback on amenity and safety issues.¹⁰⁵

- 6.3.24. According to the Mr Bowden's statement, the permit management system will update the existing permit system and include a 'comprehensive policy framework and guidelines for permit approval, management and compliance'.¹⁰⁶
- 6.3.25. Mr Bowden's statement further noted that the proposed permit system would update and reform the existing system which was not designed to cater for large numbers of applications. The transcript of evidence provided with the NLC's submissions elaborated that there are currently around fourteen to fifteen thousand permits being processed every year, a figure that is expected to double. Different types of permits are currently provided under the existing system including work, recreational, media and research permits. Such permits can take anywhere from 24 hours to 10 days or longer to process, depending on the type of permit and the proposed activity of the applicant.
- 6.3.26. It is apparent that the updated permit management system is being developed to provide for a predicted increase in permit applications in coming years, arising at least in part from the 2008 Blue Mud Bay case by the High Court of Australia.
- 6.3.27. The System is currently under development, with an intended implementation date of 31 December 2018. The development phase will include extensive consultations with traditional owners to reach agreement as to the terms and conditions upon which the NLC may issue permits, and consultations with relevant organisations about how the application process can be simplified to meet visitor needs.
- 6.3.28. While the permit management system is a generic proposal for managing access across all Aboriginal land in the NLC region including the claim areas, if granted, the NLC also commented on the specific views of some claimants,

With the exception of Maria Island, the claimants do not wish to prevent recreational fishing provided fishers obtain a permit. The claimants expressed the same concerns as in other land claims about protection of sacred sites and important cultural places, respecting rules about not leaving fish remains in the land. Rules endorsed on permits will improve their capacity to fulfil their cultural and traditional responsibilities for the land. Claimants are interested

¹⁰⁵ NLC, Attachment 1 to Submissions – Group 1 and 4 in *Detriment Review*, 18 July 2018.

¹⁰⁶ *Ibid.*

to develop a ‘regional’ permit so that fishers will not require a multiplicity of separate permits.¹⁰⁷

- 6.3.29. The NLC submissions to Groups 1 and 4 land claims also raised the possibility of permit functions to be delegated by the NLC to the proprietors of Manangoora, Greenbank and Seven Emu pastoral leases under the *Aboriginal Land Act* (NT). Existing examples of delegated permit functions are provided, with the suggestion that the proprietors ‘may find it convenient to be able to issue a permit at the same time as they make any other arrangements with their visitors.’¹⁰⁸
- 6.3.30. The NLC refuted AFANT’s claims that the NLC has not so far been able to effectively consult with traditional Aboriginal owners to obtain standing orders for a reasonable and reliable permit system, providing a number of examples where this has been achieved (enabling the delegation of permit functions under the ALRA), and noting that consultations for such instructions are currently underway in other areas of Aboriginal land. Regarding land claims relevant to this Review, the NLC held that similar such detailed consultations are ‘not warranted at this stage so far in advance of any possible grant’.¹⁰⁹ I see no reason to reject the assertion that the NLC has consulted, and will continue to consult, with traditional owners of granted land and the land the subject of the 12 beds and banks and ITZ land claims in relation to the Permit Management system.

Economic detriment

- 6.3.31. The NLC’s response to AFANT’s complaint about potential costs associated with permits argued that such complaints are unfounded. It was stated that permit costs are to be waived for the first 3 years, then likely to be ‘modest’.¹¹⁰ In their submission, the NLC contended that any such costs must be looked at in the context of the substantial expenditure on recreational fishing, reported by participants in the AFANT community survey. Further, the NLC drew attention to the willingness of recreational fishers to pay fees for permission to access waterways via pastoral lands.
- 6.3.32. NLC also referenced the Northern Territory’s submissions regarding the benefits of recreational fishing to the local economy in asserting that any costs associated with

¹⁰⁷ NLC, Submissions – Group 3 in *Detriment Review*, 18 August 2018, 3, [13].

¹⁰⁸ NLC, Submissions – Group 1 and 4 in *Detriment Review*, 18 July 2018, 5, [19].

¹⁰⁹ NLC, Submissions – Group 5 in *Detriment Review*, 1 September 2018, 3, [12].

¹¹⁰ *Ibid* 5, [22].

the permit system would also benefit the Northern Territory economy ‘in the same way as any other item of expenditure’.¹¹¹

- 6.3.33. In their submissions to Group 3 land claims, the NLC responded to AFANT’s claim that detriment may arise if there is an increase to access and camping fees on pastoral leases resulting from a grant of Aboriginal land, commenting that

If AFANT was consistent it would be as critical of pastoral lessees levying fees for access and camping in areas covered by s 79 [of the Pastoral Land Act], or imposing access restrictions to the same areas, as it is of the possibility of permits being required to access areas that could become Aboriginal land as a result of these land claims.

- 6.3.34. The NLC noted that participants in the AFANT community survey did not complain about seeking permission, and in some cases paying for entry, to the land claim areas currently accessible only via land held under a pastoral lease or owned by an Aboriginal land trust. That comment by the NLC would, therefore, appear to have some validity. In any event, it is demonstrated clearly enough, that recreational fishers are prepared to pay permit fees for the benefits of recreational fishing in certain locations (albeit at present to pastoralists).

Social detriment

- 6.3.35. In their submissions to the Lower Daly River Land Claim No. 68 the NLC responded to AFANT’s claims that recreational fishing experiences would be impacted by a loss or reduction of access to the claim areas, resulting in potential social impacts. According to the NLC, the words and phrases used by AFANT to substantiate such claims, such as ‘special’, ‘the experience a whole’, ‘enjoying space on water’, ‘social and amenity value’, are very subjective, unquantifiable and therefore ‘meaningless to support a claim of “detriment”’.¹¹² NLC contended that such claims should be disregarded.

Recreational fishing – Discussion

- 6.3.36. The detriment concerns about recreational fishing are likely to be met by the proposed updated permit management system.
- 6.3.37. The NLC’s proposed permit management system as described would be a considered a purpose-built approach to managing access to the claim areas, should they proceed to a grant of Aboriginal land. As a proposal, it clearly aims to address issues of access

¹¹¹ Ibid.

¹¹² NLC, Submissions – Group 2 in *Detriment Review*, 8 June 2018, 5, [18].

to Aboriginal land, associated time and financial costs in obtaining permits. It does so in the context of a predicted increase in the demand for such permits. The proposed system would rely on instructions from traditional Aboriginal owners as to the terms and conditions upon which the NLC issues permits, and in so doing, would support the entitlements of those owners under the ALRA.

- 6.3.38. The Northern Territory's submissions in reply to the Group 1 submissions asserted that, in the absence of a fully functioning permit system with binding terms and conditions on which permits are granted, the uncertainty of access and associated costs must be regarded as detriment that might result if land is granted.¹¹³ AFANT contended that 'permit systems are characterised by uncertainty',¹¹⁴ and further, that it 'does not consider the permit system outlined as an adequate or appropriate mechanism to address the detriment issues raised with respect to the claim'.¹¹⁵ AFANT reiterated that 'There is no guarantee, or even any assurance, that permits would be offered for areas that fishers want to access nor can there be any certainty that if offered the permits will continue to be available in the future.'¹¹⁶ Certainty, security and guaranteed long term access to the claim areas are clearly key concerns for both the Northern Territory and AFANT with respect to recreational fishing.
- 6.3.39. In light of the 'considerable uncertainty for commercial and recreational fishing sectors over access to waters' created by the BMB case,¹¹⁷ and the resulting delay in resolving the current land claims, the proposed permit management system offers a constructive and practical approach to the finalisation of the claims.
- 6.3.40. I recognise that certainty and long-term access presently are not guaranteed under any current policy or legislative framework. I consider the proposed system to offer a significant degree of certainty for recreational fishers that they do not currently have, 10 years after the final decision in the BMB case. The proposal appears to go a significant way in addressing access issues, related social and economic detriment, as well as protecting the interests and property rights of claimants following any grant of land.
- 6.3.41. With regard to detriment that may be classified as 'social' or 'experiential' I accept the Northern Territory's submissions in reply for Group 1 claims which stated, with reference to Commissioner Toohey's first Land Claim Report, that detriment is not

¹¹³ Northern Territory, Submissions in reply to the NLC – Group 1 in *Detriment Review*, 9 August 2018, [13].

¹¹⁴ AFANT, Submissions in reply – Group 2 in *Detriment Review*, 19 June 2018, 3.

¹¹⁵ *Ibid.* 4.

¹¹⁶ AFANT, Submissions in reply – Group 1 and 4 in *Detriment Review*, 8 July 2018, 3.

¹¹⁷ Northern Territory, Submissions – Group 1 in *Detriment Review*, 16 March 2018, [n].

limited to the economic sense or to something that can be quantified. As social detriment claims are inherently subjective and unquantifiable, it is difficult to consider a means of alleviating all such claims. I take the view that the NLC's proposed permit management system would largely address the access and related social detriment concerns of recreational fishers, and concur with Commissioner Gray's comments¹¹⁸ that detriment may result from the grant of land claims if permits were denied to a significant number of people who currently have access as of right.

- 6.3.42. On the present information, I do not consider detriment will arise in relation to the time taken to apply for and obtain permits under the proposed permit management system.
- 6.3.43. Detriment would arise from any permit fees to access the claim areas for recreational fishing, although such detriment is likely to be slight. I note that any such detriment is unlikely to arise in the first 3 years of implementing the proposed new system. While recreational fishing clearly contributes to the Northern Territory economy, economic detriment to the local or Territory economies that may arise from the grant of specific claims was not really established in the submissions. Further, in any event, the proposed permit management system, if it operates as to be designed, the consequence should be that the similar patterns of access and use by recreational fishers to the same locations as are presently accessed will continue. The only differences will be that, after 3 years, a small permit fee will be payable in addition to the unregulated fees presently charged by some pastoralists for access across their pastoral lease lands. There may also be some more explicit regulation to protect special sites and to maintain the cleanliness of the fishing locations.
- 6.3.44. Regarding the cumulative detriment claims asserted by AFANT, the evidence in support of this proposition was speculative and far from rigorous. Such claims misconstrue the intent of the ALRA, which does not contemplate detriment arising as a result of multiple claims. I refer to my previous Chapter 5 addressing legal principles, which discusses this matter in more detail. I also consider cumulative detriment claims in relation to "whole of fisheries management" in the relevant part of this Chapter. More directly important, is that the proposed permit fee would enable access in essence to the same fishing locations as at present, including multiple of those locations, so there should be no cumulative detriment experienced on the part of recreational fishers.

¹¹⁸ *The Ngaliwurru / Nungali (Fitzroy P.L.) Land Claim No. 137 and Victoria River (Beds and Banks) Land Claim No. 140 Report (No. 47)*, December 1993, Gray, J, [6.12.2(d)].

- 6.3.45. In summary, in my view, should the NLC's proposed permit management system be implemented as planned, detriment issues related to uncertainty of access and any social and economic detriment, suffered by recreational fishers will be minimal.
- 6.3.46. The Northern Territory submitted that, as the system is still under development, due weight should be given to assertions of detriment as to time and cost. They claimed that detriment 'should not be disregarded or afforded less weight on the basis of proposed or speculative measures or agreements that may be reached to ameliorate or mitigate that detriment'.¹¹⁹ The new system is proposed by the NLC to be implemented in early 2019.
- 6.3.47. Should the proposed permit system described in the NLC's submissions not be implemented at the time the Minister considers the grant of the relevant claims, and in the absence of alternative agreements, access is likely to be managed by way of the existing permit system. In that case, detriment might result in respect of the land claim areas more easily accessed, similar to that described by Commissioner Gray in the *Kenbi (Cox Peninsula) Land Claim Report (No 59)*.
- 6.3.48. Simply obtaining a permit would not, in my opinion, be an onerous addition to the organisational requirements of such activities. There would be some detriment arising from the inability of people to engage in spontaneous activities involving the use of Aboriginal land.¹²⁰
- 6.3.49. As with the proposed new permit management system, detriment may also arise in respect of any permit fees that are currently not required to access the claim areas. Such detriment would be minimal.

6.4. Commercial Fishing Operations

Introduction

- 6.4.1. Submissions from the Northern Territory and the NTSC in respect of most¹²¹ claims over the beds and banks of rivers and ITZ areas stressed the importance of continued access to those waterways for commercial fishing operations; the economic values of commercial fisheries; the need for flexibility to access waterways in response to

¹¹⁹ Northern Territory, Submissions in reply to the NLC – Group 1 and 4 in *Detriment Review*, 9 August 2018, [13].

¹²⁰ *The Kenbi (Cox Peninsula) Land Claim Report (No. 59)*, December 2000, Gray J, [11.13.11].

¹²¹ Lower Daly Region Land Claim No. 68 was the major exception where no commercial operations were identified.

market and environmental variability, and the potential for displaced fishing effort. These matters are addressed below.

- 6.4.2. The NLC's response to commercial fishing detriment was largely provided in the previous section on 'whole of fisheries management', which also dealt with agreement making. The Northern Territory's submissions in reply addressed the NLC's response, but neither the Northern Territory nor the NTSC provided any significant additional submissions in reply specifically in relation to commercial fishing operations.

Access to and use of claim areas

- 6.4.3. Major commercial fisheries across the land claim areas include the Mud Crab, Barramundi and King Threadfin fisheries. There are currently 14 Barramundi Licences (which include King Threadfin) and 49 Mud Crab licences in the Northern Territory, none of which are geographically restricted except in respect of those areas closed to commercial fishing under the Barramundi Management Plan and the Mud Crab Fishery Management Plan. Areas currently closed under the respective plans occur in land claim Groups 1, 3 and 4.
- 6.4.4. In their submissions the Northern Territory provided 2008 – 2017 catch figures for all three fisheries in respect of the relevant land claims. It did not provide a description of the precise areas from which the catch data was drawn, nor how those areas intersect with the specific claim areas, except in some land claim areas where there was no catch data recorded. Nevertheless it is discernible from the data that harvest rates and productivity of commercial operations across the broader groupings of land claims since 2008 has been highly varied. Annual variations in mud crab harvests were attributed to environmental factors.
- 6.4.5. The NTSC submitted statements of Katherine Winchester, Chief Executive Officer, in respect of land claim Groups 1, 3, 4 and 5. Ms Winchester's statements described fisheries operations in the claim areas as including harvesting fish and mud crabs and undertaking processing activities and crew changes where there are sheltered waters. A number of mud crab camps are currently situated adjacent to the relevant land claims and provide a base for servicing and accessing the fishery operations. Boat ramps in some of the claim areas are also utilised to access and service the barramundi fishery and to transport product to market.
- 6.4.6. Ms Winchester stated in all their submissions that the relevant land claim areas have good stocks of barramundi and king threadfin; that NTSC members have fished in these systems for many years and that income derived from these operations

represents the majority portion of members' yearly revenue. Ms Winchester claimed in her statements that commercial catches of mud crab from the Gulf of Carpentaria region, which includes the land claim areas, provide on average 75% of the total catch for the Northern Territory fishery with catches between 2007 and 2016 averaging 215t, and ranging from 46t to 419t. No further quantitative data was provided in support of 'stock' rates, catch rates and income derived from operations as they pertain to the other claim areas under review.

- 6.4.7. Ms Winchester stated that commercial barramundi fishery operations are critically reliant on ongoing access to certain rivers within the land claims, but also that access to all waters in the land claim areas allows flexibility to operators. The mud crab fishery is claimed to be critically reliant on ongoing access to all waters in all land claim areas, allowing operators to be flexible.

Economic detriment

- 6.4.8. Areas within Groups 1, 4 and 5 are identified by the Northern Territory as having significant levels of commercial fishing. It noted in its submissions for Group 1 that these fisheries are 'the basis of major commercial industry activity, and is (sic) among the most important commercial fishing in the NT'.¹²² They also highlight the regional economic values of commercial fishing which in some land claim areas 'underpins the livelihood of several operators in the region' and is 'considered a driver of other economic activity in the region'.¹²³ Similarly, the NTSC advanced the claim that 'any loss of area for commercial fishing in the Northern Territory is a loss of economic opportunities for the Northern Territory including for people who wish to participate in the commercial sector'.¹²⁴
- 6.4.9. No financial details were provided by the Northern Territory in respect of the economic value of the fisheries to the operators, businesses in the region or the "region" as a whole. The total mud crab fishery was valued at nearly \$12 million Gross Value of Production (GVP) in 2008/2009 and approximately \$4.5 million GVP in 2015/2016.¹²⁵ The cost of licenses alone is estimated by the Northern Territory to be \$650,000-\$750,000 each for a barramundi licence and \$250,000 and \$350,000 each for a mud crab licence.

¹²² Northern Territory, Submissions – Group 1 in *Detriment Review*, 23 April 2018, 10, [e].

¹²³ Ibid [g].

¹²⁴ NTSC, Submissions – Group 1 in *Detriment Review*, 15 March 2018, 3 [28].

¹²⁵ Northern Territory, Submissions – Group 5 in *Detriment Review*, 22 June 2018, 4, [m].

Cumulative detriment

- 6.4.10. Ms Winchester's statements expressed concerns consistent with the cumulative detriment raised by other stakeholders including the Northern Territory. Ms Winchester stated that a lack of access to multiple claim areas would reduce the number of waterways (including intertidal zones) available to commercial fishing, preventing the flexibility required to respond to environmental and seasonal variability and changes in demand.¹²⁶ It is claimed that loss of access to the claim areas would place significant pressure on fish (including crustaceans) stock in other areas, noting that waterways previously removed from the barramundi fishery for the benefit of recreational fishing has led to an increased importance of the remaining waterways for their members.¹²⁷
- 6.4.11. The following comment provided by Ms Winchester is noted,
- If the claim areas were granted to a land trust and access to the claim areas was denied, our members would not be able to exercise their commercial fishing rights in the claim areas.¹²⁸
- 6.4.12. To clarify, such commercial fishing rights over Aboriginal land would only exist subject to the permission of traditional Aboriginal owners to access the claim areas.

Commercial fishing operations – NLC's response on behalf of the claimants

- 6.4.13. The NLC's submissions did not respond directly to claims of detriment in respect of commercial fishing operations, but addressed such concerns more broadly in the context of agreement making and 'whole of fisheries management'. Their responses have been considered previously.
- 6.4.14. In an exception to the above, the NLC's submissions for land claim Group 3 noted that claimants have recently been in consultations with NLC staff concerning fishing business opportunities in the region.

Commercial fishing operations – Discussion

- 6.4.15. In light of the absence of a detailed response from the NLC, or any submissions in reply from either the NTSC or the Northern Territory specifically in relation to

¹²⁶ NTSC, Submissions – Group 1 in *Detriment Review*, 15 March 2018, 3 [25].

¹²⁷ Ibid. [26]-[27].

¹²⁸ NTSC, Submissions – Group 1 in *Detriment Review*, 15 March 2018, 3 [24].

commercial fishing, I refer to my discussion in the previous section regarding whole of fisheries management.

- 6.4.16. I note that in the absence of any proposed agreements addressing access for commercial fishing operators, financial detriment may result.
- 6.4.17. There is no reason to think that the traditional owners of the 12 beds and banks and ITZ land claim areas would not wish to benefit from the economic opportunities presented by commercial fishing in those areas. Nor is there any reason to think that, in general, the agreement making process would not in some cases be adopted, as has already been done in some areas where land grants have been made. So, in those cases, subject to a negotiated fee and suitable other terms of agreement, there would be no other detriment to the fishers presently engaged in that activity in the claim areas.
- 6.4.18. There may be areas where the traditional owners themselves wish to benefit more directly, by acquiring the licence from the present holder or from the Northern Territory. In those cases too, there should be no detriment to the Northern Territory, but a substituted licence or licences. There has been some recent suggestion (not made in submissions) that the Northern Territory may redeem/buy back the fishing licences, so that they may be re-issued to the traditional owners. There would be an economic cost in doing so, and it is not clear that in all instances, that would be how the traditional owners would wish to benefit from their lands. If licences are still to be issued to the existing licensed fishers, those fishers would have to separately secure access rights to the relevant areas from the traditional owners. That will involve, in a sense an element of profit sharing with the fishers, but will obviously have to be on commercially realistic terms to be workable. In such cases, there may well be some economic detriment to the persons presently holding the relevant licences.

6.5. Boat Ramps

Introduction

- 6.5.1. Boat ramps currently used to access the land claim areas were noted by the Northern Territory, NTSC, AFANT and several other stakeholders. Other than the Northern Territory, few submissions raised issues of detriment arising specifically in relation to boat ramp access, distinct from access to the claim areas, apparently reflecting the changed legal context since the Blue Mud Bay case. The central matter raised by stakeholders was whether certain boat ramps meet the definition of public roads under the ALRA, enabling their exclusion from a grant of land. That matter gave rise

to how detriment relating to such boat ramps might otherwise be addressed. This section does not address informal boat ramps that may nevertheless be currently accessible to the public, including under the provisions of the *Pastoral Land Act*.

- 6.5.2. The Northern Territory's submissions in reply to the NLC's submissions on the Group 5 land claims are addressed throughout this section as they provide significant further information on the detriment claimed.

Detriment claimed

- 6.5.3. The Northern Territory identified certain boat ramps which it claimed required specific consideration as public roads on the basis that the boat ramps are actively managed by the Northern Territory at considerable cost, are well used by members of the public, and are in some cases an extension of adjacent public roads. Other Crown assets and interests in the claim areas were also identified which do not raise the same legal questions as such "public" boat ramps.
- 6.5.4. The Northern Territory asserted that recreational fishing and tourism, and related Government expenditure on maintaining the boat ramps, were the primary reasons for treating boat ramps as public roads. Evidence was adduced in support of the location of relevant infrastructure on maps, images and Survey Plans, and visitation numbers at the boat ramps which were produced in respect of tourism related detriment. The submissions also relied on the relevant Land Claim Reports of former Commissioner Olney, which commented that potential detriment to the public and government authorities could be alleviated by the exclusion of public boat ramps from the grant of land.
- 6.5.5. The Northern Territory proposed that consideration should be given to King Ash Bay boat ramp, Port Roper boat ramp/No. Landing, Roper Bar boat ramp and the Roper Bar Crossing being excluded from grant as public roads under section 12(3) of the ALRA in order to alleviate any detriment arising from a grant of Aboriginal land over those areas¹²⁹. In respect of the Munbililla/Tomato (Munbililla) boat ramp, the Northern Territory acknowledged that this is not a public road for the purposes of the ALRA, but should be considered as such, or otherwise treated as assets of the Crown occupied within the meaning of s 14 of the ALRA for the purposes of use and

¹²⁹ Northern Territory, Submissions – Group 1 in *Detriment Review*, 23 April 2018; Northern Territory, Submissions – Group 5 in *Detriment Review*, 22 June 2018; Northern Territory, Submissions in reply – Group 5 in *Detriment Review*, 27 September 2018.

maintenance, and for which rent may be payable under s 15 (in the event the assets are not solely for a community purpose within the meaning of the ALRA¹³⁰).

- 6.5.6. In considering any detriment arising from the grant of land where public boat ramps are within the claim areas, I note AFANT's reference to Commissioner Olney's report on the Lower Roper River Land Claim No. 70, that the exclusion of such boat ramps from a grant of Aboriginal land would enable access to waterways and diminish potential detriment to fishers. AFANT commented that Commissioner Olney's proposition is no longer valid since the decision in the Blue Mud Bay case clarified that it is an offence to remain on Aboriginal land whether or not it is overlain by water¹³¹. Detriment arising from any restrictions on access to boat ramps was not addressed by AFANT separately from detriment which might arise in accessing any part of the claim areas.

Boat ramps – NLC's response on behalf of the claimants

- 6.5.7. The NLC disagreed that the King Ash Bay boat ramp should be considered a road over which the public have a right of way, noting that Commissioner Olney did not make such a determination. Their submissions asserted that boat ramps cannot be considered roads as they do not lead anywhere other than to the bottom of a river.
- 6.5.8. In their responsive submissions for Group 5 land claims, the NLC reiterated that it does not agree that any of the boat ramps should be categorised as public roads. It further commented more generally that boat ramps should not be excised from the land claimed and that the appropriate measure to address any detriment arising where boat ramps are immediately adjacent to a public road, is for an agreement between the NLC on behalf of the claimants and the Northern Territory or any other party that uses the facility.
- 6.5.9. The NLC also cautioned that if publicly accessible boat ramps are to be categorised as public roads, there may be unexpected consequences as to their regulation, maintenance, liability issues and so on.¹³²

Boat Ramps - Discussion

- 6.5.10. The context of detriment claims in respect of boat ramps has clearly changed since the High Court's Blue Mud Bay case decision. Claims of detriment specific to accessing waterways via boat ramps, barge landings and similar infrastructure have to

¹³⁰ Northern Territory, Submissions in reply – Group 5 in *Detriment Review*, 27 September 2018, 7-8.

¹³¹ AFANT, Submissions in reply – Group 5 in *Detriment Review*, 27 September 2018, [10].

¹³² NLC, Submissions – Group 1 and 4 in *Detriment Review*, 18 July 2018, 21 [86].

a large extent given way to broader claims of public detriment that may arise from restrictions on access to the entire claim areas. Implementation of the NLC's proposed permit management system will substantially address any detriment to the public and is dealt with previously in this Review. Public access is not further considered here.

6.5.11. Overall, the proposal to exclude boat ramps from the grant of Aboriginal land does not have the same import in enabling permit-free public access to the claim areas that it previously did. Nevertheless, the question of whether the boat ramps may be public roads under the ALRA remains, as does the related issues of Northern Territory access to Crown assets for maintenance purposes.

6.5.12. The Northern Territory's submissions in reply to Group 5 land claims addressed the matter of public boat ramps with reference to Commissioner Olney's comments in the Lower Roper River Land Claim No. 70 report as below,

The present claimants do not seek to argue [that the Roper Bar boat ramp is not a public road]. In these circumstances, in the absence of any other evidence, it is reasonable to conclude that the Roper Bar boat ramp is part of a public road and as such is excluded from the area of land that is claimed and if that be so no question of detriment arises.

6.5.13. However, in their recent submissions regarding the same land claim, the claimants have opposed the categorisation of boat ramps as public roads.

6.5.14. I agree with Commissioner Olney's comments in an earlier report, that whether or not the boat ramps identified by the Northern Territory are roads of the type referred to in s 12(3) of the ALRA is not a question on which I can make a final decision.¹³³ However, on the material before me, it appears that boat ramps that are adjacent to public roads, used by the public to go somewhere, and maintained by the relevant Northern Territory department have the characteristics of a public road.

6.5.15. The relevant provision of the ALRA, s 12(3), necessarily requires the exclusion of public roads from any grant of land. It does not operate at the discretion of the Minister or on the recommendation of the Commissioner. To the extent that this section of the ALRA is applicable, the land claim areas, including any boundaries they share with public road reserves, will need to be identified by way of a survey.¹³⁴

¹³³ *The McArthur River Region Land Claim No. 185 and Part of Manangoora Land Claim No. 185 Report No. 62*, Olney, J, March 2002, [167].

¹³⁴ Relevantly, a survey plan of each land claim the subject of this Review is required to be lodged with the Surveyor General prior to a grant of land.

The NLC and the Northern Territory may negotiate an agreed position on public boat ramps in defining the Scope of Works prior to the survey being undertaken.

- 6.5.16. If boat ramps are not identified by survey as public roads such that they are excluded from grant, restrictions on access by the relevant Northern Territory department for maintenance would remain unresolved.
- 6.5.17. In that event, consideration of public boat ramps as Crown assets under ss 14 and 15 of the ALRA would enable access by the Northern Territory for use and maintenance, with the option of rent payable should these assets not be solely used for community purposes. Detriment would be limited to a rental fee payable by the Northern Territory under s 15. I observe that detriment to commercial interests would not be addressed by way of ss 14 and 15 of the ALRA.
- 6.5.18. As proposed by the NLC, future access to boat ramps not considered public roads under the ALRA may be alleviated by an agreement between the NLC and the Northern Territory, or other (eg. commercial) interest, under ss 11A or 19 of the ALRA, or in the case of recreational fishers the boat ramp access would presumably be covered by a permit. Should such agreements be made, detriment would be limited to the fee payable under such an agreement. In the absence of an agreement, detriment may arise in respect of certain commercial interests, consistent with my discussion of Tourism related detriment below. I cannot conclude that there would be detriment to the Northern Territory in the absence of an agreement, should the boat ramps not be considered public roads. It would have such statutory rights of access as are prescribed.
- 6.5.19. I have sought in this Review to identify arrangements for expediting the finalisation of the relevant land claims, consistent with the Terms of Reference. Considering this approach, I note that it is also open to the Minister to make a determination under s 67A(5)(d) that he or she does not propose to recommend to the Governor-General that a grant of estate in fee simple in the area of land, or in an area of that land that includes the area of land, be made to a land trust.
- 6.5.20. In the interests of expediting the finalisation of the claims, I consider that where surveys do not result in a clear conclusion or agreement on whether the relevant boat ramps are a public road under the Act, that the Minister consider making a determination in respect of those boat ramps under s 67A(5)(d). It would be unfortunate if the grant of land claims was delayed as a result of ongoing disagreement on this point. I note it would also be open to the Minister to make a

determination about boat ramps with similar characteristics to public boat ramps, such as Munbililla.

- 6.5.21. I do not consider that the making of such a determination in respect of the boat ramps identified in this section would meaningfully disadvantage the claimants should the NLC's proposed permit management system and s 19 agreements under the ALRA be implemented to permit access to the remainder of the claim areas, following any grant of land.

6.6. Tourism

Introduction

- 6.6.1. Submissions were provided in respect of tourism and related businesses in respect of all land claim groups other than Group 6. The primary detriment concerns submitted were possible financial detriment to individual businesses who depend for their business on access to the claim areas, and economic detriment to the "region" and to the Northern Territory as a whole. Although their concerns were essentially similar, FTOs are addressed in this Chapter separately from other businesses, consistent with the submissions.
- 6.6.2. This section addresses the concerns of tourism related business that do not operate under the relevant provisions of the *Pastoral Land Act*, although there was significant commonality in the detriment issues raised between all tourism interests. There was also a high level of commonality between the concerns of tourism businesses and recreational fishers regarding public access to waterways.
- 6.6.3. Claims of detriment and the NLC's response on behalf of the claimants are initially addressed below, followed by a discussion taking into account any relevant submissions in reply to the NLC.

Fishing Tour Operators (FTOs)

- 6.6.4. The Northern Territory submitted that there are about 150 licenced FTOs in the Northern Territory catering for about 31,000 client days fished, with an economic contribution of \$26 million per annum.¹³⁵ It noted in its submissions that the number of FTOs operating in the area of each relevant land claim group since 2008 has ranged from 1 to 6. No information was provided about the precise area the data is drawn from and where the FTOs operated in relation to each land claim. Fishing

¹³⁵ Northern Territory, Submissions – Group 5 in *Detriment Review*, 22 June 2018, [x].

tourism itself was claimed to generate a ‘significant amount of localised economic activity in the region’ which may have ‘adverse impacts on expenditure and on individual business operations’ should access arrangements be modified.

- 6.6.5. Across the claim areas, only four FTOs contacted the Review regarding their detriment concerns relating to claims in their area of operation: three operators in the Lower Daly River Land Claim No. 68, and one operator in the McArthur River Region Land Claim No. 184. In particular, they submitted concerns about permits for accessing certain areas, including boat ramps, and any associated fees. It was claimed that permits would cause detriment to their businesses and others, and negatively impact the local economy. No evidence was adduced in support of the value of their businesses, or the contribution to the local economy with respect to their operations in the claim areas. That lack of detail on those matters is somewhat significant because the desirability of such detail with supporting documentation to better appreciate and assess the detriment asserted was one of the matters specifically requested. In certain respects, such information was provided as noted below.
- 6.6.6. A further comment was made by Stuart and Marnie Brisbane that if access to certain parts of the Daly River was restricted (without permit) this may put a strain on the relationship between recreational fishers and traditional Aboriginal owners.¹³⁶ I have previously addressed such a concern. For the reasons given, I do not consider it is a detriment which merits much consideration.

Other businesses / investment interests

- 6.6.7. Submissions were received from the following tourism interests in the claim areas: Fullham Pty Ltd (Gulf Minimart) and KABFC in respect of land claim Group 1; Stephen Barrett Fishing Camp in respect of land claim Group 3; and the Estate of Veronica Januschka in respect of land claim Group 5. The KABFC submissions included related submissions of small businesses that operate within the lease area or on adjacent McArthur River. Moreover, substantial financial detriment was claimed by the KABFC and its members/member groups on the basis of their capital investments in developing the area of the Club’s Perpetual Crown Lease.
- 6.6.8. Aside from Stephen Barrett Fishing Camp, stakeholders expressed common concerns about the potential financial loss that may accrue as a result of any restrictions on tourist business access and tourist access to nearby waterways, including a requirement to obtain permits to access those areas. It was asserted that any such

¹³⁶ Stuart and Marnie Brisbane, Submissions – Group 2 in *Detriment Review*, 13 February 2018.

restrictions or permit system would result in a drop in tourist numbers in those areas. One stakeholder suggested that some tourists would choose not to fish rather than purchase a permit¹³⁷. The Januschka Estate expressed concern regarding access for the residents of Ngukurr and commercial fishers. Claims of financial detriment included the devaluation of businesses and infrastructure and diminished, or loss of, income for businesses and their employees, including contractors. It was submitted that businesses and infrastructure would be ‘worthless’¹³⁸ or ‘almost valueless’¹³⁹ without access to the river. KABFC provided detailed financial estimates but no further evidence of the capital improvements to the properties in support of claimed detriment. The Estate of Veronica Januschka provided a financial statement including income, expenditure and assets in support of its detriment claims, and noted that that the business is currently for sale.

- 6.6.9. Stephen Barrett raised similar concerns that tourist access to waterways may be restricted or require permits following a grant of Aboriginal land. His concerns were framed in terms of operational rather than financial detriment.
- 6.6.10. ‘Social’ detriment was also raised in letters of support for the KABFC submission. Such concerns are similar to those of recreational fishers dealt with earlier in this Chapter, and also at Chapter 7 in respect of individual claims.

Regional and NT economy

- 6.6.11. The Northern Territory and several stakeholders submitted that economic detriment of a more general nature might be suffered in the land claim regions, and by the Northern Territory as a whole, as a result of any restrictions or loss of access to the claim areas, including relevant waterways and the historical heritage site of the Old Elsey Homestead. It was submitted by the Northern Territory that the Katherine Region, which appears to include a number of the relevant land claims, attracted 346,000 interstate and international visitors in 2017 with an expenditure of \$186 million.¹⁴⁰ It was further submitted that within the Katherine Region, the smaller Daly Region was estimated to have had 81,000 visitors in the year ending March 2017.¹⁴¹ The Savannah Way was also noted as a 4WD touring route traversing Queensland, the Northern Territory and Western Australia, which passes near some of the land claim areas. No evidence was provided of visitation numbers to, and use

¹³⁷ Lesley Garner, Submissions – Group 1 in *Detriment Review*, 19 January 2018.

¹³⁸ KABFC, Submissions – Group 1 in *Detriment Review*, 16 March 2018, [41].

¹³⁹ The Estate of Veronica Januschka (deceased), Submissions – Group 5 in *Detriment Review*, 15 June 2018.

¹⁴⁰ Northern Territory, Submissions – Group 4 in *Detriment Review*, 4 June 2018, 18 [3(b)].

¹⁴¹ Northern Territory, Submissions – Group 2 in *Detriment Review*, 8 March 2018, 12, [3(f)].

of, the actual claim areas, or the economic contribution of such visitation to the actual land claims areas individually or collectively.

- 6.6.12. The Northern Territory's submissions and reply submissions listed the tourism operations (apparently including FTOs) in or near the land claim areas. However, unless provided in the separate submissions of some operators, the listed detriment interests were not supported with any information regarding their current use of the claim areas for commercial purposes, their legal entitlement to do so, or specific financial losses they may suffer in the event of the claims being granted.
- 6.6.13. The Northern Territory's submissions also referred to detriment that may arise in relation to 'future potential investment and economic development opportunities'. Such opportunities were not further described.
- 6.6.14. The Northern Territory sensibly acknowledged in some of its submissions that if suitable arrangements were to be put in place for continued management and public access, no detriment to regional tourism interests should arise.¹⁴²

Tourism – NLC's response on behalf of the claimants

- 6.6.15. The NLC's submissions on behalf of the claimants provided a brief response to detriment claims submitted by FTOs, first noting that access agreements in place in the Daly region have provided sufficient certainty of access such that the number of operators in the region appears to have risen in recent years; and secondly, that alternative avenues to obtain commercial security exist under ss 11A and 19 of the ALRA.
- 6.6.16. The NLC queried the reliability of the valuations upon which claims of economic detriment were made by members of KABFC and related interests. It was observed that as members of the Club have no apparent security of tenure and their 'ownership' of dwellings and related investments have no appreciable impact on the marketable value of the properties. NLC asserted that any investments were the result of an appetite for risk. Financial detriment raised by the service station – the only entity to hold a sublease from KABFC – was also queried by the NLC due to the sublease being short term and requiring improvements to be removed on termination of the lease. Other detriment claims were not disputed but said by the NLC to be inflated; the NLC pointed to evidence showing the business advertised at a significantly lower price than the detriment claimed.

¹⁴² Northern Territory, Submissions – Group 3 in *Detriment Review*, 4 June 2018; Northern Territory, Submissions – Group 5 in *Detriment Review*, 22 June 2018.

- 6.6.17. The failure of KABFC and related business interests to recognise existing access agreements over nearby parts of McArthur River was emphasised by the NLC, noting that ‘there is a very clear option available through the Land Rights Act’ (for addressing detriment concerns). Presumably, that comment refers to s 19, which provides for agreements to be made for the commercial use of Aboriginal land. The NLC’s response to the Januschka Estate differed, maintaining that any claims of detriment would be resolved through the planned sale of the business either by it being accounted for in the sale price, or by an intending buyer being notified of, and accepting any detriment. Again, the NLC referred broadly to ‘appropriate measures to mitigate the detriment should relevant areas of land claim be granted as Aboriginal land’.¹⁴³
- 6.6.18. The NLC did not respond to the claims of broad economic detriment to the region and the Northern Territory as a result of the impact of land grants on the tourism industry. Further to the responses referred to above, the NLC’s general submissions regarding agreements and the permit management system are relevant to such detriment claims in proposing measures for enabling public access to the claim areas.

Tourism – Discussion

- 6.6.19. Submissions in reply to the NLC addressing the tourism related detriment considered in this section were only received from the Northern Territory. Notably, a reply was not received from the KABFC, in particular about the NLC’s submissions regarding the validity of the KABFC claims. The NLC’s claims remain unchallenged.
- 6.6.20. I refer to my comments at Chapter 5 regarding detriment claimed in the absence of there being any legal interest or entitlement in the activity from which the claimed detriment arises. The fact that an entity chooses to operate a business, without the approval of the Northern Territory but on unalienated Crown land where such an approval should have been obtained, means that that entity has little to lose if it is told to stop that activity. It has taken the risk of operating without authority. The financial detriment claimed in respect of such tourism operations or investments which are not founded on a legal interest or entitlement should not give rise to a detriment of such a character as to require much weight be given to them by the Minister under s 11. Consequently, not much weight should be given to them for the purposes of this Review. The reasons for that conclusion are set out in Chapter 5.

¹⁴³ NLC, Submissions – Group 5 in *Detriment Review*, 1 September 2018, [38].

- 6.6.21. I also expressed the view in that Chapter that detriment claims in respect of businesses or investments with a legal interest should not be considered as giving rise to significant detriment for the purposes of the Minister or of this Review if those interests were acquired subsequent to the publication of the relevant land claim Report. I refer to Chapter 5 which addresses principles of timing in acquiring detriment. Accordingly, detriment claims should not transfer with the sale of commercial interests but should be dealt with at sale following appropriate due diligence process.
- 6.6.22. I also acknowledge the NLC's suggestion that financial detriment claims made by tourism operations may be mitigated by way of an agreement with traditional Aboriginal owners prior to or following the grant of land under s 11A or s 19 (respectively) of the ALRA. Further, I refer to my discussion of agreement making and the NLC's proposed permit management system earlier in this Chapter which, if implemented, would address most detriment said to arise relating to public access to the claim areas. Detriment would be limited to any permit fees for public access, and amounts payable under the terms of an agreement. Such arrangements could equally mitigate the other concerns described above, as well claims of regional economic detriment.
- 6.6.23. In the absence of such arrangements allowing commercial and public access and use of the claim areas, financial detriment in respect of any reduced or lost income or devaluation of investments may be suffered by FTOs and other tourism operations whose claims are based on existing legal entitlements acquired prior to the publication of the land claim reports. Despite limited evidence of the regional economic contribution arising specifically from commercial use of the claim areas, I accept that in the absence of any arrangements for access and use of those areas, there may be some flow-on economic impacts to other businesses. It may be difficult to assess their significance, as it cannot be assumed that after a grant of the land the traditional owners will not undertake the same or similar (or more effective) tourist enterprises to the benefit of the community as a whole. It would not be taken to be the case by the Minister that, where an area of a grant or potential grant, has the capacity to generate jobs and revenue by certain tourist or tourist-related activities, the grant would inevitably mean that none of those opportunities would be taken up. I do not think it appropriate to proceed on such an assumption for the purposes of this Review.
- 6.6.24. The potential impact of the grant of the land claims on future investment and economic opportunities in tourism cannot properly be considered a 'proposed pattern

of land use' under s 50(3)(c) of the ALRA giving rise to a relevant detriment. There is no comprehensive information provided in support of such a proposition. As discussed elsewhere, there are a range of options available to the traditional owners of the land, if granted, to get benefits from its regulated use either directly by the traditional owners or by permit or agreement with other persons or entities. There are examples of this having taken place referred to elsewhere in this Report.

6.7. Pastoral activities

Introduction

- 6.7.1. Submissions claiming detriment to pastoral operations and “diversification activities” under the *Pastoral Land Act* were provided in respect of all but one of the claims the subject of this Review.¹⁴⁴ Common concerns raised by stakeholders related to ongoing access to the claim areas for current and future pastoral operations including cattle grazing and watering, taking water for domestic use and stock watering, weed and feral animal management, staff and visitor access for recreational purposes, and infrastructure for water access. Detriment relating to current and future pastoral diversification was raised as a detriment matter in several submissions. Cumulative detriment was also claimed by the NTCA in respect of ‘potentially serious detriment impacts on attempts to increase pastoral diversification’.¹⁴⁵
- 6.7.2. Claims of detriment and the NLC’s response on behalf of the claimants are initially addressed below, followed by a discussion taking into account any relevant submissions in reply to the NLC.
- 6.7.3. I observe at the outset of this section, that the majority of leaseholders (or their agents) who provided submissions to this Review claimed to have had no knowledge of the relevant land claims and published reports prior to being notified in the course of the Review, despite assurances of due diligence in purchasing the leases.

Pastoral operations

- 6.7.4. The Northern Territory, the NTCA and pastoral lessees (including the AWC) provided submissions on this subject. I note that of the pastoral leases that are in the claim areas, three have been the subject of exclusive native title determinations and are held by native title holders who are members, or possible members, of the relevant claimant groups. Detriment submissions were received from one of these

¹⁴⁴ Finnis River Land Claim No. 39 was the only exception to this case.

¹⁴⁵ NTCA, Submissions – Group 6 in *Detriment Review*, 31 May 2018.

lessees. The Northern Territory noted that in respect of the other two leases, detriment raised during the relevant land claim inquiries may no longer exist. They noted however, that current lessees may still be affected by any limitations on their access to the claim areas, and that detriment may accrue to a future purchaser of the lease that is not also a claimant.

- 6.7.5. A number of factors central to the operation of pastoral leases were raised as detriment concerns that would arise following a grant of Aboriginal land, absent an agreement to allow those activities to continue. Many concerns related in particular to land claims over beds and banks of rivers, and issues arising in relation to water access. Operational concerns currently protected under the *Water Act 1992* (NT) (*Water Act*) included accessing the unalienated Crown land including the beds and banks of rivers (and to an extent the intertidal zone) for cattle grazing and watering, taking water for stock and domestic purposes and the installation and management of infrastructure to access water. The provision of alternative water sources and infrastructure, should access to the claim areas be prevented, was said to be costly and potentially economically unviable. Any limitations on access to and use of water within many of the claim areas was stated as significant detriment which would impact business operations, habitability and future business growth.
- 6.7.6. Stakeholders asserted that the claim areas may need to be fenced to prevent stock wandering onto Aboriginal land and the necessary entry of station personnel on to that land to retrieve stock, which without permission, would be unlawful under the ALRA and the *Aboriginal Land Act* (NT). Detriment claimed in respect of fencing costs was estimated in two submissions to be around \$150,000 and \$180,000 respectively, plus additional costs for maintenance and repair.¹⁴⁶ It was suggested that fencing costs would most likely be borne by the pastoralists. Practical and safety issues of fencing areas prone to flooding and inhabited by crocodiles were also raised as detriment matters.
- 6.7.7. Access to claim areas for weed and feral animal management to ‘prevent or minimise degradation of or other damage to land and its native flora and fauna’ was put forward by the Northern Territory as a requirement under the *Pastoral Land Act*. It was broadly claimed that the impacts of feral animals and weeds, including ‘biosecurity’¹⁴⁷ issues, may result from lack of access to the claim areas to conduct pest management (including the ability to install infrastructure as necessary) and also

¹⁴⁶ Pardoo Beef Company Pty Ltd, Submission – Group 4 in *Detriment Review*, 20 April 2018; Tipperary Group of Stations (TGS), Submissions – Group 2 in *Detriment Review*, 8 March 2018.

¹⁴⁷ Tipperary Group of Stations (TGS), Submissions – Group 2 in *Detriment Review*, 8 March 2018.

the construction of any fences around claim area which would impede management activities.

- 6.7.8. The submissions described detriment that would arise to lessees, staff, family and visitors should the grant of Aboriginal land restrict their access to waterways for fishing and other recreational purposes. The practical difficulties of obtaining permits for access to the claim areas were also noted. Access by lessees, staff and family to waterways adjacent to pastoral leases is currently protected by s 13 of the *Water Act*. Access by the public or ‘visitors’ to those areas is protected under the *Pastoral Land Act*.
- 6.7.9. In several submissions, pastoralists stated that they granted public access to waterways for recreational fishing. Granting access is not considered a matter of detriment as pastoralists do not have the legal right deny access. Detriment claimed in respect of public access is addressed in this Report under the subheading Recreational Fishing. Any commercial detriment claimed in respect of public visitation to the claim areas is addressed below, as a diversification activity. Access and use of waterways by lessees, staff and family for fishing and other recreational purposes is addressed here as a detriment claim relating to pastoral operations.
- 6.7.10. Similar concerns to the above were raised in respect of Mataranka Area Land Claim No. 69 which, while not including beds and banks of rivers or ITZ areas, is relied upon by adjacent pastoralists for grazing and pastoral operations. It was claimed that detriment would arise in relation to infrastructure maintenance, mustering stock, access to and from the Roper Hwy and stockyards (and therefore the market), accessing the homestead from the road, possible fencing required, and access to bores and water, access by lessees, staff and visitors to waterways for recreation, weed and feral control and prevention.
- 6.7.11. Concerns about overall business sustainability were raised in respect of the possible grant of land claims; any resulting restrictions on access to the claim areas to undertake the pastoral activities described above, and the cost of adapting operations, where viable, to account for restricted access. Evidence of relevant costs provided in the submissions are presented in greater detail in my consideration of individual land claims.
- 6.7.12. The NTCA’s Paul Burke made further, general comments in relation to ‘industry-wide’ detriment referring to the negative impacts on investor confidence and security

in the pastoral sector.¹⁴⁸ He went on to say that uncertainty about access to the claim areas can have significant economic detriments, preventing pastoralists from making short and long term decisions in respect of investments in capital improvements and infrastructure in terms of stocking rates.¹⁴⁹ There was no evidence provided to support the above proposition throughout the relevant submissions: conversely, several claims were made in the light of purchases and investments into pastoral leases over recent years. Nevertheless Mr Burke claimed that he is not confident that even the grant of land claims will ‘restore’ investor security on the basis that the value of the land claims is ‘almost entirely in its ability to exclude others’.¹⁵⁰ Detriment claimed in relation to investment in diversification activities is set out below.

- 6.7.13. The costs of negotiating and entering into any agreements to allow access to the claim areas, if granted, was asserted by the Northern Territory, NTCA and other stakeholders in relation to pastoral operations, echoing submissions on fishing-related detriment.

Diversification activities

- 6.7.14. The Northern Territory, NTCA and pastoralists commented on financial detriment arising from any limitations on the generation of alternative sources of income by pastoralists, and related economic returns to the Northern Territory economy. Such activities were described as including tourism, camping, 4WD expeditions, fishing tours or agriculture, horticulture, aquaculture, and bush tucker harvesting.
- 6.7.15. It is noted that of the numerous diversification activities described in the submissions, there was only one current example that was described as having the appropriate legal entitlement under s 85A of the Pastoral Land Act. Some stakeholders claimed to have held appropriate permits in the past, and some claimed to be currently applying for such permits from the Northern Territory.
- 6.7.16. Detriment submissions from a number of pastoral lessees noted the fees they currently charge for visitor entry to, and accommodation on the property, enabling access to the waterways for camping and fishing and other activities such as guided tours. Investments into developing these businesses, particularly tourist facilities, were also claimed as detriment. Limited examples of existing pastoral diversification other than tourism were provided: Flying Fox Station submissions advised that their

¹⁴⁸ NTCA, Submissions – Group 5 in *Detriment Review*, 25 May 2018.

¹⁴⁹ *Ibid.*

¹⁵⁰ *Ibid.*

contracting business operates from the station and delivers training at the accommodation facility.¹⁵¹ Pastoral diversification activities were claimed in some cases to have involved significant financial investment by the lessee, as well as promotional and other support from the Northern Territory. Broad investment amounts, tourist visitation rates and employment figures were reported in some submissions in support of the potential detriment that might arise following a grant of land. No information was provided about the income generated by such activities either to the lessee, to the region, or to the Northern Territory economy as a whole.

- 6.7.17. Broadly defined pastoral diversification activities were described by the Northern Territory and others as ‘proposed patterns of land use’ for comment under s 50(3)(c) of the ALRA. The NTCA emphasised the potential significance of such activities, asserting that long-term pastoral viability may be dependent on diversification. Its submissions contended that the grant of the land claims may reduce pastoral diversification (especially tourism) opportunities, amounting to cumulative detriment to the Top End economy and potential job creation.¹⁵² Other than the continuation and possible growth of current tourism operations there were few specific examples provided of future diversification proposals that may be impacted by the grant of the claim areas. Flying Fox and Lorella Stations informed of their interest in agricultural development and aquaculture respectively: Flying Fox said that a non-pastoral use permit application is currently under consideration by the Pastoral Land Board. No detailed information was provided on the potential financial contribution of future diversification activities to the Northern Territory economy.

Pastoral activities – NLC’s response on behalf of the claimants

Pastoral operations

- 6.7.18. The NLC’s responses to the submissions on detriment included a number of comments of broad relevance. In particular their submissions proposed a licence to be granted under the ALRA by the traditional owners as “suitable safeguard” to address the “jeopardy” faced by pastoral lessees adjacent to the claim areas in respect of the economic use of their lands as pastoralists, and as distinct from the development of prospective agricultural, tourist, recreational and mining uses on the pastoral properties.¹⁵³ The NLC proposed:

¹⁵¹ Fly Fox Pty Ltd, Submissions to Group 5 in *Detriment Review*, 25 July 2018.

¹⁵² NTCA, Submissions – Group 5 in *Detriment Review*, 25 May 2018.

¹⁵³ NLC, Submissions – Group 1 and 4 in *Detriment Review*, 16 July 2018, [25].

A licence to be provided to the stations that would reflect the current usage of the claim area by the adjoining pastoral lessee include the following essential features (this is not an exhaustive recitation of the elements of a proposed licence):

- i) TO permit those pastoral activities presently undertaken in the claim area – access for mustering (replacing s 27 Livestock Act), repair and maintenance of fencing (if any);
- ii) Feral animal control;
- iii) Assume obligations to comply with the Weeds Management Act, and other legislation relating to the environment;
- iv) Term will run with the pastoral lease;
- v) Fully transferrable on sale of the pastoral lease without further consent (but on notice to the Land Trust);
- vi) No licence fee (peppercorn);
- vii) Non-exclusive;
- viii) Replicate current rights of an adjoining land owner under sections 11 and 13 of the Water Act.¹⁵⁴

6.7.19. The NLC said that some claimant groups, where consulted, expressed support for such an arrangement. The NLC proposed seeking instructions from other traditional owners to offer a licence, consistent with the terms set out above, to other lessees.

6.7.20. The NLC also responded to the Northern Territory submissions to the effect that some ‘generic’ issues of detriment raised were ‘not entirely accurate, nor the complete picture’.¹⁵⁵ They claimed that such ‘inaccuracies’ asserted a detriment where there is none, or somehow served to exaggerate an asserted detriment.¹⁵⁶ The NLC sought to correct submissions on detriment relating to weed and feral animal control which, it claims, is not a requirement or responsibility of the lessee under Northern Territory legislation but (in the absence of a direction from the Pastoral Land Board under the *Pastoral Land Act*) a voluntary activity undertaken to achieve pastoral management outcomes. It was noted too that, while there is provision for weed and feral animal management on Crown land, this does not amount to an entitlement of neighbouring land owners to engage in such activities.

¹⁵⁴ Ibid.

¹⁵⁵ NLC, Submissions – Group 2 in *Detriment Review*, 8 June 2018, [42].

¹⁵⁶ Ibid.

Diversification activities

- 6.7.21. Comment was made by the NLC in relation to diversification activities referred to in the Northern Territory submissions. The NLC noted that this was raised as a broadly relevant detriment matter even where it was not raised by lessees.¹⁵⁷ The NLC submissions also commented that such activities presumably refer to ‘The possible availability of a permit for a non-pastoral use’ under the *Pastoral Land Act*. They further explained that Part 7 of that Act by s 85A provides that the Pastoral Land Board may, on application by the lessee, grant a permit for non-pastoral use on pastoral land for up to 30 years. Again, on application by the lessee, the Board may extend the permit. Permits may be suspended or revoked. The NLC submissions observed that such permits do not grant any rights to use adjacent Crown land. They further noted that a separate application for a licence to take and use surface water (on or off pastoral land) would need to be made under s 45 of the *Water Act*, involving a separate decision by the Controller of Water Resources.¹⁵⁸
- 6.7.22. The NLC submissions therefore queried the use of Crown land for commercial purposes in the context of detriment claims relating to diversification activities. They stated,
- The inference is that Crown land is public land permanently available without restriction to any person who wished to use it for commercial purposes, and to all such persons as members of the public.
- 6.7.23. The NLC claimed that the above inference is the ‘only logical inference that could support the claimed detriment’, and requested clarification from the Northern Territory as to how Crown land would be or is administered under the *Crown Lands Act* to enable and regulate the use of it by third parties for commercial purposes’.¹⁵⁹
- 6.7.24. In their submissions on Group 5 land claims, the NLC commented generally, that,
- To the extent that a pastoralist may not have a future opportunity to carry out a non-pastoral activity not currently being undertaken, in our submissions potential loss must be regarded as speculative and not a matter of detriment.¹⁶⁰
- 6.7.25. Responding to broad comments made by the NTCA in its submission to the Lower Daly River Land Claims, the NLC stated ‘To the extent that NTCA expresses the

¹⁵⁷ Pastoralist’s submissions to Group 2 in particular did not raise any such detriment.

¹⁵⁸ NLC, Submissions – Group 2 in *Detriment Review*, 8 June 2018, [51]-[53].

¹⁵⁹ *Ibid* [54].

¹⁶⁰ NLC, Submissions – Group 5 in *Detriment Review*, 1 September 2018, [31].

political stance of the organisation with regard to this and similar land claims, this is not the appropriate place to respond'.¹⁶¹

Pastoral activities – Discussion

- 6.7.26. As noted at the outset of this section, submissions were received from a number of pastoralists claiming they had no knowledge of the land claim prior to this Review. In respect of three such stakeholder submissions concerning the Mataranka Area Land Claim No. 69, the Northern Territory submissions in reply specifically commented that the lessees were made aware of the land claim at the time of purchase of the subject leases. It is not safe, therefore, to proceed on the assumption of no knowledge of the relevant land claims. As I have discussed above, it is difficult to excuse such ignorance, if it existed (as distinct from indifference) when the acquisition of the lease is a significant transaction almost inevitably supported by legal or conveyancing involvement.
- 6.7.27. Other claims of detriment resulting from the purchase of, or investment in, pastoral operations or diversification activities since the publication of the Land Claim Reports should also be regarded cautiously in light of my discussion of these issues in Chapter 5. I reiterate my view that detriment acquired since the publication of the relevant land claim reports demonstrates an appetite for risk on the part of the stakeholder, and should not be given much weight in consideration by the Minister under s 11 or on this Review.
- 6.7.28. I further note the numerous claims of detriment relating to diversification activities which are currently being undertaken on pastoral land without any permit, and therefore legal entitlement, under s 85A of the *Pastoral Land Act*. I do not consider such detriment claims relating to the use of the adjacent claim areas for those activities to be a significant matter for consideration by the Minister under s 11 or on this Review. It is like saying: you should not grant the unalienated Crown land to the traditional owners because I am doing something on my pastoral lease that I am not entitled to do, and by implication my unauthorised activity on my pastoral land should take priority over the traditional landholders of the adjoining Crown land.
- 6.7.29. In any event, detriment said to arise in respect of the pastoralists' income from and investment in those activities is not confined to the pastoral lease areas. It is said in most cases to depend on the claim areas, as well as the pastoral lease itself. In the case of those unauthorised activities on the pastoral land and involving the adjacent

¹⁶¹ NLC, Submissions – Group 2 in *Detriment Review*, 8 June 2018 [66].

Crown land, it is even more difficult to see why the claims would not proceed to a grant of Aboriginal land. The alternative is, in effect, to say: you should not grant the unalienated Crown land to the traditional owners because I am doing something on my pastoral lease that I am not entitled to do, and it requires access to and use of the adjacent Crown land for the purposes of the activity although I have not got authority to use the adjacent Crown land for a profit making business, and again by implication my unauthorised activity on my pastoral leases and on the adjacent Crown land should take priority over the traditional landowners of the adjoining Crown land.

- 6.7.30. It should also be noted that, consistent with the purposes of the ALRA, the grant of the unalienated Crown land does not routinely prevent the conduct of authorised commercial activities either through the traditional Aboriginal owners conducting them or by agreeing with the adjacent pastoral interest upon terms for the pastoralist to do so. From the point of view of the Northern Territory, such activities may be the subject of a licence or other negotiated agreement under relevant provisions of the ALRA and so the economic benefit to the Northern Territory may well continue.
- 6.7.31. The preceding paragraph is based upon the proposition that, where permits for non-pastoral use of pastoral land are granted under the *Pastoral Land Act*, those permits do not include access to and use of Crown land for commercial purposes or large organised activities, or for the extraction of surface water for agricultural or other such purposes. As addressed in the NLC submissions and the NT submissions in reply,¹⁶² such access and use is managed and regulated under the *Crown Lands Act* and the *Water Act* respectively.
- 6.7.32. Notwithstanding the above, I note that the Northern Territory submissions in reply distinguished between commercial activities permitted by licence or an appropriate form of tenure under the *Crown Lands Act*, and circumstances where the clients of a tourism operation undertake Low Impact Activities incidental to the commercial tourism activities (which a member of the public has the liberty to exercise).¹⁶³ The Northern Territory submitted that Low Impact Activities are generally regarded by the Crown to include ‘fishing, bushwalking, picnicking, bird watching, bike riding, walking the dog etc.’¹⁶⁴ In claiming detriment arising from commercial operations, stakeholder submissions did not identify any the legal basis upon which such activities were undertaken (save for such activities by the pastoral lessee and family

¹⁶² NLC, Submissions – Group 2 in *Detriment Review*, 8 June 2018 [53], Northern Territory, Submissions in reply- Group 2 in *Detriment Review*, 26 July 2018, [54-55].

¹⁶³ *Ibid.*

¹⁶⁴ *Ibid.*

and visitors). Given the claims of detriment raised by some stakeholders regarding the importance of ongoing access to the claim areas for their tourism activities, I question the implicit assumption that such activities would be “incidental” to the pastoral lessee’s commercial operations. There is an obvious line drawn between such low impact activities by individuals and where they are undertaken as part of a profit making package by an adjacent landowner.

- 6.7.33. Further, in general I accept the NLC’s comment in their submissions to Groups 1 and 4 land claims, that upon any grant of land, traditional Aboriginal owners should not be denied the opportunity to benefit economically from any commercial activities on their land even where there is presently no cost to conduct such activities on Crown land currently under claim.¹⁶⁵ However, it is necessary to consider separately each of the 16 separate land claims and the detriment asserted in relation to each to form a concluded view or to express an opinion to the Minister for the purposes of this Review.
- 6.7.34. The assertions of the Northern Territory and the NTCA in particular, that unspecified opportunities for pastoral diversification should be commented on as “proposed patterns of land use” under the ALRA is noted. Such opportunities are presumably dependent on a broad range of variables, including environmental, economic and market factors and licencing under alternative policy and legislative frameworks. In my view, adequate evidence or other information was not provided in respect of these claims, such that they would constitute a “proposed pattern of land use” beyond the fishing activities referred to above. There was no document in any way equivalent to the Fishing Harvest Strategy or Guidelines. There was no documented overall strategic plan of the Northern Territory which encompasses what has taken place informally. Indeed, as noted, save for one instance, what has taken place by some pastoralists informally is not apparently authorised by the Northern Territory. In my view, the legal possibility of pastoral diversification does not of itself fall within the concept of “proposed patterns of land use”.
- 6.7.35. Of course, it is necessary to address the pastoralist’s concerns, shared by the Northern Territory and the NTCA, about access and use of the Crown land abutting many pastoral leases. In the light of the BMB case, the way in which pastoralists have accessed adjacent rivers and creeks, and in some cases the ITZ waters, would strictly speaking no longer be available if the 12 claims within the beds and banks and ITZ waters land claims were granted.

¹⁶⁵ NLC, Submissions – Group 1 and 4 in *Detriment Review*, 16 July 2018.

- 6.7.36. The NLC's response is a proposed licence. In its terms it appears to address the detriment concerns relating to pastoral operations. The submissions in reply from three pastoralists responded positively to the proposal. The comments made in reply to the NLC submissions regarding the responsibilities of pastoralists in conducting weed and feral animal management and consider that such activities appear to be, and should be, accounted for in NLC's proposed licence, if that is not clear. That is irrespective of the issues about who has the legal obligation and right to manage weed and feral animal problems.
- 6.7.37. Four submissions in reply raised concerns that the NLC's proposed licence is not workable or reasonable, as it does not include future use of the claim area, future pastoral use of the lease, or current or future diversification activities. I accept the NLC's position that (other than current diversification activities) the licence need not authorise future diversification activities. Such activities are speculative and would need to be addressed on a case by case basis, including whether there should be payment to traditional Aboriginal owners, as appropriate, for non-pastoral commercial activities. Access to the claim areas for current diversification activities may be dealt with similarly.
- 6.7.38. I take the view that the NLC's proposed licence to enable the continued access and use of land claim areas for pastoral operations is a workable and reasonable mechanism that would effectively address the relevant detriment claims of pastoralists carrying out normal pastoral activities. Clearly, the Minister under s 11 should take into account the detriment to pastoral interests in conducting their pastoral activities involving access to unalienated Crown land the subject of the Land Claim Reports. Equally clearly, the Minister would, if a grant were made, have regard to the licence proposal when considering the recommendations to grant land and any detriment matters.
- 6.7.39. This is one of those matters which the Minister might wish to approve in principle as to its content, and then make the grants, confident that the licences will then be issued. As elsewhere indicated, in my view what is proposed for the licence contents is satisfactory in all relevant respects. It covers the range of activities which AFANT and the pastoralists have identified as the normal or routine concerns in their pastoral activities, including feral weed and animal control. It avoids the fencing concerns. So I suggest its approval in principle to the Minister. Also, for reasons expressed elsewhere, I recommend that the Minister should not embark upon any process of further negotiation about its contents or drafting with stakeholders.

- 6.7.40. Finally, the concluding comments of the NTCA submissions to the Lower Daly River Land Claim No. 68 are noted. Such comments are, as argued by the NLC,¹⁶⁶ considered more political than they are an attempt to establish detriment as provided for under the ALRA. I note in particular the comment by the NTCA that,
- A grant of this Land Claim area, or any other similarly situated land claims, to a land trust does nothing beyond providing advantage to that land trust built on the detriment to the pastoral lease holder.
- 6.7.41. I refer to my comments in previous Chapters regarding the primary, beneficial purpose of the Act in addressing the land related interests of Aboriginal people in the Northern Territory, and the secondary provision in the Act for matters of detriment to be considered by the Minister. In my view, it is important to be reminded of the intended meaning of detriment, and the proper context for considering detriment claims.

6.8. Mining and energy

Introduction

- 6.8.1. Submissions in respect of mining and petroleum interests were received from the Northern Territory in respect of all land claims groups. Submissions from tenement holders were received in respect of all land claim groups, save for Group 2. Both the Northern Territory and individual mining and petroleum interests raised matters of general relevance to the claim areas. This section addresses those general submissions and the responsive submissions from the NLC. The discussion takes into account the submissions in reply, where relevant.
- 6.8.2. In general, the position is that mining and petroleum interests are accommodated by relevant provisions of the ALRA, including the provisions in Part IV, ss 70 and 19. Consequently, the detriment claims which are made by or on behalf of mining and petroleum interests generally indicate a dissatisfaction with the terms of the ALRA. When the Minister is exercising powers under s 11 of the ALRA, it is therefore appropriate to regard the concerns of this category of ‘detriment’ as addressed by the ALRA expressly, and to give little weight to them. That is the position which has been taken for the purposes of this Review.

¹⁶⁶ NLC, Submissions – Group 2 in *Detriment Review*, 8 June 2018, [66]

- 6.8.3. Of course there may be matters outside the scope of the relevant provisions which require separate consideration. To the extent any such claims of detriment were made, as noted, they are addressed in Chapter 7.

Claimed detriment

- 6.8.4. In their submissions the Northern Territory raised a number of general matters in respect of mineral and petroleum activities. With reference to some mining and petroleum interests in or near the claim areas, its submission noted that restrictions or denial of access to, and use of, the claim areas may negatively impact on current and future activities.
- 6.8.5. The Northern Territory acknowledged that following a grant of Aboriginal land, agreement from traditional Aboriginal owners would need to be sought under Part IV or s 19 of the ALRA for certain mining and petroleum activities to proceed. Tenement holders also commented on these requirements.
- 6.8.6. The Northern Territory put forward that in respect of the petroleum industry:
- There is no certainty that a future access agreement would be reached for other petroleum activities in which case undertaking activities on granted titles that may require access to the claim area cannot be relied on;
- Failure to reach agreement may result in a strong risk that existing and proposed patterns of land usage associated with petroleum exploration and production could be detrimentally impacted if access is withdrawn or restricted;
- Even if an agreement can be reached, it would likely create additional costs to petroleum explorers.¹⁶⁷
- 6.8.7. Further, it was argued that mineral tenure applicants may suffer a greater administrative burden and costs as a result of their tenements covering land affected by both the Native Title Act 1993 and the ALRA.¹⁶⁸
- 6.8.8. A number of submissions stated that mining is an important contributor to the Northern Territory economy, and the Northern Territory noted that the development of assets give rise to ‘significant infrastructure expenditure and long-term employment’¹⁶⁹. Other comments were made highlighting the local and regional community economic benefits of current operations. For example, it was claimed by

¹⁶⁷ Northern Territory, Submissions – Group 1 in *Detriment Review*, 16 March 2018, [l-n]

¹⁶⁸ Northern Territory, Submissions – Group 2 in *Detriment Review*, 8 March 2018, [qqq]

¹⁶⁹ Ibid [lll].

Glencore that detriment to the future economic viability of the McArthur River Mine (MRM) mining and potentially other industries ‘may inhibit industry in the region over the long term, which may have material negative effect on the region and the NT as a whole’.¹⁷⁰

- 6.8.9. Several other financial and operational issues were raised as detriment matters by mining and petroleum interests. Detriment claims were made by tenement holders in respect of their significant investments in current operations since the relevant Land Claim Reports. Additionally, it was noted that where there are contractual obligations to third parties in respect of the claim areas, these may not be able to be honoured should a grant of Aboriginal land be made. Possible detriment associated with future development and use of the claim areas was also noted.
- 6.8.10. In a number of cases tenement holders made comment on their beneficial contributions to the local community and environment.
- 6.8.11. The exact location of land claim areas with respect to certain interests was raised by both Glencore and NTIO as a matter requiring resolution. Detriment concerns were described in such cases, should the claim area be determined to include the relevant interests.
- 6.8.12. The potential for closure of seas under the *Aboriginal Land Act* (NT) was raised by the Northern Territory, NTIO and Glencore as a matter of detriment, and later conceded by the Northern Territory not to be a matter of detriment for the purposes of the ALRA.

Mining and energy – NLC’s response on behalf of the claimants

- 6.8.13. The NLC’s submissions on behalf of the claimants in respect of land claim Groups 1 and 4 addressed the general matters raised above, and were also adopted in their subsequent submissions. The NLC’s response refuted complaints of detriment in respect of mining and petroleum activities, arguing that the operation of the ALRA is not a foundation for relevant detriment and that such concerns represent a dissatisfaction with the ALRA itself. Its submissions referred to observations of Commissioners Toohey and Kearney in previous land claim reports, that such detriment claims are an argument with the Act, not with the land claim. Commissioner Toohey is further referenced in respect of petroleum activities:

But when Parliament itself has replaced the certainty of the Petroleum Ordinance with the uncertainty of negotiation and arbitration, I do not think

¹⁷⁰ Glencore, Submissions – Group 1 and 4 in *Detriment Review*, 16 March 2018.

that can fairly be regarded as a detriment resulting from acceding to a claim.¹⁷¹

- 6.8.14. The NLC noted that any obligation to comply with Part IV would apply equally to the need to comply with s 70 of ALRA, which provides a defence to the general prohibition against entering Aboriginal land.
- 6.8.15. The NLC submissions stated that an agreement under s 11A of the ALRA could clarify and secure certain interests ahead of a possible grants of land¹⁷², although it was also conveyed that to date, none of the tenement holders providing submissions to this Review have approached the NLC regarding such negotiations.
- 6.8.16. The NLC submissions also commented that where the tenement holders have existing agreements (including under the *Native Title Act*) with claimants over adjacent areas of land, there is a strong likelihood that claimants would enter into further such agreements with those interests. It was noted that Commissioner Olney did not have the benefit of knowledge of such agreements that now exist.

¹⁷¹ *The Warlpiri-Kartangarurru-Kurintji Land Claim Report (No. 2)*, Toohey, J, 1979 [328].

¹⁷² NLC, Submissions – Group 1 and 4 in *Detriment Review*, 18 July 2018, [46].

Mining and energy – Discussion

- 6.8.17. I observe that, given past Commissioners' comments on claims of mining and petroleum detriment, the Northern Territory and the mining and petroleum interests have been somewhat bold in raising such detriment as matters for this Review.
- 6.8.18. Consistent with the views of previous Commissioners I consider that compliance with the ALRA as a consequence of the grant of Aboriginal land is not a detriment. Nor are any time and financial costs arising from compliance with the ALRA considered detriment, again based on the reasoning of previous Commissioners. I see no reason to take a different view. Such detriment claims made in respect of current mining and petroleum interests, or future proposed use of the claim areas by the mining and petroleum interests, are a complaint with the ALRA, not with the grant of the claim area as Aboriginal land.
- 6.8.19. In addition, consistent with my discussion earlier in this Report at Chapter 5, I consider detriment claims arising from actions taken by stakeholders since the publication of relevant Land Claim Reports to have a particular character. Such actions and investments made with the knowledge of the Land Claim Reports demonstrates the risk taking attitudes of those stakeholders. Whether investing in or purchasing mining and petroleum interests, those stakeholders were or should have been aware of the land claims, including the Land Claims Reports the subject of this Review, and so should have taken into account the prospect of the Minister making a land grant in each of them. Those involved in the mining and petroleum industry are well aware of the relevant procedures and approvals required under the ALRA and under the *Native Title Act*. Again, there is no suggestion that any of them, in their dealings with the Northern Territory, were given any erroneous information about the existence or significance of the relevant Land Claim Reports.
- 6.8.20. It is easy to accept that mining and petroleum are important contributors to the Northern Territory economy. It is likely that such significance led to the specific provisions of the ALRA particularly Part IV, to allow for such activities to proceed on Aboriginal land. Moreover, it is clear that there are existing agreements between some of the present stakeholders and other mining and petroleum interests and some claimants in respect of adjacent areas of land. This indicates that in any event there is a good prospect that similar such agreements may be made should the claims proceed to grant. In that context, it is also encouraging that mining and petroleum interests are in some instances making contributions to the local communities, which may provide a foundation for future negotiations under the ALRA. The picture is one of a clear

understanding by those in the industry of the relevant provisions of the ALRA, and that those provisions are providing a suitable structure for the making of agreements where the traditional owners consider that that is appropriate, and of those in the industry and the traditional owners working cooperatively in their respective interests.

- 6.8.21. I note that the precise location of some mining and petroleum interests in relation to the relevant claim areas may need to be established by survey before ascertaining any implications under the ALRA. The BBLF established by MRM is the most striking example of this, and is dealt with in more detail under the individual land claim, the McArthur River Region Land Claim No. 184.

7. Consideration of Individual Claims

7.1. Introduction

- 7.1.1. I have discussed above in Chapters 1 and 3 the Terms of Reference and the matters which they require to be considered in relation to the individual land claims which are the subject of this Review to determine the status of detriment issues, included updated detriment issues. Chapter 4 describes how the Review has been conducted in accordance with the Terms of Reference, and in particular to provide notice to all potential stakeholders of the Review and to provide to the stakeholders an opportunity to be heard on the Review.
- 7.1.2. I have then discussed above in Chapter 5 the issues of principle, including concerning questions about the proper construction and application of the ALRA, having regard to decisions of the High Court of Australia and the Federal Court of Australia, and in the reports of the Commissioner from time to time, at least as they have arisen in the conduct of the Review.
- 7.1.3. I have also discussed above the issues of detriment which have commonality concerning a number of the land claims which are the subject of this Review.
- 7.1.4. Those discussions are intended to inform the consideration of the individual claims which are the subject of this Review, and to avoid unnecessary repetition in addressing the individual claims. So far as relevant to each individual land claim, then, the consideration of each individual land claim makes use of those general considerations where applicable.
- 7.1.5. In this Chapter I consider the individual land claims, in the sequence in which they are listed in the Terms of Reference, subject to certain changes where the grouping of the land claims was accepted by the principal stakeholders to be more convenient.
- 7.1.6. Each individual discussion is intended to provide to the Minister details of the particular land claim as contained in the relevant Land Claim Report of the Commissioner, the focus of the detriment issues both at the time of the relevant Report and currently, an analysis of the detriment issues and my comments and/or recommendations to the Minister in relation to them, and a summary of the views expressed and of other relevant matters for the Minister's consideration under s 11.
- 7.1.7. The Executive Summary in Chapter 2 of this Report is intended to provide a brief summary of the major comments and/or recommendations of this Report, extracted from this and the preceding Chapters.

7.2. Finniss River Land Claim No. 39, Report No. 9, Group 6

Introduction

7.2.1. Date of Report

22 May 1981

7.2.2. Area

All that land being Section 2968, Hundred of Goyder (the former Rum Jungle Mine Site), containing an area of approximately 6.00km². It is a small part of the claimed area. The majority has already been granted.

7.2.3. Summary of comments and recommendations

- i. The central issue in respect of granting Section 2968 to traditional Aboriginal owners is the rehabilitation of the former Rum Jungle Mine Site.
- ii. The Commonwealth Government's Department of Industry, Innovation and Science (Commonwealth) and the Northern Territory are currently collaborating with traditional owners to develop an improved rehabilitation strategy to be completed by 30 June 2019 for governments' consideration. Any submissions relating to this strategy are not submissions of detriment, because it is accepted by the claimants that it is preferable that the rehabilitation process should be completed before the grant of the land.
- iii. At that time, the traditional owners are concerned about taking the land with the risk of the rehabilitation works leaving a legacy of problems. They seek indemnity from the Commonwealth against that risk. That is not so much a matter of detriment but about whether, whatever arrangements are made between the traditional Aboriginal owners and the Commonwealth, the traditional Aboriginal owners seek the grant. At that point, subject to such issues, there is no reason why a grant should not be made. The detriment claimed by mineral leaseholders is not detriment for the purposes of s 50(3)(b). Part IV of the ALRA and the agreement provisions account for these interests. Any detriment claimed in respect of complying with these provisions is not detriment but a quarrel with the Act itself. Moreover, it is possible that the existing mining interests in any event will have lapsed by that time.
- iv. The location of Rum Jungle Road is not agreed between the NLC and the Northern Territory. The survey prior to grant should resolve that issue. In any

event, it will likely be considered by the Minister as a public road and thus excluded from grant by s 12(3) of the ALRA.

- v. In short, after the rehabilitation process, subject to the traditional owners wishing to receive the grant (having regards to concerns about the adequacy of rehabilitation or legacy risks associated with it), there should be no reason why the grant should not be made.

Land Claim Report

7.2.4. Land recommended

The majority of the land (totalling approximately 272.32km²) subject to Land Claim No. 39 was granted to the Gurudju Aboriginal Land Trust and the Finnis River Aboriginal Land Trust in 1991 and 1993. Other areas subject to Land Claim No. 39 but not recommended for grant by the Commissioner were incorporated into the Finnis River Region Land Claim No. 237. Most of the areas in respect of that claim were disposed of by Commissioner Olney under s 67A(8) in May 2007.

The beds and banks of the Finnis River from the eastern-most point of the southern boundary of NTP 3283 to the southern-most point of the western boundary of NTP 3412 (Area of Land Claim No. 237) have not yet been the subject of an inquiry and are not relevant to this Review.

For the purposes of this Review, the remaining area of the claimed land recommended for grant to the traditional Aboriginal owners by Commissioner Toohey but not finalised was:

All that land being Section 2968, Hundred of Goyder (the former Rum Jungle Mine Site), containing an area of approximately 6.00km².

The claimed land subject to this Review is unalienated Crown land for the purposes of s 50(1) of the ALRA.

7.2.5. Traditional ownership

Commissioner Toohey held that there were traditional Aboriginal owners for the claim area subject to the Review, being the Kungarankany and Warai claimants, who demonstrated strong spiritual affiliations to the land in Area 4, the area of the claim containing the former Rum Jungle Mine Site.¹⁷³ The claimants' names appeared in the land claim report.

¹⁷³ *Finniss River Land Claim Report* (No. 9), 22 May 1981, Toohey J, [219]-[225].

7.2.6. Detriment at inquiry stage

The area subject to the Review is relatively smaller than the original area that was subject to the Finnis River Land Claim No. 39. It is therefore difficult to differentiate detriment that was only relevant to the former Rum Jungle Mine Site from the other detriment reported on relevant to the original land claim area. Also, 37 years have elapsed since Commissioner Toohey's Land Claim Report.

At the time of Commissioner Toohey's inquiry, the Commonwealth was implementing a project to rehabilitate Rum Jungle over four years. Commissioner Toohey believed that if the Commonwealth had access to the land for that period, by way of s 14 of the ALRA, then it would not suffer detriment. At the time of the inquiry, the Northern Territory Department of Mines and Energy had a right to store drill core samples at Rum Jungle. Commissioner Toohey stated that if the storage was not considered a community purpose, then the Department may suffer detriment to the extent of rent being payable under s 15 of the ALRA. Commissioner Toohey held there was not enough evidence to establish that the former Rum Jungle Mine Site was meaningfully used for recreation. Commissioner Toohey did not believe that the holders of any exploration licences or mining interests would suffer detriment, as their interests were protected by Part IV of the ALRA.

Updated detriment

Mining

- 7.2.7. The Department of Primary Industry and Resources (DPIR) submitted that the claim area affects most of Exploration Licence (EL) 27560, EL 27559 and part of ELs 27007 and 27562. They also submitted that it affects most of Exploration Licence in Retention (ELR) 146. An exploration licence is considered 'in retention' when the area contains a significant recognised resource but is not yet considered commercially viable. An ELR gives the holder a right to apply for a mineral lease.
- 7.2.8. DPIR claimed detriment on behalf of the EL and ELR holders based on the requirement to comply with processes under Part IV of the ALRA, the need to negotiate an agreement under s 46 of the ALRA, and the requirement to gain consent to negotiate for a mineral lease pursuant to s 45(b) of the ALRA. As explained in Chapter 5 of this Report, these processes prescribed under the ALRA itself do not amount to significant detriment.
- 7.2.9. The holders of Mineral Leases Northern (MLNs) 142, 146 and 150 will be able to continue to operate in the event of a grant of title, as the MLNs would be existing

mineral leases and would be exempted from compliance with Part IV processes.¹⁷⁴
No detriment would be suffered.

- 7.2.10. Northern Territory Resources Pty Ltd (NTR) hold ELR 146. The majority of ELR 146 sits within the claim area. NTR also hold MLNs 140, 143 and 150 which also extend into the land claim area, although only across a small portion. It noted that the focus of its detriment concerns is ELR 146. ELR 146 is part of the Batchelor Region Project and involves sulphide mineralisation. The ELR was granted in 2001 and has an expiry date of September 2021.
- 7.2.11. NTR explained that it was aware the land claim area had been recommended for grant when it acquired the Batchelor Region Project but,
- ...took the view that the land was unlikely to become Aboriginal land at any time in the near future given the long period in which the Land Claim had been outstanding in relation to the Outstanding Land Claim Area and the status the rehabilitation of the legacy issues associated with the Rum Jungle Mine Site.¹⁷⁵
- 7.2.12. NTR claimed detriment in respect of the uncertainty that a grant of land to traditional Aboriginal owners may create, and uncertainty in regards to being able to make reasonable arrangements with the traditional Aboriginal owners. NTR submitted that uncertainty creates a disincentive to invest and therefore develop the business. This disincentive has repercussions on not only the project but the wider community too, in respect of job creation. NTR also claimed that mining in the land claim area has the potential to reduce environmental clean-up costs, as if the Project fails these costs will be borne by the public. These last-mentioned detriment claims were unsubstantiated by any documentation or attempt at any real quantification. In my opinion, they are too imprecise/speculative to be considered as significant detriment for the purposes of s 50(3(c) and so should not be taken into account in any significant way when the Minister comes to consider making a grant of this small section of residual land under s 11 of the ALRA, and consequently for this Review.
- 7.2.13. Further, there is nothing to suggest that reasonable arrangements could not be made with the traditional Aboriginal owners of the land. The benefits of environmental clean up of the land would be a shared or common one.

¹⁷⁴ See *ALRA 1976* (Cth) s 3(4).

¹⁷⁵ NTR, Submissions – Group 6 in *Detriment Review*, 4 July 2018, 2.

- 7.2.14. Part IV of the ALRA, along with the agreement provisions in the ALRA, account for NTR's detriment concerns. The only detriment suffered would be the amount payable under an agreement and that detriment would be slight.
- 7.2.15. I note that Doe Run Company (Doe Run) provided a response to an invitation to participate, expressing an intention to be heard. Doe Run are in agreement with NTR to potentially acquire the Browns Sulphide Project. Some weeks later, I was informed by Doe Run's lawyer that Doe Run were withdrawing their intention to be heard, on the basis that their interests would be dealt with by NTR's submissions. That being so, the comments I have made in respect of NTR's interests apply also to Doe Run.
- 7.2.16. The NLC, on behalf of the claimants, acknowledged that Part IV would apply to NTR's interests, so it rejected NTR's detriment claims on the basis that, 'The application of the ALRA to land as a consequence of it becoming Aboriginal land is not a detriment.'¹⁷⁶
- 7.2.17. The NLC submitted that any perceived delays caused by the agreement making process for mineral interests could be factored into the timeframe for the project and mitigated by beginning negotiations now.
- 7.2.18. The NLC submitted that they were advised in 2017 by DPIR that there is a restriction in place on the title for ELR No. 146, being,

Renewal is on condition that no mining activity resulting in surface or subsurface disturbance, substantial or otherwise will occur on any area of this title that has been rehabilitated, is in the process of rehabilitation or is planned to be rehabilitated; unless that activity has been approved by the Department prior to commencement of the activity.¹⁷⁷
- 7.2.19. The NLC, apparently, have not heard otherwise since.

Rehabilitation

- 7.2.20. The Commonwealth submitted a response to the invitation to participate, updating the Review on the status of the Commonwealth and Northern Territory planned rehabilitation program. The Commonwealth submitted that the issues of detriment identified at the inquiry stage have changed, in that the Commonwealth no longer has any legal estate or interest in the former Rum Jungle Mine Site. Nor is it an occupier or owner of the site.

¹⁷⁶ NLC, Submissions – Group 6 in *Detriment Review*, 31 August 2018, 2, [7], adopting Toohey J's discussion in the *Walpiri and Kartangarurru-Kurrintji Land Claim Report (No. 2)*, 4 August 1978, Toohey J, [327] and [328].

¹⁷⁷ See Attachment 2 to *ibid*.

- 7.2.21. The Commonwealth stated that it has committed, along with the Northern Territory, to conduct bilateral consultations on various strategic matters¹⁷⁸, including responsibility and liability, which they acknowledge will be a challenge to settling any matters of detriment.
- 7.2.22. The Commonwealth would not suffer detriment because of a grant of Aboriginal title.
- 7.2.23. The Northern Territory submitted information about the environmental concerns relating to the former Rum Jungle Mine Site and of their joint rehabilitation strategy with the Commonwealth, outlined above. More detail of this strategy is outlined in its detriment submissions, annexed to this Review.
- 7.2.24. In respect of remediating the former Rum Jungle Mine Site, the Northern Territory would not suffer detriment because of a grant of Aboriginal title.
- 7.2.25. The NLC, on behalf of the claimants, submitted that the claimants are still seeking grant of title to the claim area, but only once it has been satisfactorily rehabilitated and the Land Trust indemnified against the risk of a failed rehabilitation. The claimants ask that the Northern Territory and Commonwealth governments retain liability for risk and costs associated with rehabilitating the area and that the Commonwealth and Northern Territory governments continue any monitoring and maintenance activities. The claimants also advised that they would like to remain involved in the rehabilitation process, noting that possible employment and economic opportunities may arise out of the rehabilitation scheme.
- 7.2.26. Attachment 1 to the NLC's submission is the Project Agreement for the Management of the Former Rum Jungle Mine Site (Stage 2A), as agreed between the Commonwealth and the Northern Territory.

Transport

- 7.2.27. The Department of Infrastructure, Planning and Logistics (DIPL) of the Northern Territory submitted that Rum Jungle Road (Section A and B) traverses the claim area. They also submitted that there is an unmaintained, unconstructed road running east-west along the southern boundary of Sections 1104, 1111 and 2944 Hundred of Goyder, which abuts the northern boundary of Section 2968.¹⁷⁹
- 7.2.28. Those roads are said to be public roads by the Northern Territory, and therefore excluded from any grant pursuant to s 12(3) of the ALRA. In the event that Rum Jungle Road was not excluded as a public road, it was submitted that s 14 of the

¹⁷⁸ As per the *Project Agreement for the Management of the Former Rum Jungle Mine Site (Stage 2A)*.

¹⁷⁹ See Attachments 4-8 to Northern Territory, Submissions – Group 6 in *Detriment Review*, 4 June 2018.

ALRA would apply and any rent payable for maintenance of such road would be determined by the Minister pursuant to s 15 of the ALRA.

- 7.2.29. The NLC submitted that both the Rum Jungle Road and the unconstructed and unmaintained road referred to in the Northern Territory submission are not relevant to a grant of title, as neither road enters the boundaries of the claim area.

Water resources

- 7.2.30. The Department of Environment and Natural Resources (DENR) of the Northern Territory recorded that there are 140 bores and 6 water monitoring sites located in the claim area.¹⁸⁰ However, the current use and status of the bores is unknown and DENR does not own, monitor or maintain the bores or water monitoring sites. No detriment concerns were submitted.

Consideration

Timing Issues:

- 7.2.31. NTR evaluated the risk of a grant of the land and decided to actively pursue the Batchelor Region Project in that light. Any potential detriment that might be suffered is therefore because of this informed decision and not so significant as to lead to a decision not to grant the land, or place conditions on the grant of land. That aspect is discussed in Chapter 5 of this Report.
- 7.2.32. In any event, NTR's interests will be protected by Part IV of the ALRA and any harm claimed in relation to complying with Part IV or in negotiating an agreement is not significant detriment for the purposes of s 50(3). Again, the detailed reasons for that conclusion are set out in Chapter 5 of this Report.

Mining:

- 7.2.33. Further to NTR's detriment claims, the Northern Territory reported that the restriction on the title of ELR 146 referred to above, as provided in the submissions on behalf of the claimants, is unchanged. NTR responded that they did not believe this to undermine their public detriment claim in respect of clean-up costs. I have addressed that concern in Finally, I note that the NTR's ELR expires in September 2021. There is a very real prospect that the completion of the rehabilitation works will occur after that date. As the traditional owners accept that it is preferable that any grant should take place after that rehabilitation work, the concerns of NTR will no longer be relevant at that time.

¹⁸⁰ See Attachments 10-11 to *ibid*.

Rehabilitation:

- 7.2.34. If the land becomes Aboriginal land under the ALRA, the issue of liability in respect of the former Rum Jungle Mine Site must be seriously considered. In the event of a grant of title, the claimants seek that the land trust is ‘fully indemnified’ but the Commonwealth is not prepared to offer such indemnity. The Commonwealth’s position is that it was not responsible for Rum Jungle. Responsibility and liability between parties may need to be resolved before a decision is made under s 11.

Roads:

- 7.2.35. The Northern Territory accepted that the unconstructed and unmaintained road does not enter the claim area. However, the NLC and the Northern Territory are in disagreement about whether the Rum Jungle Road does.¹⁸¹ In any event, Rum Jungle Road is likely to be considered a public road and would be excluded from grant by s 12(3) of the ALRA.

Comments and recommendations

- 7.2.36. The summary in the earlier part of this section sets out the conclusions and recommendations in relation to this land claim.

7.3. Mataranka Area Land Claim No. 69, Report No. 29, Group 6

Introduction

- 7.3.1. Date of Report
14 December 1988
- 7.3.2. Area
The portion of the Urapunga Stock Route, comprising NTP 2193 and NTP 1718 (which traversed the former Roper River Station).
- 7.3.3. Summary of comments and recommendations
- i. Brolga Tours is no longer in operation and therefore no longer holds a detriment interest.
 - ii. Pastoral activities: In 1995, 7 years after Commissioner Maurice provided his land claim report to the Minister, the Roper Valley Station was subdivided into four separate parcels. In his report, Commissioner Maurice held that the Roper Valley Station lessees would suffer significant detriment if the land was granted and no

¹⁸¹ See Attachment 1 to Submissions in reply to NLC – Group 6 in *Detriment Review*, 26 September 2018.

accommodations for their pastoral interests were made. The Northern Territory was aware of this yet agreed to the subdivision, seemingly without an attempt to settle the detriment concerns, which were magnified when three additional pastoral lessees acquired a detriment interest in the land claim area.

- iii. Detriment would flow from a grant of Land Claim No. 69, if provision is not made for adjacent pastoral lessees.
- iv. The adjacent pastoral lessees should have been aware of the land claim upon purchase, and detriment suffered in the event of a grant of land might be said to have been a risk assumed by the purchasers of the leases. The Minister might, nevertheless, take the view that the detriment, as recorded at the time of the Land Claim Report should be accommodated by the traditional owners by agreeing to access to the claim area for the pastoralists and their families for activities associated with the use of the pastoral lease for pastoral purposes. Elsewhere in this Report I have recorded the extent of such activities, as reflected in the submissions of the NLC.
- v. The present and contemplated range of diversified activities by pastoralists should not be an impediment to the grant of land. Such activities or planned activities all arose well after the Land Claim Report. The traditional Aboriginal owners were not consulted about those activities. Even though the Northern Territory has authorised some tourism related activities on the pastoral lease (as noted, this is the only occasion in respect of the relevant land claims, in which such authorisation has been given), it has been assumed that the pastoralist may use the adjacent Crown land for profit making as part of those activities. It does not appear that there are any specific entitlements to access the unalienated Crown land for profit making activities. In any event, to accommodate such activities as a reason not to make a grant would effectively reflect the recognition or prioritisation of the informal (i.e. not legally based) interests of the pastoralist over Aboriginal land at the expense of the traditional owners.
- vi. In any event, if a grant of land is made, there is no reason to believe the claimants will not be prepared to consider authorising such activities by agreement, with the so-called detriment being the payment of the access fees to the traditional owners. Resolution of any detriment by agreement is appropriate in light of the alternative: that is, that a grant of land is not made and traditional Aboriginal owners do not benefit from such a grant because the pastoralists rely on the land claim area to generate certain profits without any legal entitlement to do so.

- vii. NTIO's and other tenement holders' detriment concerns will be addressed by Part IV of the ALRA or by reason of ss 12(3) and (3A) of the ALRA.

Land Claim Report

7.3.4. Land recommended

Commissioner Maurice submitted his Land Claim Report to the Minister on 14 December 1988, recommending the grant of land subject to the applications described in the Land Claim Report, minus the several areas withdrawn during the inquiry by the NLC.

For the purposes of this Review, the remaining area of the claimed land recommended for grant to the traditional Aboriginal owners but not finalised is:

The portion of the Urapunga Stock Route, comprising NTP 2193 and NTP 1718 (which traversed the former Roper River Station).

All this area is unalienated Crown land for the purposes of s 50(1).

7.3.5. Traditional ownership

Commissioner Maurice held that the persons listed in Chapter 6 of the Land Claim Report as Mingirringgi, Junggayi and Darlnyin for the thirteen 'countries' comprising the claim area are the traditional Aboriginal owners of that area. This is to be considered in light of the area subject to the Review being but a portion of the original claim area. In recommending Land Claim No. 69 for grant, Commissioner Maurice observed that,

The Aboriginal witnesses and their anthropologists amply demonstrated the great spiritual and practical significance of the claimants' attachments to their land, including the claim area.¹⁸²

7.3.6. Detriment at inquiry stage

Commissioner Maurice reported that if the stock route was granted Aboriginal land then the lessees of Elsey and Roper Valley Stations would suffer considerable detriment. He also reported that if access to the stock route was prohibited or restricted then Brolga Tours may suffer detriment in respect of their tourism operation and that the Northern Territory's efforts in respect of disease control may be impacted.

¹⁸² *Mataranka Area Land Claim Report (No. 29)*, 14 December 1988, Maurice J, 68, [9.1.2].

Updated detriment

- 7.3.7. Since 1988, a considerable amount has changed in respect of the detriment that might result if the claim were acceded to either in whole or in part. Brolga Tours is no longer in operation. Roper Valley Station was subdivided in 1995 into four separate land parcels.¹⁸³

Pastoral

Northern Territory

- 7.3.8. The DENR submitted detriment concerns on behalf of the following four adjacent pastoral landholders:
- 1) NTP 4972 Lonesome Dove Station – Perpetual Pastoral Lease (PPL) No. 1185 – DK Pastoral Company Pty Ltd as trustee for the DK family land trust
 - 2) NTP 4775 Flying Fox Station – PPL No. 1179 – Fly Fox Pty Ltd as trustee for Mark Scott Sullivan Family Trust.
 - 3) NTP 4973 Big River Station – PPL No. 1160 – Daniel Tapp
 - 4) NTP 4971 Mount McMinn – PPL No. 118 – Joe Cahill (Vic) Pty Ltd as trustee for the JG Cahill Family Trust.
1. DENR submitted that the pastoral landholders required access to the claim area (stock route):
 - To control feral animals and weeds to prevent or minimise degradation of or other damage to land subject to lease and its native flora and fauna.
 - To access the Roper River from the Roper Highway
 - To potentially undertake future diversification activities, which may generate an alternative source of income.
 - To graze cattle, muster and maintain any pastoral infrastructure
 2. More specifically, DENR advised that the access roads to Lonesome Dove and Big River Homesteads from the Roper Highway are through the land claim area and that Flying Fox Station has a non-pastoral use permit granted to it for accommodation facilities, which sit in close proximity to the land claim area.

¹⁸³ See Attachment 19 to Northern Territory, Submissions – Group 6 in *Detriment Review*, 4 August 2018.

7.3.9. DENR also submitted that within the land claim area there are tracks, lakes, lagoons and dams to water cattle, water pipelines, tanks and fencing.¹⁸⁴ There are also said to be Rangeland Monitoring sites located within the claim area¹⁸⁵, which access is required to in order for DENR to monitor the condition of the pastoral estate, including the stock route and stock reserve areas.

7.3.10. DENR submitted that if access was restricted or denied, the adjacent pastoral leaseholders would suffer significant detriment. They endorse Commissioner Maurice's conclusions at paragraph 17.1.5,

Acceding to this claim could...result in loss of important grazing land, loss of access to water, severance of paddocks and extraordinary operational difficulties.¹⁸⁶

NTCA

7.3.11. NTCA submitted detriment concerns in respect of how the pastoral industry may be affected in the event of a grant of title. The two primary themes of detriment submitted were pastoral diversification and investor insecurity.

7.3.12. Mr Christopher Nott, the president of NTCA, submitted that acceding to the land claim may generate detriment to pastoral diversification efforts, such as tourism ventures and aquaculture and horticulture projects. Mr Nott claimed that pastoral diversification strengthens the economic sustainability of the pastoral industry but does not adduce any evidence as to how it does so. He claims that any impact on pastoral diversification may cause cumulative detriment, by reducing economic opportunities in the Top End and potential job opportunities.

7.3.13. Mr Nott explained that the *Pastoral Land Legislation Amendment Bill 2017* was introduced in October 2017 and that the amendments proposed will further encourage investment to diversify pastoral estates.

7.3.14. NTCA submitted that acceding to the land claim may cause detriment to the pastoral industry's attempt to broaden patterns of land use throughout the region by cutting of access from the adjacent pastoral properties to transportation infrastructure. Again, no examples or evidence supporting such claims was adduced.

7.3.15. In regards to investor insecurity, NTCA submitted that a land claim 'muddles tenure'¹⁸⁷ and that pastoralists will be hesitant to invest in their business/operations,

¹⁸⁴ See Attachments 20-23 to *ibid.*

¹⁸⁵ See Attachment 20 to *ibid.*

¹⁸⁶ *Mataranka Area Land Claim Report (No. 29)*, 14 December 1988, Maurice J, [17.1.6].

¹⁸⁷ NTCA, Submissions – Group 6 in *Detriment Review*, 4 July 2018, [14].

which can adversely affect ‘everything from stocking rates to investments in capital improvements and infrastructure for both pastoral uses and non-pastoral diversification.’¹⁸⁸ Once granted, the NTCA submits that there is still uncertainty, in respect of not knowing whether the traditional Aboriginal owners will refuse access to the claim area. NTCA also submitted that Flying Fox, Lonesome Dove and Big River stations might suffer cumulative detriment, as they are impacted by multiple land claims and may therefore have to negotiate multiple arrangements for access.

DK Pastoral Company Pty Ltd

- 7.3.16. Mrs Kelly White, director of DK Pastoral Company Pty Ltd (DK Pastoral), submitted detriment concerns about the land claim being granted. DK Family Land Trust own Lonesome Dove Pastoral Lease (PPL 1185) (Lonesome Dove). Lonesome Dove is one of the four parcels that was created in the Roper Valley Station subdivision. DK Pastoral acquired Lonesome Dove in early 2016 and claim that they were not aware of Land Claim No. 69 at the time. It is approximately 723 square kilometres and is bisected by the Roper River, which also forms a portion of its border with the Flying Fox and Big River pastoral stations. To the south of the river, between the Roper River and Roper Highway, is the stock route, which also traverses through Lonesome Dove.
- 7.3.17. Mrs Kelly submitted concerns about access to 12 of their 14 paddocks¹⁸⁹ that are north of the claim area and require passage through the claim area (stock route) to access. Without reasonable accommodation, Mrs Kelly submitted that DK Pastoral would have no way to transport stock to market. Mrs Kelly also submitted that 30km of fencing would be required to restrain cattle from grazing in the land claim area if reasonable access arrangements could not be made with the traditional Aboriginal owners. It was submitted that approximately 5500 head of cattle are run at Lonesome Dove and Mrs Kelly feared that if access to the claim area was lost DK Pastoral would have to destock, which would cause financial detriment. She also expressed concern about accessing water sources, some of which are apparently on the stock route, though little evidence was adduced as to this. Finally, Mrs Kelly claimed that DK Pastoral would suffer cumulative detriment, as they are potentially also affected by the Upper Roper River Land Claims and may therefore have to negotiate multiple access rights with multiple claimant groups.¹⁹⁰

¹⁸⁸ Ibid [15].

¹⁸⁹ See Annexure 1 to DK Pastoral Pty Ltd, Submissions - Group 6 in *Detriment Review*, 2 July 2018.

¹⁹⁰ See Annexure 2 to *ibid*.

- 7.3.18. I note at the outset that by letter dated 13 November 2018, the solicitor for the claimants notified me that Flying Fox Station had been sold to new proprietors. The claimants' solicitor submitted that a search of the title confirmed the registration of the transfer of PPL 1179 to Kupang Agricultural Management Pty Ltd was registered on 25 October 2018.¹⁹¹ The letter also advised that solicitors acting on behalf of proposed purchasers had contacted the NLC, asking for information about adjacent land claims. It has not been confirmed as to whether these proposed purchasers were Kupang Agricultural Management Pty Ltd. In the letter, the claimants' solicitor also stated that little weight should be accorded to Fly Fox Pty Ltd's (Fly Fox) detriment submissions following the sale and that the buyer has bought the station with notice of the land claims and the price of the station would take into account the buyer's assessment of any risk involved. Finally, it was also stated that NTCA's detriment submissions in respect of 'investor insecurity' are of less relevance following the sale, as the land claim has clearly not dissuaded the purchaser from investing in the purchase. The Minister should consider the letter about the sale of Flying Fox Station when evaluating the detriment claimed. In the time available, this Review has had no direct contact with the new lessee. When the Minister comes to consider this land claim in the light of the Review, it will be desirable to make that contact to ensure there is nothing further which that entity can put to the Minister that has not been dealt with by the Review. For present purposes, I have assumed that what was said on behalf of Flying Fox Station is said also on behalf of the new proprietors.
- 7.3.19. Mr Mark Sullivan, director of Fly Fox who own Flying Fox Station, submitted detriment concerns along with 29 attachments about his interests in the land claim area. Flying Fox Station was also formerly part of the Roper Valley Station until subdivision in December 1995.
- 7.3.20. Fly Fox purchased Flying Fox Station in October 2003. Mr Sullivan claims that due diligence was undertaken and the Urapunga Stock Route was identified as Crown land but no land claim was identified. He also submitted that the fencing built by Flying Fox Station's former owners through the claim area is indicative that there was no knowledge that the stock route was subject to claim, as no reasonable person

¹⁹¹ See NLC, Submissions – Group 6 in *Detriment Review* (letter regarding sale of Fly Fox Pty Ltd), 13 November 2018.

would build on country they ‘may lose’¹⁹². I note that to apply the same reasoning, you would expect the same conclusion in respect of building on any Crown Land, which is not part of the Flying Fox pastoral lease.

7.3.21. The claim area traverses Flying Fox Station from the eastern boundary to the western boundary¹⁹³ and effectively cuts off the homestead from the rest of the pastoral lease. Fly Fox therefore rely on access to and use of the claim area for pastoral operations. If access was denied, Fly Fox would suffer significant financial losses. Carrying capacity would be reduced, operation costs would increase and the value of the business and property would significantly decrease.

7.3.22. Other pastoral concerns of Mr Sullivan’s included:

- Denied access to paddocks
- Denied access to grazing land
- Denied access to water supplies
- Inability to control feral weeds
- Inability to undertake fire management
- Costs and requirement for fencing and maintenance
- Practical difficulties of permits being required for staff, visitors and contractors

Pastoral diversification:

7.3.23. Fly Fox also operates a tourism business and has the non-pastoral permit required to do so. As noted above, this is the only instance where the pastoralist has specific approval to conduct such a business. At the homestead, there is the Accommodation Village, which contains a commercial kitchen and 32 ensuite rooms. If the land claim was granted and access was denied through the stock route, then guests would not be able to access the Roper River for recreational activities, which is a central part of the guests’ experience. Mr Sullivan submitted that the income received from their accommodation services is critical to his business. The Accommodation Village is also used by MS Stock Contracting (MSC)¹⁹⁴, another business owned by Mr Mark Sullivan. MSC provides a range of civil services to the mining, oil and gas industries.

¹⁹² Fly Fox Pty Ltd, Submissions – Group 6 in *Detriment Review*, 25 July 2018, 6, (b).

¹⁹³ See Attachment 12 to *ibid*.

¹⁹⁴ See Attachment 13 to *ibid*.

Mr Sullivan explained that before the hydraulic fracking moratorium, MSC were conducting training and employment programs with local Aboriginal persons. Now that the moratorium has been lifted, MSC plan to conduct these training and employment programs again. Mr Sullivan therefore submitted that any impact on MSC will adversely affect the local Roper Region community and the regional and Northern Territory economy in relation to the financial and employment contributions made by MSC.

- 7.3.24. Areas on Flying Fox Station have also been identified by the Northern Territory as having suitable soil and water to support large scale agriculture development. Mr Sullivan submitted that in 2017 an area of some 40 hectares was identified in 2017 as a trial site for various crops and an ideal location for a Northern Territory Government supported Cooperative Research Centre¹⁹⁵ with a possible start date of 2019. The area cannot be accessed without traversing across the claim area. Mr Sullivan submitted that a significant amount of preliminary work has been conducted by the Northern Territory and himself to develop a funding application for the Cooperative Research Centre.

Relationship with local community:

- 7.3.25. Mr Sullivan submitted that he has a good relationship with the local Aboriginal communities in the Roper Gulf Region and that residents of the Old Roper Valley community use the station to access the Roper River.

NLC on behalf of the claimants

- 7.3.26. The NLC, on behalf of the claimants, submitted that the subdivision of the Roper Valley pastoral lease, as approved by the Northern Territory, has had the effect of substantially amplifying detriment, prejudicing the claimants by multiplying the number of persons claiming detriment with whom an accommodation must be reached. The NLC attached correspondence evidencing that this issue was raised with the Northern Territory in 1997.¹⁹⁶
- 7.3.27. At Attachment 5 the NLC include the Northern Territory's Record of Administrative Interests and Information for NTP 2193, demonstrating the ease at which someone may find information about the land claim over Urapunga Stock Route.
- 7.3.28. The NLC accepted that detriment would be suffered by the pastoral lessees if they are not able to access the claim area. The NLC submitted that various attempts were

¹⁹⁵ See Attachment 30 to *ibid*.

¹⁹⁶ See Attachment 3 to NLC, Submissions – Group 6 in *Detriment Review*, 17 August 2018, Document 3, 2, (v).

made to resolve detriment issues since Commissioner Maurice's Land Claim Report, but to no avail.¹⁹⁷

- 7.3.29. The NLC adopted the general remarks that were made in paragraphs 41 to 53 of the submissions on behalf of the claimants to the Review in Lower Daly Land Claim No. 68, to the extent that they apply. I shall not repeat them at this point in detail.

In response to NTCA:

- 7.3.30. The NLC agreed that benefits to the land trust flow from the ability to exclude persons from the land but add that the importance of a grant of title to the claimed land derives from giving the traditional Aboriginal owners full recognition to the cultural values of the land and their relationship to it, thereby enabling them to protect and preserve their relationship and those values.¹⁹⁸
- 7.3.31. The NLC responded that investor security concerns have arisen because of the professional ignorance or intransigence of successive pastoral lessees, noting that the claim was recommended for grant 30 years ago and was subdivided by the Northern Territory who ignored various opportunities to resolve detriment interests.

In response to Fly Fox Pty Ltd:

- 7.3.32. NLC point out that correspondence progressing the proposed irrigated cropping trial¹⁹⁹ were dated after receipt of my invitation to participate, advising Mr Sullivan of the Review and adjacent land claim. The NLC expressed doubt as to whether due diligence procedures were undertaken in respect of the land claim status of the stock route as Survey Plan S.93/325 and the aforementioned Northern Territory's Record of Administrative Interests and Information for NTP 2193 are both easily accessible.²⁰⁰ The NLC submitted that the absurdity of the due diligence submission is further compounded by the fact that the Northern Territory has been actively assisting Mr Sullivan, as evidenced in Fly Fox's submissions and corresponding attachments. The Northern Territory is clearly aware of Land Claim No. 69. The NLC therefore submitted that,

¹⁹⁷ See *ibid* [10] – [19] and Attachment 3.

¹⁹⁸ *Ibid* [24].

¹⁹⁹ See Attachments 21 and 31 to Fly Fox Pty Ltd, Submissions – Group 6 in *Detriment Review*, 25 July 2018

²⁰⁰ See Attachments 2, 5 and 8 to *ibid*.

The fact that a party has in claimed ignorance of the land claim undertaken developments on the land claimed and thereby in effect compounded the detriment should not be a burden imparted to the claimants for resolution²⁰¹

7.3.33. Considering the availability of such information, I am inclined to agree.

In response to Lonesome Dove:

7.3.34. The NLC acknowledged that Lonesome Dove will require accommodation for it to continue pastoral operations across the claim area in the event that the land becomes Aboriginal land. This can be negotiated via an agreement. The NLC made similar comments to those made about Fly Fox in relation to DK Pastoral's claimed ignorance about the existence of Land Claim No. 69.

Acknowledgement of Big River's (PPL 1160) potential interests:

7.3.35. Although no submission was received by or on behalf of the proprietor of Big River Station, Mr Daniel Tapp, the NLC acknowledged that an agreement will be required between him and the traditional Aboriginal owners to continue pastoral operations across the claim area if the area is granted. The NLC further submitted that Mr Tapp enjoys a positive relationship with the local Aboriginal people. It is therefore likely that a suitable agreement can be reached.

Consideration

Timing issues and agreement making

7.3.36. The adjacent lessees will suffer detriment if suitable agreements cannot be reached for access and use of the claim area. However, this detriment to Fly Fox Pty Ltd and DK Pastoral arises because of a failure to undertake due diligence procedures. The Urapunga Stock Route has been subject to Land Claim No. 69 for 30 years and information about the land claim status of the area is available and accessible. In response to the claimants' submissions about this, DK Pastoral submitted that expecting those outside of the 'rarefied world of legal practitioners, policy makers and professional advocates in which Aboriginal land claims are front and centre'²⁰² to know about the existence of land claims is unreasonable. From page 3 of their reply to the claimants they outline what due diligence enquiries generally involve. It is hard to reconcile this position with the undoubted knowledge of the Northern Territory and possibly NTCA.

²⁰¹ NLC, Submission in Submissions – Group 6 in *Detriment Review*, 17 August 2018, [31].

²⁰² DK Pastoral Pty Ltd, Submissions in reply to NLC – Group 6 in *Detriment Review*, 11 September 2018, 2, [20]-[22].

- 7.3.37. The Northern Territory explicitly said in its submissions in reply to the claimants that, at the time of offer following the Roper Valley Station subdivision, the lessees were made aware that if Land Claim No. 69 was granted as Aboriginal land, the lessee of each property would need to negotiate a point of access across that land with the NLC.²⁰³ They submitted that it was also made clear to the lessors that if an agreement could not be reached, a determination on any access route could be made by an independent arbitrator appointed by the Federal Minister for Aboriginal Affairs.²⁰⁴
- 7.3.38. I have not accepted the Northern Territory's submission that this Review has no function to inquire into a person's state of knowledge about a land claim or make any comment to the affect that knowledge or lack of has any bearing on the stakeholder's detriment interest.
- 7.3.39. In any event, there is no reason to believe that a reasonable agreement will not be reached between the claimants and pastoral lessors. In reply to the submissions on behalf of the claimants, Fly Fox responded that they would be happy to negotiate an agreement.²⁰⁵ DK Pastoral, on the other hand, did not deem it suitable to respond to the option of agreement making, as the claimants provided no information or proposal of such, rather the NLC just referred to the requirement for agreement.
- 7.3.40. There is, therefore, a reasonable position to adopt by the Minister that the detriment concerns of the pastoralists in this instance all arise from leasehold interests acquired well after the Report, and that the pastoralist lessees should be left to negotiate with the traditional owners to secure by agreement the access they require after the grant of the land. However, in my view, it is appropriate to reflect the status quo at the time of the Commissioner's Land Claim Report, and so preserve the pastoral activities at that time as a step in the grant process. That means that detriment which has arisen as a result of the subdivision of the lease, and the increased and diversified activities it has generated should not be routinely accommodated as a means of prioritising such activities at the expense of the traditional owners. The traditional owners, after a grant of the land, may choose to enter into an agreement to enable some or all of those additional activities to be undertaken.

²⁰³ Northern Territory, Submissions in reply to NLC – Group 6 in *Detriment Review*, 18 September 2018, 2, [7].

²⁰⁴ See Attachment 4 to *ibid*.

²⁰⁵ Fly Fox Pty Ltd, Submissions in reply to NLC – Group 6 in *Detriment Review*, 11 September 2018.

Weed and feral animal management

7.3.41. This issue should be dealt with in the terms of an agreement. Even though the claim area is outside of the pastoral leases, uncontrolled weeds and feral animals which grow and traverse the claim area can adversely impact pastoral operations. I accept DK Pastoral's submission that,

Weeds and feral animals pay no attention to the legal boundaries between Crown land and pastoral leaseholders. Best biosecurity management practices often require activity on adjacent land to protect the health of the stock, protect the health of the grazing lands, and protect the value of the lease to both the pastoralists and the Northern Territory.

7.3.42. This should be reflected in any agreement made with adjacent landholders.

Cumulative detriment

7.3.43. I do not accept cumulative detriment claims by stakeholders who are potentially affected by more than one land claim. I refer to comments made in Chapter 5 about the topic. If there is a need to deal with more than one traditional ownership group, that is a function of the ALRA.

Agreement proposals

7.3.44. The claimants did not offer clear or detailed agreement proposals to mitigate the detriment that might be suffered by adjacent landholders. However, I understand that the NLC, in their consultations with claimants, would be hesitant to consult about the details of agreements, as doing so may create certain expectations about grants of title that might not be fulfilled. This hesitation would be compounded by the significant time that has elapsed since claimants were acknowledged as traditional Aboriginal owners and the areas recommended for grant. In considering the history of detriment negotiations and the approach of the claimant groups throughout this Review, there is no reason to expect that claimants would not make suitable accommodations for stakeholders asserting detriment.

Mining

Northern Territory

7.3.45. DPIR provided that there are various petroleum interests over and adjacent to Land Claim No. 69, including:

- Exploration Permit (EP) 162, held by Santos QNT Pty Ltd and Tamboran Resources Ltd;²⁰⁶
- EP 154, held by Jacaranda Minerals Ltd and Minerals Australia Pty Ltd; and
- Exploration Permit (Application) (EPA) 353²⁰⁷

- 7.3.46. DPIR also submitted that, based on the NT Geological Survey, the land claim area can be considered to have moderate petroleum potential. Petroleum industry is an important part of the Northern Territory economy and gives rise to significant infrastructure and long-term employment.
- 7.3.47. In the event the land claim was granted, DPIR claimed detriment on behalf of petroleum explorers who would be required to pay additional costs to enter into a Part IV agreement.
- 7.3.48. I have not accepted DPIR's repeated submissions about the detriment that arises out of the requirement to adhere with Part IV and relevant processes. This is not a detriment within the meaning of the ALRA.
- 7.3.49. At Attachment 27 to the Northern Territory's detriment submissions for Land Claim No. 69, DPIR advised of the current granted minerals tenures within and/or surrounding the claim area.²⁰⁸ These include ELs 24101, 28291, 19349, 29490, 29493, 30115, 30385, 31125, 31142 and 31431.
- 7.3.50. Again, Part IV accounts for these interests. In the event of a grant of title, detriment suffered will be limited to the amount payable under an agreement. That is as contemplated by the ALRA.

Northern Territory Iron Ore Pty Ltd (NTIO)

- 7.3.51. NTIO is the proponent of the Roper Valley Iron Ore Project (the Project). NTIO submitted that the intent of the Project is to,
- ...transport mined product from NTIO's mineral leaseholders north and east to a River from where product will be barged further down the river into the Gulf of Carpentaria for trans-shipment to ocean going vessels to take the product to market.²⁰⁹

²⁰⁶ See Attachments 24-25 to Northern Territory, Submissions – Group 6 in *Detriment Review*, 4 August 2018.

²⁰⁷ See Attachments 25-26 to *ibid*.

²⁰⁸ See Attachments 27 and 28 to *ibid*.

²⁰⁹ NTIO, Submissions – Group 6 in *Detriment Review*, 31 May 2018, 1. See, also, Annexure 4 to NTIO, Submissions in *Detriment Review*, 4 July 2018.

- 7.3.52. The Northern Territory Environment Protection Authority issued terms of Reference for the Project in November 2017 and the Project is currently undergoing environmental assessment by the NT pursuant to the *Environmental Assessment Act 1982* (NT).
- 7.3.53. NTIO is concerned with losing access to the area in the event of a grant of title, as the Project relies on proposed Roper Highway upgrades, including possible realignment or widening where the road sits adjacently to NTP 2193.²¹⁰ The land claim area may need to be accessed for gravel and other materials. NTIO submitted that any prevention or increase to costs of transport of iron ore might jeopardise the project. This may result in potential loss of jobs in construction and operation.²¹¹
- 7.3.54. The Project also includes improvements to approximately 235 kilometres of existing roads.²¹² If the Project is jeopardised, NTIO submitted that the planned improvements might not go ahead, which would then detriment the regional economy.
- 7.3.55. NTIO also claimed potential detriment in respect of its past investment in the Project and planned future investment of \$250 million.
- 7.3.56. It was also submitted that if the Project does not proceed the traditional Aboriginal owners and Aboriginal Freehold Land Owners who are described in the confidential agreements NTIO and NLC have negotiated would suffer detriment in that they would not receive those benefits provided for in the agreements.
- 7.3.57. Finally, NTIO claimed cumulative detriment in respect of being potentially affected by multiple grants of Aboriginal land, including, the Mataranka Land Claim No. 69 and the Maria Island and Limmen Bight River Land Claim No. 71 and part of the Maria Island Region Land Claim No. 198 and the Lower Roper River Land Claim No. 70. NTIO submitted that this has cumulative adverse effects on the Project, increasing economic risk and uncertainty, as they may have to negotiate multiple agreements with multiple traditional Aboriginal owner groups.
- 7.3.58. In submissions made by NLC on behalf of the claimants for Group 3, the NLC addressed NTIO's interests in more detail. This matter is discussed in more detail in the relevant part of this Chapter. The only matter concerning NTIO's detriment interests which was raised in NLC's submissions on behalf of the claimants for Mataranka Land Claim No. 69 is their dismissal of any potential detriment asserted in respect of the Roper Highway. NLC submitted that the road corridor is unaffected by

²¹⁰ See Annexure 2 to NTIO, Submissions – Group 6 in *Detriment Review*, 4 July 2018.

²¹¹ See Annexure 4 to *ibid*.

²¹² See NTIO, Submissions – Group 6 in *Detriment Review*, 4 July 2018, 2.

the land claim and if subsequent inspection found otherwise, Roper Highway would be excluded by ss 12(3) or (3A) of the ALRA. In short, there is no clear picture that the grant of this land claim would impeded that proposed development, but if it impeded access to or along the Roper Highway, that section of the claim area as a public road would be excluded from the grant.

Consideration

Cumulative detriment and detriment relating to negotiating agreements:

- 7.3.59. I do not accept that the potential ‘cumulative’ harm or inconvenience arising from having to negotiate in relation detriment interests in multiple land claim areas is a significant detriment within the meaning of s 50(3)(c). I have discussed that earlier in this Report. I also do not accept that the requirement to negotiate an agreement per se is a detriment for the purposes of the ALRA, for similar reasons.

Roads and Infrastructure

- 7.3.60. The Northern Territory and NLC do not believe that the Roper Highway road corridor is affected by Land Claim No. 69. In any event, if future investigation shows that it is, then the parts of the road within the land claim area will be excluded from any grant by virtue of ss 12(3) or (3A) of the ALRA.

Tourism

- 7.3.61. The Northern Territory Department of Tourism and Culture (DTC) submitted that detriment may be suffered by the tourism industry if there are any limitations on access to experiences along the Savannah Way adventure touring route (Savannah Way). There is no evidence that a grant of Land Claim No. 69 would affect visitation to the Savannah Way.

Other

- 7.3.62. The NLC submitted that multiple attempts had been made by the NLC and claimants to resolve detriment and negotiate a settlement over a period of more than 10 years. These attempts are briefly documented in the submissions on behalf of the claimants from paragraph 10 to 19 and supporting material is provided for at Attachments 1, 3, 5 and 6 of the claimants’ submissions.²¹³ The NLC claimed that the Northern Territory was fully aware of these attempts to resolve ongoing issues, yet subdivided the Roper Valley Station anyway. The NLC also referred to a survey plan which was apparently prepared to allow for the subdivision of the Urapunga stock route into

²¹³ NLC, Submissions – Group 6 in *Detriment Review*, 17 August 2018.

separate parcels, each presumably related to a particular affected pastoral lease. The NLC asked that the Northern Territory provide this plan to the Review. It responded that no such plan exists.²¹⁴

- 7.3.63. On the material before me, I do not consider it useful for the Review to comment on the past attempts and negotiations attempted by the NLC and claimants to settle detriment interests with adjacent pastoral lessors and the Northern Territory in this context.

Comments and recommendations

- 7.3.64. The summary of these views is set out above under the Heading ‘Summary of Comments’.

7.4. Lower Daly River Land Claim No. 68, Report No. 67, Group 2

Introduction

- 7.4.1. Date of Report

30 April 2003

- 7.4.2. Area

All that land in the Northern Territory being the bed and banks of, and the islands in, the Daly River from the northern prolongation of the western boundary of Pastoral Lease 820 (Elizabeth Downs) to the seaward extremity of the river.

- 7.4.3. Summary of comments and recommendations

- i. In determining whether to grant the land as recommended, it is necessary to have regard to a number of interests where detriment has been asserted.
- ii. In the case of the pastoral lessee, notwithstanding that the then holder of the pastoral lease over Litchfield Station did not at the initial inquiry assert detriment, it is apparent that the lessee will experience detriment in the normal operations of the pastoral lease. The traditional owners, through the NLC, have indicated that those concerns may be met by a form of licence as indicated below, for a nominal rental. It is reasonable to conclude that the form of the proposed licence meets the reasonable concerns of the lessee in all respects. The Minister may wish to ensure that the licence has been, or will be, granted before making the grant of the land.

²¹⁴ See *ibid* [17]-[19] and Northern Territory, Submissions in reply to NLC– Group 6 in *Detriment Review*, 18 September 2018, [17]-[19].

- iii. The pastoral diversification claims of detriment by TGS (and supported by the Northern Territory and the NTCA) are not claims which, upon analysis, should impede the grant of the land to the traditional owners. Those claims fall into the basket of unauthorised activities under the lease/unauthorised profit making activities over unalienated Crown land/ too non-specific/ not yet undertaken or potentially developed in the face of knowledge of the Land Claim Report. In any event, such activities, if the lessee wants to pursue them, might more properly be pursued by agreement with the traditional Aboriginal owners, thereby giving the traditional Aboriginal owners some benefit for the commercial use of their land. As noted, the alternative really calls for the Minister simply to override the traditional Aboriginal ownership of the claimants because the pastoralist wants, or might want in the future, to take commercial advantage of the Crown land to which there is no present entitlement.
- iv. The claim area is closed to commercial fishing.
- v. The claim area is popular for recreational fishing and if the claimants do not enter into agreements for access or the proposed permit management system is not introduced, then recreational fishers will suffer detriment. This detriment may flow onto the regional and wider Northern Territory economy, in respect of its impact on tourism and visitation numbers. The material presented by the NLC indicates that the claimants will negotiate accommodating access agreements, or in the alternative, the NLC will develop an adequate permit management system that allows reasonable access to the claim area to recreational fishers.
- vi. If the land is granted, FTOs may suffer detriment in the absence of suitable agreements. There is a good history of the traditional Aboriginal owners of nearby land and waters entering into such agreements, and no reason to suspect that similar arrangement will be made with FTOs as they choose to operate in the claim area and on terms that are mutually satisfactory. Consequently, the Minister could comfortably make a grant of the land on that assumption, having regard to the potential detriment to FTOs if otherwise they are not permitted to conduct their operations in the claim area. Such an agreement or agreements would reflect a proper balance between the traditional Aboriginal owners gaining some commercial benefit from the commercial use of their land and the FTOs similarly being able to continue their operations. Accordingly, this aspect of detriment should not impeded the grant of the land.
- vii. No mining or exploration is currently undertaken in the claim area.

Land Claim Report

7.4.4. Land recommended

The area recommended for grant to the traditional Aboriginal owners by Commissioner Olney following his inquiry into Land Claim No. 68 was:

All that land in the Northern Territory being the bed and banks of, and the islands in, the Daly River from the northern prolongation of the western boundary of Pastoral Lease 820 (Elizabeth Downs) to the seaward extremity of the river.

7.4.5. Traditional ownership

In regards to traditional attachment, Commissioner Olney reported that,

The traditional attachment of the Banagula claimants to the land adjacent to the claim area is beyond question. That land has of course been Aboriginal land for over 20 years and although currently none of the claimants reside in the immediate vicinity of the claim area their attachment to it is demonstrated by ceremonial observance, protection of important sites, occasional visitation and the teaching of emerging generations about their land. To the extent that the claimed land is properly regarded as being one with the adjacent land it may be said that the claimants have demonstrated a strong traditional attachment to it.²¹⁵

7.4.6. Detriment at inquiry stage

7.4.7. In summarising his comments made under s 50(3), Commissioner Olney concluded that there was not enough evidence to establish that any adjoining landowner would suffer detriment if the land claim area was granted or that commercial and recreational fishing took place in the section of the Daly River under claim. In undertaking his comment function under s 50(3)(b) Commissioner Olney did however refer to recreational anglers which were observable upstream from the claim area, predicting, therefore, that the waters above the claim area were also used for fishing.

7.4.8. Commissioner Olney did not find that a grant of title would affect any existing or proposed patterns of land usage in the region.

²¹⁵ *Lower Daly Land Claim Report (No. 67)*, 30 April 2003, Olney J, [283] and [73].

- 7.4.9. I also note that Commissioner Olney recommended consideration be given to the vesting of the land claim area in the Daly River/Port Keats Aboriginal Land Trust rather than creating a separate land trust.

Updated detriment

Pastoral

Northern Territory

- 7.4.10. DENR submitted concerns on behalf of adjacent pastoral landholder (NTP 2681), Litchfield Station, in regards to the detriment the lessees may suffer in the event of a grant. These concerns centred on the potential abrogation of rights afforded to pastoralists under the *Pastoral Land Act* and the *Water Act* following a grant of title to traditional Aboriginal owners. The rights that may be abrogated can be summarised as follows:

- The right for lessees, their staff and visitors to access adjacent waterways for camping, fishing and other recreational purposes: s 13 of the *Water Act*
- The right to access and use adjacent waterways for domestic purposes, irrigation and grazing and watering stock: s 11 of the *Water Act*
- The right for the general public to access adjacent waterways through pastoral land: s 79 of the *Pastoral Land Act*

- 7.4.11. DENR also expressed concerns as to the detrimental affect a grant of title may have on the ability of Litchfield Station to control feral animals and weeds on the beds and banks of the Daly River. . It also expressed concerns about the impact acceding to the claim may have on future diversification activities of the pastoralists, in respect of the potential to generate an alternate income.

TGS

- 7.4.12. TGS is the agent for the Branir and Booloomani Partnership, which own Litchfield Station. TGS became agents for the partnership in 2016 and at the same time the Booloomani Unit Trust (Booloomani) became part owners of the Station. The general manager, David Connolly, made three submissions to the Review. The first was an outline of detriment in response to the invitation to participate; the second was a more detailed submission about TGS' detriment interests; and the third was a letter in reply to the submissions on behalf of the claimants.
- 7.4.13. I requested more information from Litchfield Station about the lessees' knowledge of the land claim. Mr Connolly responded stating that he personally had no knowledge of the claim until Litchfield Station received the invitation to participate for the

Review. Mr Connolly said he was involved in the sale but was not privy to what Booloomani knew with respect to the claim and he apparently made no further inquiries of it.

- 7.4.14. Mr Connolly submitted detriment concerns about the requirement of fencing to prevent movement of livestock into the land claim area. He stated that the construction and maintenance of a fence would likely be borne by TGS. Mr Connolly estimated that the cost of such could be up to \$180,000 a year, plus maintenance and repair which would cost a further \$44,000 per year. He also expressed safety concerns regarding the building and repairs of the fencing due to the significant crocodile population in the Daly River.
- 7.4.15. Mr Connolly submitted that a grant of title to the claim area would make it difficult for Litchfield Station to control invasive weeds such as cane grass and mimosa grass. It was submitted that both invasive species are categorised by the Weeds Management Branch as category A and B weeds. Apparently this categorisation requires that the weeds are either eradicated or controlled. He also submitted that a grant would detriment TGS' biosecurity efforts to control feral pigs and wild buffalo that cross the ITZ, which is required in order to 'prevent fouling of water holes, and to minimise the spread of disease that can be passed from those animals to cattle'.²¹⁶ Mr Connolly also claimed that if the land is granted, then it will be more frequently accessed, and as Litchfield Station is an access point, then more people will traverse the pastoral lease, increasing the biosecurity threat further.
- 7.4.16. TGS stated that recreational fishing and boating as significant amenities at Litchfield Station and thus it was submitted that any loss of access to the river would adversely affect the quality of life at Litchfield Station. Concern was also expressed about possible detriment to potential pastoral diversification activities, as apparently TGS are in the planning stages for a tourism venture, which may include recreational fishing and wildlife/birding ecotourism. They claimed that tourism infrastructure is already available at the Station, including accommodations and an all-weather airstrip, but that those tourism opportunities rely on access to the river.
- 7.4.17. TGS also receive royalties from an undisclosed entity who apparently access the Daly River through Litchfield Station to harvest crocodile eggs. No further detail or evidence was adduced as to this claim.

²¹⁶ TGS, Submissions – Group 2 in *Detriment Review*, 8 March 2018, 2.

NTCA

- 7.4.18. Mr Burke, the then CEO of the NTCA, advised that, to his knowledge, Litchfield Station changed owners around the time the land claim report was published in 2003. He advised that ownership changed again in 2016 and because of this, stated that it should not be inferred, as the Lower Daly Land Claim Report did, that ‘the pastoral interests did not and do not perceive that their interests would be detrimentally affected by a grant of title.’²¹⁷
- 7.4.19. In relation to the BMB High Court decision, NTCA submitted that pastoralists whose properties abut rivers are now in a position to suffer greater detriment, as recreational fishing and boating are ‘activities of great importance to many of NTCA’s members, their families, employees and guests.’²¹⁸
- 7.4.20. NTCA made the same submissions as TGS in respect of the requirement for fences and the likelihood that pastoralists will bear the cost. They submitted that if fences are not erected, then cattle may stray onto the beds and banks of rivers and/or intertidal zones abutting pastoral properties. Pastoralists would then suffer detriment if unable to retrieve cattle without a permit.
- 7.4.21. NTCA made the same submissions as the Northern Territory in respect of the rights provided for by the *Water Act* and in respect of the potential for a grant of title to affect pastoral diversification, particularly in relation to tourism operations.
- 7.4.22. To conclude, NTCA submitted that the Minister should use his powers under s 11 and s 67A(5)(d) of the ALRA, to decide against granting title or dispose of the claim, because,
- A grant of title to this Land Claim area, or any other similarly situated land claim, to a land trust does nothing beyond providing advantage to that land trust built on the detriment to the pastoral lease holder.²¹⁹
- 7.4.23. NTCA also provided information about its Real Jobs Program (RJP) that has operated in partnership with the Indigenous Land Cooperation since 2008. The RJP is a program aimed at increasing ‘indigenous participation in the Territory’s pastoral industry.’ NTCA inferred that acceding to land claims will obstruct the continuation of such a program in the future. This uncomfortably presents itself as more of a threat than a claim of detriment. It is not explained why the grant of the land claim should impede programs such as the RJP.

²¹⁷ NTCA, Detriment Submissions – Group 2 in *Detriment Review*, 31 January 2018, 1.

²¹⁸ Ibid 2.

²¹⁹ Ibid 3.

- 7.4.24. NTCA asked that their submissions in relation to Lower Daly Land Claim No. 68 be read as applying to the detriment that may be suffered by all pastoralists whose land abuts areas claimed under the ALRA.

NLC on behalf of the claimants

- 7.4.25. The NLC responded to the detriment submissions relating to pastoral operations. The NLC submitted that the *Pastoral Land Act* does not directly require pastoralists to control weeds and feral animals in the claim area as the Pastoral Land Board has no functions with respect to Crown land that adjoins pastoral leases, as it is not land that the lessors legally occupy. It should be noted that this proposition by the NLC, applicable generally, has not been refuted. Rather, it is a voluntary biosecurity measure undertaken by pastoral lessors to protect their cattle and grazing potential.
- 7.4.26. The NLC submitted that pastoral diversification was not a detriment issue for Land Claim No. 68 because Litchfield Station did not raise it as an issue. The NLC refer to s 85A of the *Pastoral Land Act*, which provides that a pastoral lessee may only undertake non-pastoral, or diversification, activities if they have a non-pastoral use permit granted by the pastoral board. The NLC submitted that a non-pastoral use permit does not extend to use of adjacent Crown land and that diversification activities which rely on access to Crown land require separate licences to do so. They also questioned, in respect of claims about pastoral tourism ventures and the corresponding additional income, whether the *Crowns Land Act* allows for the use of Crown land by third parties for commercial purposes.
- 7.4.27. The NLC rejected claims by the NTCA and the Northern Territory that Litchfield Station will suffer detriment because its rights to use the water overlaying the claim area to water cattle and for domestic purposes will be extinguished, as it is most likely the water is saline and because the detriment was not raised at the initial inquiry by Litchfield Station.
- 7.4.28. In response to TGS, the NLC submitted that it may be assumed the then proprietors of Litchfield Station knew of the land claim, as notice of the inquiry was widely advertised and notice was given to adjoining landholders. The NLC contended that fencing would be impractical and costly and that there may be instances where lessees may require access to the claim area to recover livestock. They also accepted that although it is not their responsibility, it is common practice for pastoral lessees to undertake feral animal and weed control in adjacent crown land.
- 7.4.29. Following consultations with claimants about the option of providing Litchfield Station with a non-exclusive licence over the bank of the Daly River subject to the

claim, the NLC submitted a proposal for a licence that would be provided to the station, reflecting the current pastoral usage of the claim area. They acknowledged that the terms are subject to details being agreed but provide the following as what they envisage as the licence's essential features:

- (i) 'To permit those pastoral activities presently undertaken in the claim area- access for mustering (replacing s 27 *Livestock Act*), repair and maintenance of fencing (if any);
- (ii) Feral animal control;
- (iii) Assume obligations to comply with the *Weeds Management Act*, and other legislation relating to the environment;
- (iv) Term will run with pastoral lease;
- (v) Fully transferable on sale of the pastoral lease without further consent (but on notice to the Land Trust);
- (vi) No licence fee (peppercorn);
- (vii) Non-exclusive;
- (viii) Replicate current rights of an adjoining landowner under s 11 of the *Water Act*.²²⁰

7.4.30. In submissions received later by the Review, the NLC amended (viii) by adding that the licence will 'Replicate current rights of an adjoining landowner under s 11 and 13 of the *Water Act*.'²²¹

7.4.31. In response to TGS' concerns about biosecurity threats arising out of increased use of the claim area by others, the NLC submitted that, as the claim area is not presently subject to any public access restrictions, this potential detriment will be less likely if a grant is acceded to, as the land trust may develop conditions for public access that would respect valid concerns of the station.

7.4.32. In response to NTCA's detriment submissions, the NLC adopted their submissions in response to the Northern Territory and TGS. They also commented that the concluding comments made in NTCA's submissions are of a political nature, and not relevant to any detriment issues for Land Claim No. 68.

Consideration: Pastoral diversification

7.4.33. NLC submitted that pastoral diversification is not an issue for the Review into Land Claim No. 68, However, I consider tourism to be pastoral diversification and TGS did

²²⁰ NLC, Submissions – Group 2 in *Detriment Review*, 6 August 2018, [62].

²²¹ See, for example, NLC, Submissions – Group 5 in *Detriment Review*, 1 September 2018, [30].

discuss their tourism plans and submitted that they have a planned or actual additional income through allowing third parties access to harvest crocodile eggs.

- 7.4.34. In respect of pastoral diversification, I adopt my earlier comments in Chapter 6 concerning tourism, including in relation to the Northern Territory submission that, irrespective of whether pastoralists have a non-pastoral permit or not, ‘members of the public have a privilege or liberty to enter upon and enjoy Crown land unless restricted or prohibited by the Crown.’²²²
- 7.4.35. This category of concern by the pastoral lessee should be given little weight because mostly, its plans for diversification are prospective, rather than actual; it does not have authority to conduct other than the usual pastoral activities on its lease; it does not have authority to conduct a profit making business by use of the unalienated Crown land; and finally, there is little or no evidence than speculation about the value of such activities to the pastoral lessees. In any event, if the event of a grant of the land, the traditional Aboriginal owners may then enter into agreement with the pastoral lessees for access and use of their lands for tourism ventures undertaken by the lessees. Further, public access would be provided for by the NLC’s proposed permit management system. More generally, there is a very real question about the weight to be given to such detriment claims standing against the grant of the land to traditional Aboriginal owners.

Consideration: Pastoral activities

- 7.4.36. It may be assumed that not being able to manage feral weeds and animals in the claim area is a detriment concern in respect of the biosecurity threat it poses to pastoral properties. In any event, these detriment concerns are accounted for in the claimants’ licence proposal.
- 7.4.37. The claimants’ licence proposal addresses most of the detriment concerns identified by TGS concerning normal pastoral activities.
- 7.4.38. I do not consider ‘uncertainty’ to be a detriment, as it is conceptual only. To say a step might be taken and that the step might be adversely affected by the grant of land to traditional owners so that the grant should not be made, as discussed earlier, is almost to restore the concept of terra nullius.
- 7.4.39. I also refer to my discussion in Chapter 6 in response to various submissions about detriment by the time and cost of agreement making in reply to the claimants’ licence

²²² Northern Territory, Submissions – Group 2 in *Detriment Review*, 8 March 2018, [54]-[55].

proposal. In the case of the proposed licence, there is in effect no uncertainty. In other respects, it is a process established under the ALRA.

Consideration: Timing issues

7.4.40. I refer to my discussion on this topic in Chapter 5. As a further consideration in relation to the detriment complained of, it is fair to say that the present owners of Litchfield Station should have known about the adjacent land claim, as previous owners were sent a notice of commencement of inquiry.²²³ No detriment was asserted to the inquiry on behalf of the then pastoral lessees. It is also clear that the Northern Territory knew of the potential detriment issues that would arise for the pastoral lessees of Litchfield Station, as it submitted detriment assertions on their behalf during the inquiry.²²⁴ This demonstrates that information about the claim is readily accessible. The claimants should not be prejudiced because of the purchasers' failure to conduct due diligence purchase procedures or because of inadequate third party advice. However, in the particular circumstances of this land claim, those observations do not really matter. There are other reasons why, putting aside the pastoral activities to be protected by the suggested licence, the claims for detriment on behalf of the pastoralists should not preclude the grant of the land.

7.4.41. NTCA's submission about Aboriginal advantage being built on detriment to a pastoral leaseholder, quoted above, is a good illustration for the purposes of the discussion in Chapter 5 about the tenor of some of the submissions. It is tantamount to an assertion that no grant of unalienated Crown land to the traditional Aboriginal owners should be made where it might adversely affect the "interests" of a pastoral lease holder, using "interests" in the widest sense to include whatever the lease holder might do or choose to do some time in the future, and whether or not that activity is or is not permitted under the lease at the time, and whether or not it includes the pastoral leaseholder using the unalienated Crown land for a profit making business.

Recreational fishing

Northern Territory

7.4.42. In contrast to Commissioner Olney's 2003 conclusions, DPIR submitted that the claim area is a high value recreational fishing area. DPIR stated that this update is supported by the Survey of Recreational Fishing in the NT 2009-2010, which estimated that between 1 April and 30 November 2009, a total of 17,026 days fished

²²³ See *Lower Daly Land Claim Report* (No. 67), 30 April 2003, Olney J, [11] and [85].

²²⁴ See *ibid* [90].

were spent on the Daly River from the Daly crossing to the mouth of the river. I refer to my discussion in Chapter 6 about the survey.

- 7.4.43. Acknowledging the lack of data relating to the specific activity that occurred within the claim area, DPIR submitted that it is ‘patently clear’ that the lower sections of the river are very popular for recreational fishing, particularly in the run-off period from February to June. Considering Commissioner Olney’s contrary conclusions, it is hard to accept that the claim area is “clearly” popular for recreational fishing without an evidentiary basis.
- 7.4.44. DPIR also claimed that the claim area is a high value location for competitive fishing, as it hosts two fishing competitions each year: the Barra Classic (Darwin Game Fishing Club) and the Barra Nationals (Palmerstone Game Fishing Club). No specific evidence was adduced to show that these competitions took place in the area under claim, or any specific economic detriment claimed in respect of the competitions.
- 7.4.45. DPIR also submitted that the process of negotiating access arrangements in the wake of the High Court’s BMB case should be considered a detriment itself. They submitted that the process is time consuming and resource intensive for the Northern Territory and land councils. It also argued that this process causes detriment to taxpayers, who have to resource ongoing negotiations.
- 7.4.46. DPIR also referred to the uncertainty implicit in such negotiations, submitting that it is difficult to regulate or enforce access restrictions to the “mean low water mark”, a boundary which is not defined on nautical charts. They also submitted that, even if agreements are made, such as those concerning the Upper Daly River with Malak Malak Aboriginal Land Trust and parts of the Lower Daly with Port Keats/Daly River Aboriginal Land Trust, the agreements may not be over a sufficient term to *provide certainty and security for commercial development in the areas.*

AFANT

- 7.4.47. AFANT also submitted that the claim area was a high value area for recreational fishing and that the claim covers a section of the river that is important for fishers to access and travel through when visiting other fishing areas, such as the Moyle River or the section of the Daly River, which an access agreement has been negotiated for with Malak-Malak. AFANT relied on data relating to the West Coast Region, in which AFANT claimed the Daly River is one of the major fishing locations. AFANT referred to the three following statistical figures:

- West Coast region accounts for approximately 10% of all fishing efforts by Northern Territory residents in 2009
- West Coast region accounts for approximately 23% of all barramundi caught by Northern Territory residents in 2009/2010
- Trend reported of increasing fisher visitation to Daly River measured in 2009 (April-Nov), with between 15,000-20,000 fisher days from non-resident visitors fishing there. Apparently, this was a four-fold increase from the earlier National Recreational and Indigenous Fishing Survey in 2000/2001

- 7.4.48. It also relied on its online community survey (the methodology of which has been challenged) to argue that their members fishing experiences would suffer if they could not move through the claim area (to/ from the river mouth) in their boat.
- 7.4.49. I refer to my discussion on these matters in the previous Chapter 6 of this Report.
- 7.4.50. The responses from AFANT's community survey indicated that recreational fishing is undertaken in the claim area and that AFANT's members would consider their whole recreational fishing experience in the Northern Territory to suffer if they could no longer fish in the Lower Daly Land Claim area.
- 7.4.51. AFANT also made submissions about cumulative detriment to recreational fishers in respect of the time and money required to obtain permits for different areas and in respect of relocation of fishers to other areas, in regards to fishing effort and experiential detriment. These submissions are common and consistent throughout the 12 beds and banks and/or ITZ claims and have been addressed in Chapter 6, and Chapter 5. I will not repeat those conclusions.
- 7.4.52. Pre-empting the NLC's permit proposal for fishing in the claim area, AFANT submitted that the financial cost as well as the time taken to apply for and receive a permit may result in detriment to recreational fishers. Again, I refer to my comments about this in Chapter 6.
- 7.4.53. The NLC, on behalf of the claimants, acknowledged that the claim area is popular for recreational fishing and submitted that this is evidenced by the fact that the area has been closed to commercial fishing. That closure has been made by the Northern Territory under powers contained in the *Fisheries Act*.
- 7.4.54. The NLC referred to the Anson Bay Deed, a settlement agreement made over the Tidal Aboriginal Land owned by the Daly River/Port Keats Aboriginal Land Trust from the boundary with Elizabeth River Pastoral Lease to the mouth of an inlet on the west side of the peninsula where Cape Ford is located. The agreement was executed

in 2014 and grants licences for recreational fishing in the area, amongst other things. The traditional Aboriginal owners who approved the terms of the deed included the persons found to be the traditional Aboriginal owners of the Lower Daly Land Claim area. The NLC submitted that in consultations, the claimants advised they would be content with an agreement that would permit access to and fishing in the claim area.

- 7.4.55. As an alternative, the NLC also referred to the permit system. I will not repeat my comments made in Chapter 6.
- 7.4.56. The submissions on behalf of the claimants responded to the Northern Territory's submissions on the detriment involved in negotiating agreements, particularly those said to be suffered by taxpayers. This was addressed in Chapter 6.

Consideration

- 7.4.57. I accept that the claim area is accessed for recreational fishing. As discussed, recreational fishers will unlikely suffer any significant detriment, as the claimants have indicated a willingness to negotiate an agreement for access, or in the alternative, will likely agree to recreational fishing permits under the new, proposed permit management system. I have referred to the NLC Information Sheet²²⁵ which advised that no future BMB agreements would be made under the current arrangements and that the NLC would be focussing on introducing permits as discussed at Chapter 6.
- 7.4.58. Detriment claims based on the agreement and permit processes, including the effect on taxpayers, have been adequately dealt with in earlier Chapters.
- 7.4.59. I will not repeat the detail of the Northern Territory's detriment submissions in relation to fisheries management. They are common and consistent, and addressed sufficiently in Chapter 6.

Tourism and FTOs

Northern Territory

- 7.4.60. Due to the popularity of the Daly River for recreational fishing and other activities, DTC claimed that tourism may suffer in the event access to the claim area is lost. The evidence elicited to support this included the following:
- For the year ending March 2017, visitor estimates for the region were 81000 people:

²²⁵ Attachment 4 to Northern Territory, Submissions in reply to the NLC – Group 2 in *Detriment Review*, 26 July 2018.

- Domestic overnight visitor: 76,000
- International visitors: 5000
 - More than a quarter (28%) of domestic overnight visitors and 13% of international visitors to Katherine Daly Region had an overnight stopover in the Daly Region.
 - There are approximately 28 tour operators that utilise the area under claim. (Though I note that DPIR submitted that only four FTOs had licences to work in the claim area in 2017).

7.4.61. No information was adduced as to where this data came from or the methodology that was used. It must also be noted that regional data is not adequately informative of visitation numbers to the claim area. I refer to my discussion at Chapter 6.

7.4.62. As an attachment to their submissions in reply to the submissions on behalf of the claimants, the Northern Territory included a letter from Mrs and Mr Wauchope of Humbug Fishing Pty Ltd (Humbug Fishing).

7.4.63. The proprietors claimed that Humbug Fishing has been in operation for 10 years and 60% of their business operations relies on their Daly River charter. In the event of a grant of title, the proprietors are concerned that they would not be able to operate in the claim area. They claimed that from late February through to late May/ early June, the charter travels to the mouth of the Daly, besides Palmerston Island, and anchors in the land claim area. They submitted that the claim area is special in that it represents remote fishing and boasts beautiful wilderness and wildlife. They further submitted that Mr Wauchope, who has been fishing in the claim area for 10 years, has learnt a significant amount about fishing in the claim area and if access was denied, he would have to spend years learning how to fish a new area. This would, in their submissions, adversely affect the business, as their guests would not be provided the same informative experience.

7.4.64. Mrs and Mr Wauchope also claimed that they make a conscious effort to support local businesses in the region by encouraging their guests to eat at local businesses. They therefore submitted that if the claim was acceded to and Humbug Fishing's access limited or denied then Humbug Fishing would have to move their business to a new area and the local businesses would suffer detriment in respect of a reduction in customers.

AFANT

- 7.4.65. AFANT claimed detriment on behalf of the regional and wider Northern Territory economy, submitting that local businesses and tourism will suffer in the event of a grant if recreational fishing is affected. AFANT's community survey results indicated that recreational fishers usually visit a regional campground, kiosk or bistro when fishing in the Lower Daly River and sometimes fish with a FTO.

Daly River Barra Resort

- 7.4.66. Mrs and Mr Brisbane own and operate the Daly River Barra Resort. Most of their guests are recreational fishers who visit the Daly River to go barramundi fishing or enter into fishing competitions. Mrs and Mr Brisbane also run a guided fishing tour business from their property. They submitted that if the claim area was to become Aboriginal land and no agreements were made for access to the claim area, or if permits were required, then both businesses would be adversely affected.
- 7.4.67. Despite a letter written to Mrs and Mr Brisbane requesting more information and supporting material as to substantiate their broad claims of detriment, nothing further was received in response.

Mousie's Barra and Bluewater Fishing Charters

- 7.4.68. Mr Shannon Latham is a FTO in the Daly River Region, trading as Mousie's Barra and Bluewater Fishing Charters. He submitted to the Review that his charter takes place in the claim area during certain times of the year and that he is therefore concerned that he would suffer detriment if his access was restricted or if a permit was required to access the claim area. He also submitted broad concerns relating to local businesses being adversely affected in the event of a claim.
- 7.4.69. By letter I requested more information from Mr Latham but no evidence or further particulars were provided.

NLC on behalf of the claimants

- 7.4.70. The NLC, on behalf of the claimants, submitted that since the two access agreements were entered into (the Anson Bay Deed and the agreement with the Malak Malak Aboriginal Land Trust), the number of FTOs operating in the claim area has increased from 1 to 4. They therefore submitted that, contrary to the Northern Territory's submissions about uncertainty, the agreements are clearly not a deterrent for commercial development.

- 7.4.71. The NLC also suggested s 11A or s 19 of the ALRA as an avenue for FTOs to negotiate agreements with the traditional Aboriginal owners for access to the claim area in the event of a grant of title.
- 7.4.72. The NLC submitted that DTC's assertion that 28 tour operators use the claim area should not be accepted considering the contrary information provided by a different Northern Territory Department (DPIR) and the lack of further details provided.

Consideration

- 7.4.73. Notwithstanding the arguable lack of sufficient information and evidence adduced by DTC, having acknowledged that recreational fishing occurs in the claim area, I can accept that any restriction on accessing the claim area for fishing will likely affect tourism and FTOs. In its reply submissions, the Northern Territory indicated that the numbers quoted as tourism data were sourced through the National and International Visitor Surveys, conducted under contract by independent market research company ORC International.²²⁶ It also indicated that the data relating to FTOs submitted by DPIR was under-estimated as the sub-grid used only formed one part of the claim area. Their reply also provided a substantive list of operators, including accommodation providers and booking agents, in the region. In any event, it can be taken that tourism generally, and a number of FTOs, would suffer detriment if access to the claim area was restricted.
- 7.4.74. For reasons previously discussed, I do not regard the process of applying for a permit under the proposed management scheme of the NLC on behalf of all claimants to cause significant detriment to recreational fishers. In addition, especially given the history of agreements in this general region, FTOs have the option of a s 11A or s 19 agreement. The claimants' submissions indicated that they would be open to making such agreements. It is a realistic and sensible option. It would follow that, as is likely similar terms of agreement would be available from the traditional owners of the subject land to existing FTOs in the claim area or to proposed FTOs in the claim area.
- 7.4.75. The proprietors of Humbug Fishing were the only FTO to provide information about when they acquired their interests, despite the attempt to elicit more information from Mr Latham and from the proprietors of the Daly River Barra Resort. Humbug Fishing submitted that they acquired their detriment interest 10 years ago. The Land Claim Report was submitted to the Minister 14 years ago and thus my discussion at Chapter

²²⁶ See following link: <http://www.orcinternational.com/>, provided in footnote 7 to Northern Territory, Submissions in reply to the NLC – Group 2 in *Detriment Review*, 26 July 2018, 17.

5 should be acknowledged when considering their submissions. Not much can be said in relation to Mr Latham and the proprietors of the Daly River Barra Resort considering the scant, unsubstantiated information submitted. However, in this instance, the options available to recreational fishers and FTOs to enable their current activities to be continued are realistic. Their concerns should not inhibit the grant of the land.

Minerals and energy

- 7.4.76. DPIR submitted that there are no granted petroleum titles within or abutting the claim area but that there are petroleum title applications abutting and over most of the claim area, including the following:
- EP(A) 218, made by Arafura Oil Pty Ltd on 17 March 2011;
 - EP(A) 175, made by Bonaparte Oil Pty Ltd on 20 January 2010;
 - EP(A) 287 (on Native Title affected land), made by Arafura Oil Pty Ltd on 7 December 2017
- 7.4.77. DPIR noted that in January 2016, Arafura Oil Pty Ltd and Bonaparte Oil Pty Ltd became subsidiaries of Australian Gas and Oil Pty Ltd.
- 7.4.78. DPIR also submitted that there are two ‘mineral occurrences’ within the claim area. One is a heavy mineral sands occurrence called Cliff heading ‘containing ilmenite as 25-30% of total weight fraction and zircon as 20% total weight fraction reported in CR19730055 (Nixon and Hurst I 73. DPIR advised this information was attained from Endeavour Oil who were undertaking explorations activities in 1972/73. DPIR submitted that the concentrations of titanium and zircon were considered to be of significant mineral and economic importance at the time, noting of course that ‘the time’ was the early 1970s. The second mineral occurrence was said to be a coal mineral occurrence called Cliff Head Coal which was identified during exploration and drilling by Utah Development Company in 1971. DPIR then added that it was identified as being of no economic interest. It cannot, therefore, be considered to be a source of any potential detriment.
- 7.4.79. DPIR conceded that existing evidence suggests it is possible that the land claim area could have some potential for minerals and petroleum, however the lack of recent exploration or geological studies precludes definitive advice.

Consideration

- 7.4.80. In light of this, I do not consider there to be any detriment relating to minerals and energy in the land claim area. The submissions are purely speculative and the grant of the land will not affect adversely any existing interests under this umbrella. That is consistent with the NLC submission that the mineral interests referred to in the Northern Territory submissions are on land above the mean high water mark and thus not in the claim area.

Other

- 7.4.81. DTC submitted that the claim area is sometimes accessed by the Crocodile Management Unit (CMU) of the Northern Territory to conduct saltwater crocodile population surveys. There is no reason to think that the traditional Aboriginal owners of the area would not either agree to a term accommodating for this in a settlement agreement, or grant a permit for the CMU.
- 7.4.82. In the event of a grant of title, there may even be scope under s 74 of the ALRA for the Northern Territory to continue this monitoring operation.

Comments and recommendations

- 7.4.83. A summary of the conclusions reached with respect to this land claim appear in the Introduction.
- 7.4.84. This was the first land claim that the NLC provided claimants' submissions about. It therefore included significant amount of general detriment material common to a number of claims including submissions in reply by the Northern Territory. These matters have been addressed extensively in earlier chapters, especially Chapters 5 and 6, and have not been repeated here. Where a matter of detail applies specifically to the Lower Daly Land Claim area, I have of course referred to it.

7.5. Lower Roper River Land Claim No. 70, Report No. 65, Group 5

Introduction

- 7.5.1. Date of Report

7 March 2003

- 7.5.2. Area

The beds and banks of, and islands in, the Roper River in the Northern Territory extending from the Roper Bar in the west to the seaward extremity of the Roper River in the east BUT EXCLUDING any land on which there is a road over which

the public has the right of way and any land vested in the Arnhem Land Aboriginal Land Trust and the Marra Aboriginal Land Trust.

7.5.3. Summary of comments and recommendations

- i. The submissions about general detriment common to all beds and banks and ITZ claims are discussed at Chapter 6. Each claim must, however, be considered in its own context and on its own facts.
- ii. Notwithstanding the detriment submissions from NTCA, there are no adjacent pastoral landholders to the land claim area. Acceding to the claim will cause no detriment to pastoral landholders or the pastoral industry.²²⁷
- iii. The land claim area is of high value for recreational and commercial fishers. In the event the claim area becomes Aboriginal land, these communities may suffer detriment. In the case of recreational fishers, the proposed permit management system, provided the Minister is satisfied that it is properly functioning and reasonable, is an appropriate way to alleviate that detriment. It will mean recreational fishers have access to the fishing areas under a permit, adapted to their needs and easily procured. It may, in future years, involve an appropriate small fee. Such a fee is appropriate as it is the traditional land of the relevant Aboriginal People that the fishing is to occur. The detriment that may flow on to impact tourism and the regional economy will be alleviated also by the same process. In the case of commercial fishing, which is of course subject to the regulatory supervision of the Northern Territory, the appropriate factor to accommodate the detriment is to anticipate that the traditional owners, once a grant is made (or the NLC on their behalf and with their approval prior to the grant) will agree to access to the commercial fishers under s 19 of the ALRA. There is some history of such agreements having been made in the past. The extent of this detriment would depend upon the outcome of the negotiations towards such agreements. That is not a conclusion which will entirely satisfy all the commercial fishers, or the Northern Territory. But it is not the function of the Minister to require all detriments to be fully accommodated as a condition of the making of the grant. To adopt that position places those who assert detriment in a much superior position to that of the traditional owners. That was clearly not intended by the ALRA. Rather the ALRA contemplates that in many

²²⁷ Pastoral detriment has not been discussed in the claim. I assume it was a mistake on NTCA and their legal representatives part to include Land Claim No, 70 in their detriment submissions about related Roper River land claims.

circumstances, the grant of the land will enable the traditional owners to make such agreements, as specifically provided for in ss 12 and 19 of the ALRA.

- iv. NTIO's Roper Valley Iron Ore Project has not yet received the necessary environmental proposals. The Project was also proposed and developed with the Northern Territory post 2003, after the Land Claim No. 70 was recommended for grant to traditional Aboriginal owners. The Northern Territory is and was clearly aware that the adjacent land claim area was recommended for grant and NTIO should have been aware the area was recommended for grant. The Project, therefore has been developed in the light of the recommended grant. For these reasons the Minister might consider it appropriate to treat NTIO's detriment claim as a potential detriment arising in the knowledge of the claim which, if the Project proceeds, subject to the traditional owners having the right (by reason of a grant), may be addressed through negotiations with those traditional Aboriginal owners for such access and other entitlement to use the claim area as are desirable for the Project. Otherwise, the balance would seem to be contrary to the intent of the ALRA, putting the traditional owners' rights as inferior to pretty much any future use of the land which emerges in the commercial interests of any corporate entity. The Northern Territory of course, and understandably, is supportive of development to the benefit of its citizens. But the citizens include the traditional owner interests, as provided in the ALRA, and the traditional owners of land in the Northern Territory have shown an appropriate interest in such development opportunities.
- v. No detriment should be suffered by any mineral and/or energy tenement holders.
- vi. The power lines and water main which supply water to Ngukurr township should be considered a community purpose within s 15 of the ALRA and protected by s 14.
- vii. Carpentaria will suffer detriment if it is unable to exercise its drainage and water supply easements, as will the Northern Territory if they cannot access their water points to assist in the maintenance of roads in the area. The Minister may wish to ensure that any grant preserves those interests.
- viii. On the evidence available to me, I am not of the view that the power line sourcing the Munbililla/Tomato Island campground located on NTP 819 is a community purpose under the ALRA. Rent may therefore be payable. The extent of the rent may constitute a detriment, but it is not likely to be seen to be a significant one.

- ix. The status of public roads is accommodated under the ALRA, and the roads will be apparent from the survey which will be necessary.
- x. Commissioner Olney, in his initial Report, recommended the exclusion of the Roper Bar, St Vidgeon and Port Roper boat ramps from any grant, so as to avoid any detriment flowing from their availability to the public. Despite the submissions of the NLC, I consider that there is sufficient reason to adhere to that recommendation. Accordingly, to the extent that those boat ramps are not part of public roads, I agree with his view.

Land Claim Report

7.5.4. Land recommended

The areas recommended for grant by Commissioner Olney to traditional Aboriginal owners following his inquiry into Land Claim No. 70 were:

- (i) The beds and banks of, and islands in, the Roper River in the Northern Territory extending from the Roper Bar in the west to the seaward extremity of the Roper River in the east BUT EXCLUDING any land on which there is a road over which the public has the right of way and any land vested in the Arnhem Land Aboriginal Land Trust and the Marra Aboriginal Land Trust.

7.5.5. Traditional ownership

In the inquiry, the following nine claimant groups were put forward as traditional Aboriginal owners for the claim area:

Group 1: Milwarapara -Yutpundji

Group 2: Warlanji

Group 3: Larrbayanji and Millingbarrwarr

Group 4: Marawalwalgunyigunyi clan

Group 5: Wurlngarri/Gulungurr clan

Group 6 Warrgужaja

Group 7: Markuri clan

Group 8: Numamudidi clan

Group 9: Nayirrinji

At Appendix 3 to the Land Claim Report (No. 65), Commissioner Olney sets out a list of names that represents the final make-up of each of the claimants groups.²²⁸

²²⁸ *Lower Roper River Land Claim Report (No. 65)*, 7 March 2003, Olney J, 19 and Appendix 3.

In his Report, Commissioner Olney observed that,

The evidence in this and other related claims and applications to which reference has been made establishes that many of the claimants have been born on the land, have continued to reside on or close to their traditional country and to have actively participated in both the ceremonies associated with the country and in the fulfilment of their traditional obligations to look after it. There can be few areas in Australia where the traditional attachment of the indigenous people to their land exceeds that of the present claimant Groups.²²⁹

7.5.6. Detriment at inquiry stage

Commissioner Olney reported that the claim area was popular for recreational and commercial fishing. He held that if a grant of title resulted in prohibitions or restrictions on accessing the river, then commercial and recreational fishers would suffer detriment. He advised that the Minister consider excluding the Roper Bar, St Vidgeon and Port Roper boat ramps from the grant, as to diminish the extent of the detriment.

Commissioner Olney also advised that if access to the Roper Bar barge landing was restricted or prohibited, then this would adversely affect the effective operation of the Northern Territory Police service as well as other community services and commercial activity that use the Roper Bar barge landing to access the Ngukurr and Roper Bar communities.

Commissioner Olney also reported that, unless a co-operative management regime involving the traditional Aboriginal owners was established, the effective management of the Limmen National Park might be affected by a grant of title.

Updated Detriment

Recreational fishing

Northern Territory

7.5.7. DPIR submitted that the land claim area was significant for recreational fishing and if access and use of the lower Roper River was restricted or prohibited, then recreational fishers would suffer detriment. This detriment would flow on to impact

²²⁹ Ibid 19 [53].

the local and wider Northern Territory economy, as visitation numbers would be likely to drop.

- 7.5.8. In support of its claims of detriment, DPIR referred to the ‘Survey of Recreational Fishing in the Northern Territory 2009-2010’, which estimated that Northern Territory residents spend a total of 2067 days fishing in the lower Roper River. To put those usage figures in perspective, DPIR submit that in the same 12 month period there were 151,000 days fished by the Northern Territory residents across the whole Northern Territory.
- 7.5.9. DPIR also submitted general submissions as to the economic contributions from recreational fishing and how much fishing is undertaken territory-wide. These have been discussed in Chapter 6.
- 7.5.10. DPIR further submitted detriment in relation to the process of access negotiations. These detriment claims are not specific to Land Claim No. 70. They were also discussed in Chapter 6.

AFANT

- 7.5.11. AFANT referred to Commissioner Olney’s comments in the Land Claim Report about reducing detriment to recreational fishers by excluding the three popular boat ramps in the claim area from a grant of title. AFANT point out that this option for diminishing detriment is no longer relevant because the High Court’s decision in the BMB case clarified that tidal waters overlying Aboriginal land are considered Aboriginal land for the purposes of s 70 of the ALRA. Accordingly, AFANT submits that the potential detriment to recreational fishers has become more significant since the Land Claim Report. The comments made at Chapter 6 in respect of boat ramps are applicable.
- 7.5.12. AFANT submitted results from its community survey about recreational fishing in the land claim area for Land Claim No. 70 as supporting material to its claims of detriment. The survey results indicated that Munbililla Island, Roper Bar and Port Roper boat ramps were the most important access points for recreational fishing in the land claim area. They also indicated that, due to the remoteness of the land claim area, camping while fishing is common practice and the majority of land based fishing occurred at Roper Bar, followed by the area near the Roper Bar ramp, Munbililla Campground and Port Roper.²³⁰

²³⁰ See AFANT, Submissions – Group 5 in *Detriment Review*, 4 June 2018, [25].

- 7.5.13. AFANT also submitted that the claim area is a widely celebrated fishing location by recreational fishers and therefore stated that a loss of access to the claim area would impact upon not only people's choice to visit the area, but many people's overall enjoyment of fishing in the Northern Territory. They claimed that this was supported by their community survey, which indicated that the majority of respondents did not believe the fishing experience in the Lower Roper River Land Claim area could be replaced by another location.
- 7.5.14. In addition, AFANT submitted that, in the event the land claim is granted and access and use of the claim area is prohibited, then their members' overall enjoyment of fishing in the Northern Territory would be adversely affected. AFANT claimed that this was supported by their community survey, which indicated that the majority of respondents stated their enjoyment of fishing in the Northern Territory as a whole would suffer if they could not fish in the claim area.
- 7.5.15. AFANT also made submissions about the cumulative effect of acceding to land claims. Again, these submissions have been discussed in Chapter 6 and will not be repeated here. However, I note that AFANT commented that their cumulative detriment concerns are particularly relevant to Land Claim No. 70, due to the popularity and remoteness of the area.
- 7.5.16. In relation to the proposed permit management system of the NLC, AFANT made the same general comments about the potential detriment that may be suffered by recreational fishers, as discussed in Chapter 6. I will not repeat that discussion, which applies to this and other claims where this type of detriment is asserted.
- 7.5.17. Finally, in its submission to the Review for Land Claim No. 70 (which addressed Lower Roper and the Upper Roper River Land Claims together), AFANT submitted comments about whether it should be expected that recreational fishers would take into account the recommendations made in land claim reports before making any decisions to use the claim area. Due to the non-commercial nature of recreational fishing, I consider the comments made in Chapter 5 in regards to timing issues, that is, when detriment is said to arise after the relevant Land Claim Report, do not apply to recreational fishers. It is not realistic to apply those comments to recreational fishers both by their particular characteristics, and because their right to fish (even if qualified by the *Fisheries Act*) is sourced in the common law.

NLC on behalf of the claimants

- 7.5.18. I refer to Chapter 6 for my general comments about NLC's response to general matters of recreational fishing detriment common to all 12 beds and banks and/or

intertidal zone claims. NLC made no specific submissions in relation Land Claim No. 70

Consideration

- 7.5.19. Notwithstanding any methodology issues with AFANT's community survey, the results are consistent with the conclusions made in the Land Claim Report and the detriment submitted by other stakeholders. I accept that the claim area is of high value for recreational fishers. In the event the land claim is granted, any prohibition of or restriction to recreational fishing in the claim area will result in detriment to the recreational fishing community. This may also have flow on impacts to tourism and the regional economy in the Northern Territory. Provided the NLC's permit management proposal is effected in accordance with the general scheme as described, the detriment should be slight. If access remains available, there is little detriment involved in having to plan visits far enough ahead to make the necessary arrangements to obtain permits.²³¹ There is no suggestion that the proposed fees will be unrealistic; indeed there is an initial fee moratorium. The range of permit options seems to be wide enough to cater for most recreational fishing options.

Commercial fishing

Northern Territory

- 7.5.20. DPIR claimed that significant levels of barramundi and threadfin have been harvested from the claim area.²³² In 2017, the barramundi catch from the lower Roper River was 16,350 kg and in 2016 it was 13,682 kg. King threadfin catch was recorded as 9566.67 kg in 2017 and 5466.67 kg in 2016.
- 7.5.21. There was also said to be significant levels of fishing that occurs in the land claim area.²³³ In 2017 the catch for Lower Roper River was recorded as 39,724.9 kg and in 2016 it was 3253.9 kg.
- 7.5.22. DPIR submitted that there are three well-known boat ramps within the land claim area: the Port Roper, Roper Bar and Tomato Island (Munbililla) boat ramps.
- 7.5.23. In their submissions, DPIR also referred to a separate survey conducted by NT Fisheries within the Lower Roper River in 2009. DPIR referred to it as a 'discrete survey' and claimed that it recorded that both visitors and residents who launched

²³¹ See Gray's comments in *The Ngaliwurru/Nungali (Fitzroy Pastoral Lease Land Claim No. 137 Victoria River (Beds and Banks) Land Claim Report (No. 47)*, 22 December 1993, Gray J, (c) and (d), [6.12.2].

²³² Northern Territory, Submissions – Group 5 in *Detriment Review*, 22 June 2018, 4, [k].

²³³ *Ibid* 5 [o].

from Tomato Island boat ramp spent a total of 5,561 days fishing in the eight month period between April and November 2009. Of this total, 5216 days (93%) were attributed to fishing effort. DPIR further claimed that these figures are likely an underestimate, as they do not account for vessels that launched from other locations along the Roper River. No corresponding attachment or detail about the survey or how it was conducted was submitted. Accordingly, the reliability of this “discrete” data is not obviously reliable, but its general effect is clear.

NTSC

- 7.5.24. The Lower Roper River Land Claim No. 70 was dealt with in conjunction with the Upper Roper River Land Claims (Report No. 68), as explained in Chapter 4. The claims together made up Group 5. In their submissions, the NTSC therefore dealt with all claims in Group 5 in the one submission, without differentiating between particular claim areas. I will discuss their submissions for Group 5 here and refer to this discussion when addressing the other claims within the group.
- 7.5.25. I note that most of NTSC’s submissions were that of general detriment, common to all claims with commercial fishing. Those general submissions have been addressed in Chapter 6 and only the detriment specific to the Roper River claims will be addressed here.
- 7.5.26. NTSC submitted that the Roper River is a critical area for commercial licence holders, as it contains significant levels of barramundi and king threadfin, especially the mouth of the Roper River.
- 7.5.27. NTSC also submitted that there is a licence holder who has a land-based camp within the land claim area. However, no information as to who this was or information about its commercial fishing operation was adduced. The licence holder did not submit to the Review any individual detriment concerns either. In those circumstances, there does not appear to be the need to further consider that particular claimed detriment as significant.
- 7.5.28. NTSC claimed that ongoing access to the Roper River is of critical reliance for commercial operators, not only because of fish stocks, but also because Roper River offers safe, sheltered waters.
- 7.5.29. In respect of mud crabbing, NTSC submitted that there are vessel based operations and at least three mud crab camps based adjacent to the land claim areas near Number 1 Landing Roper Ramp. It was submitted that commercial operators who harvest mud crabs are critically reliant on infrastructure within the claim area and that during the wet season, when access issues arise, the mud crab camps may be serviced

via Roper Bar Ramp and Tomato Island Ramp (within Land Claim No. 70). NTSC concluded that at least 15 Mud Crab licences are dependent on access to the Roper River.

NLC on behalf of the claimants

- 7.5.30. The submissions on behalf of the claimants did not include anything in response to the specific detriment concerns of commercial fishers in relation to Land Claim No. 70.

Consideration

- 7.5.31. I accept that the claim area is important for the commercial fishing of mud crab, threadfin and barramundi. Detriment would flow to commercial fishers from a grant of title, if suitable agreements were not able to be reached between the traditional owners and the commercial fishers in the event of a grant.

Fisheries management

- 7.5.32. The Northern Territory, NTSC and AFANT submitted concerns about fisheries management, including submissions relating to cumulative detriment. These submissions are general and common to all 12 beds and banks and/or intertidal zone claims, to varying degrees. I discussed the general submissions relating to fisheries management in Chapter 6 and I will not repeat that discussion here.

Tourism

Northern Territory

- 7.5.33. DPIR submitted that the Guided Fishing industry includes over 150 licensed FTOs. They claimed that a 2012 assessment of this industry showed that it catered for about 31,000 client days fished each year and that its economic contribution was \$26 million per annum. I note that no evidence of this study was submitted and it appears that those figures were calculated in relation to the entire Northern Territory. DPIR further submitted data indicating that in 2017, four FTOs worked in the land claim area for a total of 30 angler days and in 2016, six FTOs worked in the claim area for a total of 70 angler days.²³⁴
- 7.5.34. DTC submitted the following specific detriment information in relation to Land Claim No. 70:

²³⁴ Northern Territory, Submissions – Group 5 in *Detriment Review*, 22 June 2018, 6.

- Land claim area is of high tourist value due to recreational fishing, four-wheel driving and camping
- Fishing, camping and four-wheel-drive tourists frequent Roper Bar, Tomato/Munbililla Island and Port Roper boat ramps²³⁵
- The iconic Northern Territory barramundi remains a key drawcard for recreational fishing visitors to the Roper River
- The Savannah Way Four Wheel Drive touring route, which travels across three states from Queensland through the Northern Territory to Western Australia, travels along the Nathan River road, which is in immediate vicinity to the land claim area.²³⁶ Many visitors travelling the route will camp and fish within the claim area

7.5.35. On the above information, DTC submitted that, in the event the land claim is granted and access is restricted or prohibited,

There may be an impact to the regional tourism economy of Katherine with flow on effects possible to the rest of the NT if visitors instead bypassed the NT in favour of fishing/camping in Kununurra and surrounds instead.

However, provided suitable arrangements are put in place in the claim areas for continued...public access, the DTC does not foresee any detriment²³⁷

NLC on behalf of the claimants

7.5.36. The NLC did not submit any specific information in response to the potential affect a grant of Land Claim No. 70 may have on tourism in the Northern Territory.

Consideration

7.5.37. Although submissions on the potential affect that a grant of title might have on tourism are, by their nature, speculative, I accept that an impact on recreational fishing would likely impact visitation to the area. Provided the NLC's permit management system is introduced, and developed to operate effectively, detriment to the tourism industry should be minimal.

²³⁵ Attachment O to *ibid.*

²³⁶ Attachment I to *ibid.*

²³⁷ *Ibid* [2] 15.

Minerals and energy

Northern Territory

- 7.5.38. DPIR submitted the following information in respect of minerals and energy on or adjacent to the land claim area:
- In September 2014 Imperial Oil & Gas Pty Ltd (Imperial) completed the drilling of 4 exploration holes in the St Vidgeon region (EP 184). The current results are preliminary but are consistent with earlier findings that suggested potential not only for gas but also for petroleum liquids²³⁸
 - EP 184 was granted to Imperial on 21 August 2013 and the expiry date is 20 August 2020²³⁹
 - On 12 April 2010, Imperial also applied for EPA 182, which is situated over Arnhem Land Aboriginal Trust²⁴⁰
 - On 12 April 2010, Imperial also applied for EPA 183, which is situated over Marra Aboriginal Land Trust²⁴¹
- 7.5.39. DPIR claimed detriment on behalf of the above energy interests in respect of negotiating agreements with traditional Aboriginal owners and the uncertainty that a future agreement would be made. They also claimed that failure to reach agreement poses a strong risk that proposed patterns of land usage associated with petroleum exploration and production could be adversely affected if access is withdrawn or restricted. I do not consider either of those claims to constitute meaningful detriment under the ALRA. I refer you to the discussion at Chapter 6 of this Report.
- 7.5.40. DPIR also submitted that the geology surrounding all Roper River land claim areas (Lower and Upper), are considered highly prospective and under-explored for a range of mineral and petroleum commodities. In the event the land is granted, DPIR claimed that detriment might arise if, in the future, commodities are required to be transported along the watercourses. No evidence was adduced as to the ‘highly prospective geology’ and the detriment claim about potentially transporting commodities along the watercourse is, in my opinion, too remote to be considered by the Minister in making a decision under s 11. Whatever the validity of such speculative claims, the ALRA was not intended to accommodate them; much less to permit them to stand in the way of a grant to the traditional owners. There is no

²³⁸ See Attachment B to *ibid.*

²³⁹ See Attachment C and D to *ibid.*

²⁴⁰ See Attachment C to *ibid.*

²⁴¹ See Attachment F to *ibid.*

structured plan of the Northern Territory at present in place in relation to such matters. To say that because mining interests might want to have access to land at some time in the future to further their economic interests means that no grant of unalienated Crown land should be granted to the traditional owners is to subordinate traditional ownership of such land to any future expectations of the commercial community. That is plainly wrong, and the Minister would not accede to such a proposition.

7.5.41. DPIR submitted that the following mineral tenures have been currently granted in the claim area:

- EL 26599
- EL 23239
- EL 28432
- EL 23500
- EL 27143²⁴²

7.5.42. DPIR claimed detriment in relation to the Northern Territory economy, stating that the development of Northern Territory mineral assets gives rise to significant infrastructure, expenditure and long-term employment, and thus any detriment suffered by the mining industry may also adversely affect the wider economy. No evidence was adduced to support these claims.

NTIO

7.5.43. NTIO's legal representatives provided a joint submission on behalf of NTIO for their detriment interests in both Land Claim Nos. 70, 71 and part of Land Claim No. 198. Later in the Review process, they also provided a detriment submission to the Review for Land Claim No. 69.

7.5.44. The main concern of NTIO is the effect grants of title may have on their Roper Valley Iron Ore Project (the Project). I have explained this Project when discussing the specific detriment submissions received for the Mataranka Area Land Claim No. 69. In the absence of any agreements, the Project may be affected by Land Claim No. 70, as NTIO plans to transport iron ore onto barges from a Barge Loading Facility at Special Purpose Lease (SPL) 291, which is near the mouth of the Roper River and adjacent to the claim area. They then plan to barge the iron ore along the Roper River out to sea.

²⁴² See Attachments G and H to *ibid.*

NLC on behalf of the claimants

- 7.5.45. As with Land Claim No. 69, I again refer to the comments made in the separate section of this Chapter dealing with the Maria Island and Limmen Bight Land Claim No 198. One matter exclusively relevant to Land Claim No. 70 however, is the NLC's observation that NTP 1184, which NTIO holds under SPL 291, does not appear to extend to the bank of the river. The NLC noted that, if that were the case, NTIO would require tenure of some form to secure ownership and usage of any part of the facility constructed outside NTP 1184.
- 7.5.46. In respect of petroleum interests, the NLC advised that they had entered into a comprehensive ILUA with the Native Title Parties and Imperial with respect to EP 184, dated 26 June 2013. They also submitted that with regards to EP(A) 182, the NLC has been involved in sacred site clearances and substantial negotiations towards an agreement with Imperial.

Consideration

- 7.5.47. It must be kept in mind that NTIO's Project has still not received its environmental approvals under the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) and thus the claims of detriment are still somewhat speculative. The uncertainty as to the Project's future, along with the lack of detail submitted, makes it difficult for the NLC to consult claimants about potential agreements. In any event, as the Project progresses, s 11A of the ALRA is a potential avenue for NTIO to make an agreement with the NLC in advance of a grant or s 19 provides the opportunity for the making of the traditional owners in the event of a grant of the land before the Project comes to be a reality.
- 7.5.48. The ALRA has special provisions for minerals and energy interests, and like former Commissioners, I do not consider the processes involved in complying with those provisions to be a meaningful detriment. The other claims of detriment submitted by the Northern Territory in relation to minerals and energy were not accompanied with enough detail or supporting material to support any assessment of detriment of such a character as to inhibit the grant of the land to the traditional owners, leaving such putative interests to take such steps under Part IV of the ALRA as appropriate..

Water and power resources

Northern Territory

- 7.5.49. The Power and Water Corporation (PWC) advised that the detriment concerns outlined in the land claim report are the same in relation to the water which is extracted from the Roper River to supply water to the Aboriginal township of

Ngukurr. They advised that the three pumps are located within the claim area, on the bank adjacent to the community and north of the Munbililla/Tomato Island boat ramp.²⁴³ PWC submitted that water is transferred by 150 mm water pipelines installed in 1971 to the water tank compound located within Ngukurr township at lot 264, town of Ngukurr. Apparently, the area required for this asset as an easement would be up to 1.5m width either side of the water main.

- 7.5.50. They also submitted that the pumps are served by a 240 voltage underground power line, which was upgraded in 2015. Apparently, the area required for maintenance of this asset as an easement would be 1.5m either side of the power line.²⁴⁴
- 7.5.51. Since the land claim report, PWC advised that new detriment concerns have arisen in relation to an overhead power line, which was installed in September 2017 across the claim area to service the Munbililla/Tomato Island campground located on NTP 819.²⁴⁵ The power poles are located outside the claim area but presumably to maintain the power line that traverses over the river, access to the claim area would be required.
- 7.5.52. PWC submitted that these assets would fall within s 14 of the ALRA and that the water main and associated power line for water supply to Ngukurr township is a community purpose within s 15 of the Act, for which no rent is therefore payable. It contends, however, that the power line for supply to Munbililla Island boat ramp is not a community purpose within s 15. If it was to be determined that the above assets are not within s 14 of the ALRA, then PWC state that detriment would be suffered by the Ngukurr township and the users of the Munbililla Island boat ramp and camp grounds.
- 7.5.53. In the Northern Territory's addendum to its Detriment Submissions dated 29 June 2018, DIPL advised that drainage and water supply easements on NTP 819 have been granted to Carpentaria Aquarium Farm Pty Ltd (Carpentaria).²⁴⁶ Carpentaria is a prawn farm and holds NTP 4249 in fee simple, since 1993. On its behalf, DPIR submitted that detriment might be suffered by Carpentaria if it is restricted or unable to access or use the river adjacent to the easements on NTP 819.

²⁴³ See Attachment F to *ibid*.

²⁴⁴ See Attachments Q and R to *ibid*.

²⁴⁵ See Attachments O and S to *ibid*.

²⁴⁶ Attachment 17 to Northern Territory, Addendum to Submissions – Group 5 in *Detriment Review*, 29 June 2018.

- 7.5.54. The addendum also submitted that Commissioner Olney's comments about watering points on the Roper River are still applicable.²⁴⁷ That is, water is still taken from the Roper River for road construction and maintenance, the main water points being at Roper Bar, the intersection of Mountain Creek and the Roper River, and at the St Vidgeon Boat Ramp.

Consideration

- 7.5.55. The power lines and water main which supply water to Ngukurr township should be considered a community purpose within s 15 of the Act and protected by s 14 of the ALRA. There was no submission by the NLC to the contrary.
- 7.5.56. On the evidence available, I am not able to determine whether the power line and water bores sourcing the Munbililla/Tomato Island campground located on NTP 819 are a community purpose under the ALRA. Rent may therefore be payable. It is likely to be nominal in any event. The extent of the rent may constitute a detriment, but in my view it is not likely to be seen as a significant one.
- 7.5.57. Carpentaria itself will suffer detriment if it is unable to exercise its drainage and water supply easements.
- 7.5.58. I agree with Commissioner Olney that, in the event the area is granted, any restriction on gaining access to the river for the purpose of obtaining water for road construction and maintenance would inhibit the effective carrying out of those activities. It may be that such uses are protected by s 14 and s 15 of the ALRA. If not considered to be a community purpose, the Northern Territory may suffer detriment to the extent of the rent so fixed under s 15. It is not likely to be significant.

Roper Bar Store

Estate of Veronica Januschka

- 7.5.59. It was submitted by the Estate of Veronica Januschka's (Estate) legal representative, that the Januschka family and their related corporate entities have operated the Roper Bar Store (Store) since 1993. The submission was rather unclear but from what I understand, the Store is on SPL No. 0220, which the Januschka family hold over NTP 1185. That SPL, according to the Northern Territory, is due to expire on 7 July 2019. It is not likely that the necessary surveys would have been completed, to enable the formal grant of the land by that date, so simply on that basis that aspect of this detriment concern will have disappeared. A related entity, Diskrig Pty Ltd, is the

²⁴⁷ *Lower Roper River Land Claim Report (No. 65)*, 7 March 2003, Olney J, 35, [106].

freehold owner of NTP 01034 and Lot 277 in the Town of Urapunga, a lot known as the “4-mile landing site”, which is also known as the Urapunga Caravan Park.

7.5.60. The Estate’s legal representative claimed that,

When the Januschka family first purchased the 4-mile lease – they were informed verbally by the NLC that the Aboriginals had no wish to claim it and that this property was the best option for the Januschka family if they wanted to remain in the Roper River region.²⁴⁸

7.5.61. There is nothing to substantiate this assertion. There is nothing to support such a claim. It is inherently unlikely, without some form of documentation. Furthermore, the assertion suggests the Januschka family and their legal representative are mistaken as to what area is claimed.

7.5.62. The Estate’s detriment concerns are, in any event, derivative. They are that any restriction on access and/or use of the Roper River may result in a decrease in tourism and visitation to the area, thereby adversely affecting their primary source of income - the sales made through the Urapunga Caravan Park and Store.²⁴⁹

7.5.63. The Estate’s legal representative also advised that Veronica Januschka’s unexpected passing on 28 November 2017 has resulted in Diskrig Pty Ltd being placed into liquidation.

7.5.64. The Estate requested that before any grant is made, the traditional Aboriginal owners enter into agreements with the Januschka family for ‘unfettered access to maintain the status quo’²⁵⁰. The Estate also expressed concerns about the amount of money they have invested into the 4-mile landing site and how a grant of title may impact the liquidators’ ability to sell the business for a reasonable price.

7.5.65. I acknowledge that Ms Januschka wrote submissions to Commissioner Olney’s land claim inquiry in 2002. The legal representative submitted that these submissions remain relevant and should be read in conjunction with the submissions provided in the Detriment Review.

NLC on behalf of the claimants

7.5.66. NLC responded stating that a sale listing for the business and associated freehold real estate was found online, which provided that the business was “Under Contract”. However, the NLC did not provide any supporting material to substantiate this. The

²⁴⁸ Estate of Veronica Januschka (deceased), Submissions – Group 5 in *Detriment Review*, 6 May 2018, 1.

²⁴⁹ See Attachment to *ibid*.

²⁵⁰ *Ibid* 1.

NLC claimed that regardless of whether a sale has happened, any purchaser of the business should be on notice of the land claim and the business should be priced accordingly, taking a potential grant into consideration. The NLC submitted that,

By accounting for it in the price, the economic effect of any detriment qua detriment should be very substantially diminished.²⁵¹

Consideration

7.5.67. The unfortunate death of Ms Januschka and the subsequent liquidation of her business complicates the consideration of these detriment concerns.

7.5.68. On the information available to me, the most that can be said is:

- If the claim is granted, the Yutpundji-Djindiwirritj Aboriginal Land Trust will own the land between Lot 227 and the top of the Roper River Bank.²⁵² The purchaser of the business should be aware of this.
- I assume the NLC did not respond to the Estate's request for an agreement, as there was nothing submitted about the business accessing or using the claim area for its commercial operations. Rather, the Estate's concern appears to be about the potential decrease of guests arising out of a reduction in visitors accessing the Roper River for recreational purposes. If I am correct in that interpretation, no significant detriment should result in a grant of title provided the NLC's proposed permit system is effectively implemented.

Roads and infrastructure

Northern Territory

7.5.69. DIPL submitted that detriment may be suffered by persons who access adjacent parcel NTP 4717, which is part of the Urapunga Stock Route, to the extent that it is used for travelling stock associated with any pastoral or other properties in the region, or accessed by members of the public to access the Roper River.

7.5.70. DIPL also expressed concern about accessing the Roper River Police Station, which now, as changed from Commissioner Olney's Report, is no longer active. However DIPL stated that the remains of the police station have been declared a heritage place.

7.5.71. DIPL submitted that detriment may be suffered by landholders, including the NT Police, if the use of the Fourmile barge landing on NTP 1185 is restricted. NTP 1185

²⁵¹ NLC, Submissions – Group 5 in *Detriment Review*, 1 September 2018, [37].

²⁵² *Ibid* [40].

is subject to Northern Territory freehold title held by the Northern Territory and subject to SPL 220 issued to Ms Veronica Janushcka, who is now deceased. The SPL is to expire on 7 July 2019. For practical reasons, that expiry date means that the SPL need not be further considered.

- 7.5.72. DIPL submitted that it is unclear as to the exact location of the Port Roper Boat Ramp/ No. 1 Landing Boat Ramp. This will be a matter for survey and in respect of any detriment concerns I refer to my comments at Chapter 6. This is also the case for the St Vidgeon/Tomato Island Boat Ramp.²⁵³
- 7.5.73. DIPL advised that part of NTP 2276 is subject to an occupation licence (No. 3745) to Mr Paul Reed. The relevant area that has been granted in the licence has been defined as proposed parcel number NTP 5660(A) for the purpose of a crabbing and fishing facility. The licence is to expire on 22 August 2019. DIPL submitted that Mr Reed and his family have resided at the location for a number of years and Mr Reed's father is buried on site. Mr Reed was said to hold a commercial Barramundi fishing licence and DIPL submitted that in the event of a grant of title, Mr Reed will require secure access and use of the waters in the claim area. If this access is restricted, denied or allowed but with significant costs, Mr Reed will suffer detriment. I add that notwithstanding several attempts to contact Mr Reed by my Office, including communications with the NTSC for updated contact details, no response was received by Mr Reed as to any detriment interests. If his licence is to expire on 22 August 2019, the practicality of surveying the claim area after the Minister determines to make a grant probably means that the expiry date of the sublease effectively excludes the sublease from detriment significance.
- 7.5.74. Substantial information was provided as to the new Roper River Bridge, which is off the Roper Highway, which traverses the claim area. DIPL submitted that the old bar crossing is open to and used by the public and maintained by the Northern Territory Road authority.²⁵⁴ Evidence was provided as to the Roper River Crossing Road Swap Deed.²⁵⁵ From what I can discern, the crux of DIPL's submission is that in the event the Minister accedes to grant, both the Roper Bar Crossing and New Road alignment would need to be excluded as to permit use by the public and for maintenance purposes.

²⁵³ See Attachments 12-14 to Northern Territory, Addendum to Submissions – Group 5 in *Detriment Review*, 29 June 2018.

²⁵⁴ See Attachments 1-5 to *ibid*.

²⁵⁵ See Attachments 6 and 7 to *ibid*.

- 7.5.75. The Roper Bar Jetty Road (RIMS ID 269) was said to traverse the claim area²⁵⁶ and an unnamed road, referred to Unnamed Road A, which runs parallel to the claim area²⁵⁷. Both are managed by the Northern Territory Road Authority. To the extent that users of the road may be prohibited from accessing or using the roads, detriment may be suffered.

NLC on behalf of the claimants

- 7.5.76. The NLC responded to DIPL's submissions about the stretch of the Urapunga Stock Route (NTP 4717) being potentially used to travel stock, stating the following,

In our submission given the absence of any pastoral properties in the area and the universal use of motorised transport to move cattle, along with the fact that the remnant leads nowhere, there is no prospect whatsoever of the land being used for moving livestock and hence no detriment arises with respect to access the river.²⁵⁸

- 7.5.77. The NLC also submitted that the Northern Territory submissions about the Fourmile Landing are no longer relevant, as with the construction of the bridge at Roper Bar, there is now all-weather access to the communities north of the river.

Consideration

- 7.5.78. I am unable to make any meaningful comments about roads in or adjacent to the claim areas until the areas are surveyed.
- 7.5.79. I do not consider that there will be any significant detriment suffered in the event the remains of the Roper River Police Station cannot be accessed due to a grant of title. If I am incorrect in this view and some evidence exists that the site is notable to tourists and others, then I believe it is likely special interest permits could be granted by the NLC to access the site. The detriment of having to seek such permits to those specifically interested is not of such magnitude as to warrant the Minister not to grant the land.
- 7.5.80. In their submissions in reply to the claimants, the Northern Territory responded that their submissions about the Roper River Barge landing/ Fourmile landing are still relevant considering the susceptibility of the other bridges to inundation and flooding. They therefore contended that the Roper River Barge landing/ Fourmile landing assist in delivery of essential provisions and services and assist with the necessary

²⁵⁶ See Attachments 2, 10 and 11 to *ibid*.

²⁵⁷ See Attachments 15 and 16 to *ibid*.

²⁵⁸ NLC, Submissions – Group 5 in *Detriment Review*, 1 September 2018, [41].

community resilience in emergency situations. I adopt the comments I made about boat ramps in Chapter 6, which explicitly refer to the Roper River Barge landing/ Fourmile landing.

Comments and recommendations

- 7.5.81. The Summary of comments and recommendations in the Introduction to this section reflects the matters I have discussed above. As noted elsewhere, I have not repeated here the detailed submissions about general detriment that are common to all beds and banks and ITZ claims. They are contained in Chapter 6. Of course, any information specific to Land Claim No. 70 has been included.

7.6. Maria Island and Limmen Bight River Land Claim No. 71 and part of Maria Island Region Land Claim No. 198, Report No. 61, Group 3

Introduction

- 7.6.1. **Note:** The detriment concerns submitted in respect of Maria Island and Limmen Bight River Land Claim No. 71 will be discussed with the detriment concerns submitted in respect of part of the Maria Island Land Claim No. 198, identified below. This is because this section of Maria Island was initially claimed as part of the Limmen Bight Land Claim No. 5, which Commissioner Toohey reported on 30 December 1980. However, Commissioner Toohey's recommendation excluded Maria Island from the land recommended for grant. It was then inquired into by Commissioner Olney in 2002 as a repeat claim, per s 50(2B) of the ALRA. Commissioner Olney performed his s 50(3) functions in regards to the two separate claims with little distinction between the land claim areas. It was therefore impracticable to request that stakeholders distinguish their detriment concerns according to the claim area in their updates of detriment issues to the Review. In discussing the detriment submissions, I have, where I can, distinguished detriment information related to the Land Claim No. 198 area, from that related to the Land Claim No. 71 area.
- 7.6.2. Date of Report
March 2002.
- 7.6.3. Area
- i. The land lying between the mean high water mark and the mean low water mark surrounding Maria Island in the Gulf of Carpentaria;

- ii. The land lying between the mean high water mark and the mean low water mark of the coast of the Northern Territory adjacent to NTP 1334 between the mouth of the Limmen Bight River and the mouth of the watercourse known as Wurlbulinji;
- iii. The bed and right bank of, and the islands in, the middle channel of the Limmen Bight River adjacent to the southern boundary of NTP 2099 above the mean low water mark and the two unnamed islands in the Limmen Bight River which are expressly excluded from NTP 2099 as shown on Compiled Plan 4524; and
- iv. The bed and banks of, and islands in, the Limmen Bight River between the junction of the Limmen Bight and Cox Rivers and the western boundary of NTP 2099 excluding any land which is part of NTP 2099 as shown on Compiled Plan 4524 and land which is part of NTP 3467 as shown on Survey Plan S 88/156.

7.6.4. Summary of comments and recommendations

- i. Recreational fishing occurs in the claim areas. There NLC proposes, on behalf of the claimants, the continued access to the claim area for recreational fishing pursuant to the permit management system discussed variously in this Report. The claimants stated that permits would be restricted around Maria Island, but provided no further information. Material was adduced by AFANT that suggested recreational fishing does occur around Maria Island. Recreational fishers would therefore suffer detriment if unable to access the Maria Island intertidal zone area. It is not apparent that such a restriction would materially be detrimental to recreational fishing in the claim area generally. Access and use of the other areas under claim is likely to be maintained by recreational fishers, by way of a permit. The claimants suggested a fee would be required. Recreational fishers may therefore suffer a minor detriment to the extent of the fees payable for a permit, but as discussed elsewhere that is an appropriate balance between the making of the grant and the interests of recreational fishers.
- ii. In relation to commercial fishing, on the slim evidence provided, the most that can be said is that in the absence of suitable agreements for commercial fisher access to the claim areas, particularly for mud crab fishing in the Limmen Bight River, commercial fishers may suffer detriment in the event of a grant of title. As elsewhere discussed, in the case of commercial fishers, the Minister may well consider that, having regard to the agreement processes contemplated by ss 11A and 19 of the ALRA, the appropriate step is to grant the land to the traditional owners and to enable those processes to be undertaken. Detriment

may be suffered to the extent of any costs incurred by commercial fishers under an agreement. Of course, should the traditional Aboriginal owners decide to enter into an access agreement similar to that discussed in Chapter 6, such an agreement may also alleviate possible detriment to commercial fishers.

- iii. NTIO has “interests” in the Land Claim No. 71 claim area. Whether these interests amount to detriment under the ALRA is questionable, considering that NTIO has not yet received the requisite environmental approvals to undertake their Roper Valley Iron Ore Project. In this sense, the potential harm suffered by NTIO may be too remote to take into account, at least in such a way as to impede the grant of the land. There is the additional difficulty confronting this detriment that, if it is to be used as a reason for not granting the land, that is almost to the point of giving third party commercial interests, whether actual or potential, priority over the traditional land owners. In any event, the claimants expressed a willingness to negotiate an agreement with NTIO for access and use of the claim area.
- iv. Britmar may suffer detriment if Land Claim No. 71 is granted and no agreement is reached between it and the traditional Aboriginal owners. However, there is a strong likelihood that an agreement would be reached, especially considering Britmar has negotiated a number of other agreements with the NLC and respective traditional owner groups in relation to its Nathan River Resources Project. Regard should be had to s 11A of the ALRA. Consequently the Minister might conclude that it is appropriate to make the grant, leaving it to Britmar and the traditional owners to agree on the terms of Britmar’s access to the claim area. Minor detriment may be suffered to the extent of any costs payable under agreement.
- v. No other mining or energy tenement holders are likely to suffer detriment.
- vi. Tourism in the claim area is not likely to experience any significant detriment provided that the recreational fishers are accommodated by the proposed permit management system.
- vii. In the event of a grant of title, it is likely that an agreement will be reached with the traditional Aboriginal owners for the continued operation of the Limmen Bight Fishing Camp. The material is positive about those prospects. This concern is, therefore, not of such significance as to preclude the grant of the land. Minor detriment may be suffered by guests, in respect of the permit fees proposed.

Land Claim Report

7.6.5. Land recommended

The areas recommended for grant in the Maria Island and Limmen Bight River Land Claim No. 71 and part of the Maria Island Region Land Claim No. 198 inquiry were:

- i. The land lying between the mean high water mark and the mean low water mark surrounding Maria Island in the Gulf of Carpentaria;
- ii. The land lying between the mean high water mark and the mean low water mark of the coast of the Northern Territory adjacent to NTP 1334 between the mouth of the Limmen Bight River and the mouth of the watercourse known as Wurlbulinji;
- iii. The bed and right bank of, and the islands in, the middle channel of the Limmen Bight River adjacent to the southern boundary of NTP 2099 above the mean low water mark and the two unnamed islands in the Limmen Bight River which are expressly excluded from NTP 2099 as shown on Compiled Plan 4524; and

7.6.6. The bed and banks of, and islands in, the Limmen Bight River between the junction of the Limmen Bight and Cox Rivers and the western boundary of NTP 2099 excluding any land which is part of NTP 2099 as shown on Compiled Plan 4524 and land which is part of NTP 3467 as shown on Survey Plan S 88/156.

Commissioner Olney held in his Land Claim Report that,

With the exception of the southern channel of the Limmen Bight River and a small portion of the bank of the river adjacent to NTP 3476, the whole of the land described in the Maria Island and Limmen Bight River Land Claim (Claim No 71) and the part of the intertidal zone adjacent to Nathan River pastoral lease (NTP 1334) the subject of the inquiry is unalienated Crown land which is available for claim²⁵⁹

7.6.7. Traditional ownership

Commissioner Olney's findings as to traditional ownership in the Maria Island and Limmen Bight River Land Claim were:

Each of the local descent groups identified in the genealogies and the claimant profile document has been shown to have common spiritual

²⁵⁹ *Maria Island and Limmen Bight River Land Claim and part of Maria Island Region Land Claim Report (No. 61)*, March 2002, Olney J, 114(a).

affiliations to a site or sites on the claim area which place the group under a primary spiritual responsibility for such site or sites and for the land and further that the several local descent groups are entitled by Aboriginal tradition to forage as of right over that land. The claimants have accordingly satisfied all of the elements of the definition of traditional Aboriginal owners in relation to the claim area.²⁶⁰

Commissioner Toohey's findings as to traditional ownership in the Report on the Limmen Bight Land Claim (Report No. 8) were:

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. The land claimed, as described below, is unalienated Crown land.
 - i. the mainland between the southern bank of the Roper River and the southern bank of the middle channel of the Limmen Bight River, more particularly described on p.2 of the claim book, Exhibit 1;
 - ii. the 6 islands in the middle channel of the Limmen Bight River, more particularly described on p.2 of the claim book, Exhibit 1;
 - iii. Maria Island (Kurrululiny);
 - iv. Beatrice Island (Yumunkuni);
 - v. Nawirriwirri sandpit.'
 - vi. Ngabulkunya sandbar;
 - vii. Munuli reef,
 - viii. Wurringmarringnagali reef.
- B. There are Aboriginals who together are the traditional owners of the land described in the preceding sub-paragraph, being the persons whose names appear below together with a reference to the estate of which they are the traditional owners.
- C. The traditional owners named in this paragraph are entitled by Aboriginal tradition to the use or occupation

²⁶⁰ Ibid [56].

of that land although that entitlement may be qualified as to place, time, circumstance, purpose or permission.

The Commissioner (at para 120 of the Report) recommended that there be a grant to a Land Trust of the claimed area as described in para 89 other than Maria Island.²⁶¹

7.6.8. Detriment at inquiry stage

Commissioner Olney reported that the claim areas were popular for recreational and commercial fishing. He held that if restrictions on access were to eventuate, then fishers might suffer detriment, including in respect of fishing pressure on other areas due to a relocation of fishing efforts to areas without restrictions. He also noted that restrictions would likely affect local tourism and individual business owners reliant on tourism such as Mr Steven Barret, the owner of the Limmen Bight Fishing Camp. However, Commissioner Olney also reported that it appeared unlikely that restrictions would eventuate following a grant of title, considering the accommodating attitude of the claimants. At the time of Commissioner Olney's inquiry, the Northern Territory Government's Limmen National Park was deemed an unlikely recipient of detriment, yet it was noted that the intertidal zone around Maria Island was an important wildlife habitat.

Updated Detriment

Recreational fishing

AFANT

7.6.9. AFANT submitted the following region-specific information in relation its detriment claims about a potential grant of title adversely affecting its members:

- According to the 2010 NT Recreational Fishing Survey, the East Coast/Gulf Area region where the claim area is located accounted for approximately 7% of all fishing effort by NT residents in 2009/10.
- The region also accounted for approximately 12% of all barramundi caught by NT residents.

7.6.10. AFANT submitted the following claim specific information in relation to its detriment claims about a potential grant of title to the Maria Island claim area adversely affecting its members:

²⁶¹ Ibid 58, quoting *Limmen Bight River Land Claim Report (No. 8)*, 30 December 1980, Toohey J, [81].

- AFANT's community survey indicated that people fish in Maria Island intertidal zone area and that the main access points used in order to do so are from the Limmen Bight River (Barrett) Fishing Camp and the Roper River (Port Roper) boat ramps.
- According to the community survey, a small number of people launched their boats at Towns River and Mule Creek (Bing Bong) ramps to access the Maria Island intertidal zone area.
- The survey indicated that recreational fishers regularly stay at the accommodation/camping facilities at Limmen Bight River (Barrett) Fishing Camp and Port Roper when recreational fishing in the Maria Island intertidal zone area.
- Boat camping in the Maria Island intertidal zone area is also a common activity for recreational fishers fishing the area.

7.6.11. AFANT submitted the following claim specific information in relation to its detriment claims about a potential grant of title to the Limmen Bight River claim area adversely affecting its members:

- AFANT's community survey indicated that people recreationally fish in the Limmen Bight River claim area.
- The main access point for which is also the Limmen Bight River (Barrett) Fishing Camp.
- Its community survey also indicated that a small number of people accessed the Limmen Bight River claim area by launching their boats at the Nathan River road crossing, as well as travelling in through the river mouth, from the sea, having launched at Port Roper.
- A small number of respondents also indicated that they camped on their boat when recreationally fishing the Land Claim No. 71 area.

7.6.12. AFANT submitted the following claim specific information in relation to its detriment claims about a potential grant of title to the Land Claim No. 198 area (Maria Island Region) adversely affecting its members:

- AFANT's community survey indicated that people recreationally fish in the Land Claim No. 198 area.
- Again, the main access point for which is also the Limmen Bight River (Barrett) Fishing Camp.

- Their community survey also indicated that a number of people accessed the Maria Island Region claim area by launching their boats at Port Roper.
- Other launching locations reported by fishers included the Towns River, Lorella Springs, Mule Creek and King Ash Bay.
- A small number of respondents also indicated that they camped on their boat when recreationally fishing the Land Claim No. 198 area.

Northern Territory

7.6.13. DPIR submitted that recreational fishers would be adversely affected in the event they can no longer fish the claim areas. Like AFANT, the 2010 NT Recreational Fishing Survey data was provided as evidence.

7.6.14. The Northern Territory also submitted that most visitors to the claim area for recreational fishing are interstate/international visitors.

NLC on behalf of the claimants

7.6.15. I have only included submissions that deal with detriment specific to the claim area.

7.6.16. NLC responded, stating that AFANT's submissions suggested that the claim area was not particularly important to the recreational fishing community.

7.6.17. On behalf of the claimants, the NLC submitted that,

With the exception of Maria Island the claimants do not wish to prevent recreational fishing provided fishers obtain a permit.²⁶²

7.6.18. The NLC submitted that in consultations the claimants expressed the same concerns as in other land claims about the protection of sacred sites and important cultural places, as well as respecting rules about not leaving fish remains on the land. The NLC stated that these concerns should be mitigated by the proposed permit management system, with their plans to attach rules to permits.

7.6.19. The claimants advised that they are interested in developing a regional permit, so that recreational fishers will not require a multiplicity of separate permits.

7.6.20. The claimants also advised that they would like to improve the capacity of rangers to protect the land and waters. It was suggested that permit fees might be one way to obtain funds for that purpose.

²⁶² NLC, Submissions – Group 3 in *Detriment Review*, 18 August 2018, [13].

Consideration

- 7.6.21. I accept that recreational fishing occurs in the claim areas. As in other instances, the proposed permit management system, once established, would appear to fairly resolve the detriment concerns expressed. The claimants did not provide any further information about why permits would be restricted to exclude Maria Island and material was adduced by AFANT that suggested recreational fishing does occur around Maria Island. Recreational fishers would therefore suffer detriment if not able to access the Maria Island claim area. So, I expect, provided the Minister is satisfied with the reason for that exclusion, that would be a minor detriment which should be accommodated. Access and use of the other areas under claim is likely to be maintained by recreational fishers, by way of the permit management system. It is not necessary to repeat the considerations which, in my view, should lead the Minister to accepting it. The claimants suggested a fee would be required. Detriment would therefore be suffered by recreational fishers to the extent of the fees payable for a permit, but that is a small matter (deferred for 3 years) in the scheme of securing recreational fishing rights and accommodating the traditional owners of the land. In addition, provided the fees do contribute to ranger programs in these areas, recreational fishers may experience benefits from the permit system, as money would be going into protecting the land and waters that are said to be important areas for recreational fishers. However, I note that the Northern Territory submitted that it is likely the administrative costs in maintaining a functional permit system will outweigh the proceeds arising from the system.²⁶³ That is really for the NLC and the traditional owners to manage.

Commercial fishing

Northern Territory

- 7.6.22. DPIR submitted that the key fisheries in the area include mud crab, barramundi and king threadfin.
- 7.6.23. Data submitted indicated that in 2016 the catch figures were 0 kg for barramundi and threadfin and 2151 kg for mud crab and in 2017, 5900 kg for barramundi, 67 kg for threadfin and 27166 kg for mud crab.

²⁶³ Northern Territory, Submissions in response to NLC – Group 3 in *Detriment Review*, 27 September 2018, [13].

7.6.24. DPIR also claimed that commercial fishing is an important driver of economic activity in the region and that commercial fishing, ‘directly underpins the livelihood of several of the commercial operators in the region’²⁶⁴.

NTSC

7.6.25. NTSC submitted that a number of its members use land claim areas for commercial fishing for barramundi, king threadfin, mud crabs and other species,

7.6.26. It said that the following commercial fishing licences can be used in the land claim areas:

- A1 Coastal Line Fishery licence
- A3 Bait Net licence
- A4 Spanish Mackerel Fishery licence
- A7 Barramundi Fishery Licence
- A8 Mud Crab Fishery licence
- A12 Aquarium Fishing/Displace Licence
- A13 Trepang Fishery Licence
- A15 Restricted Bait Net Licence

7.6.27. NTSC submitted that the land claim areas have good stocks of barramundi and king threadfin and that its members regularly take significant catches while fishing in the claim areas. NTSC claimed, that of its members who consistently fished in these systems over many years, the income derived from those operations represent the majority portion of their yearly revenue. No supporting material was adduced to substantiate these submissions.

7.6.28. In relation to the mud crab fishery, NTSC said that a voluntary three year closure was placed on commercial fishing in the Limmen Bight River, which ended on 31 December 2017. Before this closure it was said that a number of crabbers fished the area and now that crabbing has recommenced, it remains a critical fishing ground to the Mud Crab Fishery. No evidence was adduced to support these claims. Without any detailed information, it is hard to reconcile that commercial fishers placed a voluntary closure on the Limmen Bight River, yet at the same time submit that access to the Limmen Bight River is crucial to the Mud Crab Fishery.

²⁶⁴ Northern Territory, Submissions – Group 3 in *Detriment Review*, 4 June 2018, 3 (j).

- 7.6.29. NTSC submitted that there are at least three land based camps on the Limmen Bight River that support commercial mud crab operations, as well as operators with vessel based operations, who access the claim areas to harvest mud crab, but also to moor their boats in the sheltered parts of the claim areas during the day and night when they are not harvesting mud crab.
- 7.6.30. NTSC also repeated the concerns about the inability to access any commercial fishing area burdening the flexibility and in turn, viability, of commercial fishing operators. These concerns have been discussed in earlier chapters of this Report.

NLC on behalf of the claimants

- 7.6.31. The NLC submitted, on behalf of the claimants, that there are ongoing negotiations with commercial fishers and the NLC regarding fishing business opportunities in the region. It provided no details so the Review is not privy to these negotiations. Nor has any information been provided by the NTSC or the Northern Territory about such negotiations. I cannot therefore make any comment about these submissions from the claimants. There was no reply contradicting the NLC assertion about the negotiations.

Consideration

- 7.6.32. On the slim material available to me, and lack of reply to the claimants' response, the most that can be said is that if no agreements are made with commercial fishers, they will suffer detriment if they are not able to access the claim areas. This may particularly cause detriment to the mud crab fishery. However, as is generally the case with respect to commercial fishing operations, subject also to the Northern Territory legislative and regulatory management, the appropriate position would appear to be reflected in what is already taking place. That is, upon the grant of the land (or in anticipation of it) agreements can and probably will be made between the traditional owners and the commercial fishers for access to the fishing areas. That is the process contemplated by the ALRA. It is a process which, in other areas, seems to have taken place satisfactorily. It seems to strike a proper balance between the interests of the traditional Aboriginal owners, as their entitlement to the land is accepted and they have the benefit of the payments negotiated, and the commercial fishers.

Fisheries management and access negotiations

- 7.6.33. The Northern Territory, AFANT and NTSC provided submissions about fisheries management and negotiating access agreements and systems. I have addressed these general submissions in earlier Chapters and I will not repeat those comments here.

Minerals and energy

Northern Territory

- 7.6.34. The Energy Division of DPIR claimed that the areas subject to Land Claim No. 71 and part of Land Claim No. 198 is considered prospective for oil and gas. This is supported by evidence adduced from Imperial Oil and Gas Pty Ltd's (Imperial) exploration activities.²⁶⁵
- 7.6.35. The following permits also operate in or adjacent to the land claim areas:
- EP 184, granted 20 August 2013 and expires 20 August 2020²⁶⁶.
 - EP(A) 183, which is held by Imperial, was granted October 2010. The EP(A) sits on Aboriginal land held under the ALRA and also abuts the end of the coastal portion of Land Claim No. 198.²⁶⁷
 - EP(A) 183 abuts the end of the coastal portion of LC 198²⁶⁸
- 7.6.36. Current granted mineral tenures falling within the claim area for Land Claim No. 71 and part of 198 are:
- EL 30157 and 30158, granted on 9 June 2009 and expiring on 8 June 2019²⁶⁹
 - Mineral Authority (MA) 28133 and 28314, which currently exist to waters within and beyond the intertidal waters of the claim areas.
- 7.6.37. The above is information submitted by the Northern Territory about existing and prospective mining and exploration activity in and adjacent to the claim areas. I do not consider it significant detriment. DPIR claimed that the likely costs and uncertainty involved in agreement making is a detriment. Like former Commissioners, I disagree. Any time and expense, and possibly delay, by making use of the relevant provisions as to agreement making for tenement holders is a matter contemplated and intended by the ALRA. "Uncertainty" is not an acceptable detriment under s 50(3)(b), especially where the alternative is the withholding of the grant until all the actual and putative interests of third parties are accommodated to their satisfaction.

²⁶⁵ See Attachment 1 to *ibid*.

²⁶⁶ See Attachments 2 and 3 to *ibid*.

²⁶⁷ See Attachment 4 to *ibid*.

²⁶⁸ See Attachment 3 to *ibid*.

²⁶⁹ See Attachment 6 to *ibid*.

Britmar (Aust) Pty Ltd

- 7.6.38. Britmar-holds Access Authority 29691 for the Roper Bar Iron Ore Project (RBIOP). The licence extends from the boundary of Mineral Lease (ML) 28264 to the boundary of ML 29268 and crosses the Limmen Bight River.
- 7.6.39. Britmar submitted that a grant of title to the claim areas might adversely affect it's Nathan River Resources Project (NRRP). The NRRP is a new operation, taking the old RBIOP, which went into care and maintenance in 2015, into production. Approval was granted to restart the project in February 2018. The NRRP relies on use of a haul road within Access Authority 29691, which was constructed by Western Desert Resources Ltd (WDR) and includes a bridge over the Limmen Bight River, linking mining tenements. Britmar claimed that if they were unable to use the bridge, the NRRP may not be able to go ahead, as the bridge is critical to the financial viability of the project. Britmar submitted that the NRRP is planned to commence next dry season.
- 7.6.40. In their second submission to the Review, Britmar provided more detail about the NRRP. The following is a summary of the further information submitted:
- NRRP includes remediation of disturbance associated with prior activities at mine site and along the haul road
 - The first period of operations is planned to incorporate remedial earthworks, waste rock handling and the commencement of small scale mining operations
 - Approximately one million tonnes of Direct Shipping Ore is estimated to be mined during the plan period.
 - Currently there is approximately 180,000 metric tonnes (mt) of material which has been blasted and remains in the ground and an additional further 200,000 mt of stock on the ground, which will be the initial focus.
 - Once blasted, a hydraulic excavator and fleet of dump trucks will be used for extraction
 - Ore will then be transported to the Bing Bong Loading Facility, which will include travelling over the bridge over Limmen Bight River, within claim area.
 - Brimar has spent approximately \$20,000,000 on environmental bonds and acquiring the marine assets associated with transshipment of ore into the Gulf.
- 7.6.41. In addition to the potential detriment suffered by Britmar, it was also claimed that the environment might be adversely affected, as part of the NRRP involves downsizing

the original RBIOP, which currently poses an environmental risk. Britmar also claimed that the regional economy might suffer in the event of a grant of title, as planned future investment in the region may be jeopardised, as well as long-term economic opportunity. That latter submission, perhaps unintentionally, echoes others which put the actual or potential activities of third parties in their own commercial interests over the interests of the traditional owners. To express the submission that way is to demonstrate that it is not a view which is likely to attract the Minister.

- 7.6.42. Britmar also outlined that it is presently involved in three agreements with the NLC, on behalf of Native Title holders. This indicates that s 11A should be an option for Britmar regarding their concerns about the bridge over Limmen Bight River.

NTIO

- 7.6.43. NTIO's detriment interests relate to the Roper Valley Iron Ore Project. Their interests have been outlined in my comments about the detriment concerns submitted for Land Claim No. 70 and Land Claim No. 69. It is not necessary to repeat them in this section of Chapter 7.
- 7.6.44. The only claim-specific comments to add in relation to Land Claim No. 71 and part of 198, is to refer to the detriment claimed in relation to the potential for sea closure.²⁷⁰ As explained in Chapter 6, I do not accept this as a significant detriment consideration for the purposes of the ALRA.

NLC on behalf of the claimants

- 7.6.45. The NLC submitted that the MA 28133 and MA 28134 referred to in the Northern Territory submissions are applications in the name of Winchelsea Mining Pty Ltd. It noted that the applications were dated 6 June 2010 and that the Northern Territory provided no information as to why they have not been granted for 8 years.
- 7.6.46. The NLC adopted the claimants' submissions to the Review for the McArthur River Land Claim, which said that Britmar is currently in an agreement, as inherited by WDR Iron Ore Pty Ltd (the original holder of the tenements who went into liquidation), with the NLC and Wurrunburru Association Incorporated. The NLC claimed that this agreement was not mentioned in Britmar's detriment submissions, but it was evident in Britmar's detriment submission dated 6 March 2018, under the heading 'Intervening Factors'.
- 7.6.47. The NLC then submitted more information about the agreement, including that the traditional Aboriginal owners and site custodians were consulted before the

²⁷⁰ *Aboriginal Land Act* (NT) s 12.

construction of the haul road and bridge had occurred. The NLC therefore submitted that this, together with the current agreement between the parties and general condition 12 of the access authority should be interpreted as an assurance that,

There should be no difficulty reaching an agreement under the Land Rights Act should an agreement be considered desirable or necessary to protect Britmar's interests at some future time.²⁷¹

7.6.48. The NLC also advised that Wurrunburru Association Inc. (the Association) holds NTP 2432 under Crown Lease Perpetual 429. The Association is comprised of traditional Aboriginal owners of the land held by the Association. Having conducted recent consultations, the NLC is not of the view that the Association would suffer any detriment in the event the claim areas were granted to a land trust, rather, the Association would be advantaged by a grant.

7.6.49. To assist in discussing the detriment issues submitted by NTIO and the NLC in response, I note the submissions made by NLC which summarised NTIO's detriment interests,

The relevant part of the project described in the NTIO submissions is an intention to establish a loading facility on NT Portion 1184 located on the right (south) bank of the river near the mouth, which is held by NTIO under SPL 219, to load barges that will transport iron ore out to sea. A copy of SPL 219 is attached [Attachment 2] the survey plan for NT Portion 1184 is also attached [Attachment 2 – survey plan A.681 for NT Portion 1184].²⁷²

7.6.50. The NLC then outlined the history of engagement with the original developers and administrators of the three mineral leases currently held by NTIO (MLs 29070, 29071 and 29437) to try to demonstrate the frequency and thus likelihood of agreement making. It claimed that the three mineral leases were granted following an agreement under Part IV of the ALRA between the NLC and the then applicant, Sherwin Iron (NT) Pty Ltd, and that that agreement was itself pursuant to an agreement under Part IV of the ALRA consenting to the grant of EL 24102 within which the mineral leases are located. Furthermore, it was submitted that the three MLs are located on Aboriginal Land Trust land and that ML 29584 was granted following a native title agreement.

²⁷¹ NLC, Submissions – Group 3 in *Detriment Review*, 18 August 2018, [45].

²⁷² *Ibid* [29].

- 7.6.51. However, the NLC pointed out that the traditional Aboriginal owners of SPL 219, the area that NTIO is most concerned about, are different from those in the MLs.
- 7.6.52. Furthermore, the NLC stated that the information provided by NTIO was insufficient to enable the NLC to consult the traditional Aboriginal owners on what accommodations could be made for NTIO in the event of a grant of title. The NLC stated that, subject to NTIO receiving their environment approvals and subject to traditional Aboriginal owner consultations, the NLC believed that provided information is produced about the proposed Project, a s 11A agreement may be reached that would enable the Project to continue in the event the land claims are granted. The NLC submitted that they have been in contact with NTIO about the Project, but that no agreement has been proposed by NTIO.
- 7.6.53. Finally, I note that the NLC also submitted that it is unclear whether Limmen Bight Land Claim No. 5 has been “finally disposed of” with respect to the area of land between NTP 1194 and the low watermark of the river that adjoins the north-western boundary of NTP 1184.²⁷³ In their submissions in reply to the claimants, the Northern Territory submitted that they believe the grant to the Land Trust excluded the strip of land in question, so as to secure a means of access from SPL 219 over NTP 1184 to the river, such that this part of Land Claim No. 5 was disposed of. The NLC and the Northern Territory suggested that the Commonwealth might hold the relevant records. This matter should be investigated and clarified.

Consideration

- 7.6.54. The mere existence of Part IV in the ALRA, the possibility that there may be some exploration prospects in the area and that tenement holders may at some time in the future evince interest in it cannot amount to significant detriment.²⁷⁴ Compliance with the Part IV provisions is a feature of the legislation, not a detriment per s 50(3)(b). Moreover, as is sought to be explained, the prospective interests of third parties is not a matter which should impede the grant of the land to the traditional owners.
- 7.6.55. In relation to NLC’s questions about MA 28133 and MA 28134, I was informed that the delay in accepting the applications has been due to the seabed mining moratorium, which is in place until 2021. Consequently, that delay should not be of concern to the Minister.

²⁷³ Ibid [32] - [33].

²⁷⁴ See *Mount Barkly Land Claim Report (No. 22)*, 30 May 1985, Kearney J, [107].

- 7.6.56. Bearing in mind the nature of the legislative scheme of the ALRA, it is disappointing that NTIO and Britmar, having been asked to comment on the option of agreements and having been either involved in agreements with Native Title Holders or possessing knowledge that their tenement predecessors were involved in Part IV agreements pursuant to the ALRA, did not submit anything to indicate that they would be willing to enter into an agreement with traditional Aboriginal owners to use the land. Section 11A is a reasonable avenue for both Britmar and NTIO to undertake at present. Assuming agreements are reached, it is hard to see that either company will suffer any significant detriment. It is unlikely that any detriment will flow to the regional economy.

Parks and Wildlife

Northern Territory

- 7.6.57. The Northern Territory indicated that since Commissioner Olney's recommendations in 2002, the Limmen National Park (LNP) has been declared over part of St Vidgeon Station (NTP 819) and the whole of the (former) Nathan River Station (NTP 1334) and the (former) Billengarra Station (NTP 1434).
- 7.6.58. The crux of the Northern Territory's lengthy submission in relation to management of the LNP and Marine Park was as follows,

With appropriate arrangements negotiated between Traditional Owners and the DTC, DTC agrees that a grant of title to the claimed land would unlikely cause detriment to the ongoing management of LNP and the Marine Park.²⁷⁵

NLC on behalf of the claimants

- 7.6.59. The NLC submitted that any detriment claimed in relation to the LNP and Marine Park must be considered in light of the fact that the Northern Territory knew that the land claim to the ITZ had been recommended for grant prior to declaring both parks in 2012 and did not make any attempt to negotiate an agreement that address their detriment concerns.
- 7.6.60. The NLC also said that, in consultations with the claimants, the claimants talked about their involvement in developing management plans for the parks. It was also submitted that the claimants expressed concerns about recreational and commercial fishing in the intertidal zone surrounding Maria Island, as well as concerns regarding the protection of sacred sites, particularly turtle and dugong dreamings.

²⁷⁵ Northern Territory, Submissions – Group 3 in *Detriment Review*, 4 June 2018, 14, (j).

Consideration

- 7.6.61. I refer to my comments made at Chapter 5 in relation to detriment which is acquired with the knowledge of a recommendation to grant. In any event, the Northern Territory submitted in its submissions in reply to the claimants that it believes it is unlikely that a grant of title would cause any detriment in relation to the LNP and Marine Park. In that case, I consider there to be no detriment which, in this respect, should impede the grant of the land.
- 7.6.62. The Northern Territory also said in its submissions in reply to the claimants that there is a NT Marine Park Strategy aimed at facilitating joint management processes between the Northern Territory and traditional Aboriginal owners for the management of LNP and the Marine Park.

Tourism

Northern Territory

- 7.6.63. The Northern Territory submitted data showing that one FTO had a licence to operate in the claim areas in 2017 and 2 FTOs operated in the claim areas in 2016.²⁷⁶ It noted that the data for 2017 may be incomplete.
- 7.6.64. The DTC submitted detriment concerns in relation to public access to the claim areas being limited or restricted, as the areas are of high value from a tourism perspective, being utilised frequently by fishing and boating visitors, 4WDers, nature enthusiasts and those visiting the LNP. They claimed that in 2017, 17000 visitors were recorded; however no supporting material was adduced as to this data, including to which areas those visitors were recorded as visiting.

Limmen Bight Fishing Camp

- 7.6.65. The proprietor of Limmen Bight Fishing Camp, Mr Stephen Barrett, sent three emails to the Review in response to the invitation to participate in the Review of detriment issues for Land Claim No. 71 and part of Land Claim No. 198.
- 7.6.66. Mr Barrett was involved in Commissioner Olney's inquiry. Mr Barrett said that since then, he is no longer a commercial fisherman. Mr Barrett said also that he and his family still operate the Fishing Camp, Accommodation and Store.
- 7.6.67. Mr Barrett's third email stated that his block (NTP 3476) was surveyed and found to extend to the high water mark of the Limmen River. He submitted that he and his

²⁷⁶ Ibid 5 (q).

family require access to the low/high watermark, in order to manage agriculture, slipways and boat ramps.

- 7.6.68. Mr Barrett appears to have a very good relationship with the local Aboriginal groups in the area. He submitted that he supports a permit system being put in place, so as to manage the visiting recreational and commercial fishers who disrespect the land claim areas, but that he does not believe his guests should have to apply for permits to access the ITZ from his block.

NLC on behalf of the claimants

- 7.6.69. The claimants' proposal about the permit management system and including the potential regional permit option is relevant again. There is now no need to add what has already been said.
- 7.6.70. In response to Mr Barrett, the NLC agrees that his ownership of part of the bank of the river adjoining his land extends to the high water mark. The NLC acknowledged the good relationship between Mr Barrett and the claimants and therefore submitted that in the event of a grant of title there is a firm likelihood an agreement will be reached between him and the traditional Aboriginal owners if Mr Barrett wants to formalise his access arrangements. The claimants did however indicate that they would want Mr Barrett's guests to obtain permits to access the river. They suggested that the Barretts could themselves administer/issue permits for their guests (under delegation), subject to agreement on a permit fee.

Consideration

- 7.6.71. The proposal for an effective permit management system and/or access agreements means that the consequential tourism activities and its benefits will be adequately accommodated. In this instance, there concerns of the Northern Territory will not persist when the concerns about recreational fishers are addressed, as discussed above.
- 7.6.72. In the event of a grant of title, it is likely an agreement will be reached with the traditional Aboriginal owners for the continued operation of the Limmen Bight Fishing Camp. The only detriment I can foresee would be the payment incurred the Camp's guests in obtaining a permit. This detriment should be slight.

Roads and infrastructure

Northern Territory

- 7.6.73. DPIR indicated that there is an access road to Maria Lagoon Community that runs north of the Cox River and traverses through Limmen Bight Fishing Camp (NTP

3476)²⁷⁷, which the Northern Territory does not maintain. DPIR submitted that without formal survey, it is difficult to ascertain whether it traverses the Land Claim No. 71 claim area.

Consideration

- 7.6.74. In the absence of a survey, it is not possible meaningfully to comment on any potential detriment in regards to the use of the access road in the event of a grant of title. I note, though, that considering the close relationship between Mr Barrett and the claimants, if the road is found not to be a road over which the public has right of way, then an agreement between Mr Barrett and the claimants is highly likely.

Comments and recommendations

- 7.6.75. The various categories of detriment are addressed individually above, and the comments and recommendations are apparent at that part of the separate consideration of those categories.
- 7.6.76. The summary of comments and recommendations in the Introduction to this part of Chapter 7 provides a convenient location for the effect of those comments and recommendations.

7.7. Lorella Region Land Claim No. 199 and part of Maria Island Region Land Claim No. 198, Report No. 63, Group 3

- 7.7.1. **Note:** I adopt the same approach as with the consideration of the specific detriment concerns submitted in relation to the Maria Island and Limmen Bight River Land Claim No. 71 and part of Maria Island Region Land Claim No. 198. That is, to discuss the detriment concerns relevant to each land claim with little differentiation, unless it is desirable to do so because of particular elements of the claim.

Introduction

- 7.7.2. Date of Report
June 2002.
- 7.7.3. Area
- i) The land lying between the mean high water mark and the mean low water mark of the coast of the Northern Territory adjacent to NTPs 1333 and 2432

²⁷⁷ Attachment 11 to *ibid.*

- ii) The land lying between the top of the left bank and the top of the right bank of Bing Bong Creek upstream from the mouth of the creek to the point where the creek ceases to be adjacent to the boundaries of NTPs 2532 and 4319;
- iii) The land lying between the mean high water mark and the mean low water mark of the coast of the Northern Territory adjacent to NTP 1334 from the point where the watercourse known as Wurlbulinji crosses the coast (the coordinates of which are 598323 (easting) and 8315075 (northing) using GDA (zone 53)) to the boundary between NTP 1334 and NTP 1333; and
- iv) The land lying between the top of the left bank and the top of the right bank of the Cox River upstream from the junction of the Cox and Limmen Bight Rivers to the point where the Cox River meets the boundary between NTP 819 and NTP 1334.

7.7.4. Summary of comments and recommendations

- i. Due to the amount of crossover between submissions made in relation to these land claim areas and submissions made in regards to the Maria Island and Limmen Bight River Land Claim No. 71 and part of Maria Island Land Claim No. 198, this section should be read together with the preceding section.
- ii. Lorella Station as a pastoral activity has not complained of detriment, but it is assumed that it has the same concerns as other pastoralists about access to and use of the adjacent waters in the unalienated Crown land. To that extent, any detriment it might experience by a grant of the land will be abated by the proposed licence which the NLC has referred to in its submissions. There is no reason why that licence would not be granted.
- iii. As to the tourist activities undertaken on Lorella Station and using the adjoining unalienated Crown land, there is a reasonable basis for treating that activity, as a profit-making business, as unauthorised on the pastoral lease itself and on the adjacent claim area. In that event, its detriment claims on the basis of its tourist activities should not be taken into account, and again the grant might promptly be made. However, the claimants recognise the expenditure on the tourist venture of the pastoralists, and have indicated a preparedness to accommodate those activities on their land, if granted, by an appropriate agreement to be negotiated. That is a fair and realistic step on the part of the traditional owners. Consequently, in any event, the Minister might make the grant promptly. It

would be unfair to the traditional owners to require them to enter into such an agreement before a grant was made, because that would give to the pastoralists an unfair leverage – no agreement, no grant – when there is presently no entitlement of the pastoralist, at the least, to use the unalienated Crown land of the traditional owners for commercial profit making activities.

- iv. The number of recreational and commercial fishers accessing the claim areas are relatively small. In the absence of an effective permit system or access agreements, some detriment may be suffered. In this instance, in addition to the small recreational fishing numbers, there are apparently other accessible fishing areas nearby, so the Minister may decide to make the grant in any event. Otherwise, any detriment to them will be appropriately allowed for by the proposed permit management system. The interest of the small number of commercial fishers can properly be accommodated by allowing for the agreement processes under the ALRA to be undertaken following a grant of the land.
- v. No detriment should be suffered by any mineral or energy tenement holders.
- vi. This is one claim group which might be the subject of a grant in the proximate future, for the reasons given, without the putting in place of the permit management system, but the Minister may prefer to await that event.

Land Claim Report

7.7.5. Land recommended

The areas recommended for grant to the persons found to be traditional Aboriginal owners by Commissioner Olney following his inquiry into Land Claim No. 199 and part of Land Claim No. 198 were:

- i. The land lying between the mean high water mark and the mean low water mark of the coast of the Northern Territory adjacent to NTPs 1333 and 2432
- ii. The land lying between the top of the left bank and the top of the right bank of Bing Bong Creek upstream from the mouth of the creek to the point where the creek ceases to be adjacent to the boundaries of NTPs 2532 and 4319;
- iii. The land lying between the mean high water mark and the mean low water mark of the coast of the Northern Territory adjacent to NTP 1334 from the point where the watercourse known as Wurlbulinji crosses the coast (the coordinates

of which are 598323 (easting) and 8315075 (northing) using GDA (zone 53)) to the boundary between NTP 1334 and NTP 1333; and

- iv. The land lying between the top of the left bank and the top of the right bank of the Cox River upstream from the junction of the Cox and Limmen Bight Rivers to the point where the Cox River meets the boundary between NTP 819 and NTP 1334.

7.7.6. Traditional ownership

In regards to traditional ownership, Commissioner Olney held that,

Each of the claimant groups satisfies the description of a local descent group for the purpose of the Land Rights Act definition of traditional Aboriginal owners. Each group consists of Aboriginals whose membership of the group is based upon well established and recognised principles of descent.²⁷⁸

7.7.7. Detriment at inquiry stage

Commissioner Olney reported that it was unlikely any adjoining landowner would suffer detriment in the event of a grant of title. He advised that if as a result of a grant of title restrictions were placed upon activities on waters overlaying the claim area, then recreational and commercial fishers may suffer detriment but that detriment would be slight due to the remoteness of the claim area. Commissioner Olney also noted that it was likely suitable accommodation could be reached between the traditional Aboriginal owners and the relevant fishing interests. Notwithstanding the Northern Territory's submissions on detriment, Commissioner Olney concluded that a grant of title was unlikely to affect the establishment or operation of the Limmen National Park.

Updated detriment

Pastoral

Northern Territory

- 7.7.8. DENR provided brief information about the adjacent pastoral properties, Lorella and McArthur River Stations. It advised that Lorella Station (NTP 1333, Pastoral Lease (PL) 757) is held by Maximus and Landmark Developments Pty Ltd and that the lessees are currently in the process of formalising a non-pastoral use arrangement through the non-pastoral use provisions of the *Pastoral Land Act*. That has not yet

²⁷⁸ *Lorella Region Land Claim and part of Maria Island Region Land Claim Report (No. 63)*, June 2002, Olney J, [51].

been approved. It will only proceed now in the knowledge of the potential for a grant of the land under the ALRA.

- 7.7.9. It advised that McArthur River Station (NTP 1333, PPL 1051) is held by Mount Isa Mines Ltd (MIM).
- 7.7.10. DENR submitted that the lessees would suffer detriment in the event of a grant of title if they could not exercise the same rights as they presently have under the *Water Act* and *Pastoral Land Act*. They also submitted that a grant of title would likely affect the existing and future proposed patterns of land usage. Again, there is no real evidence of any concluded plan for future land usage. This is another of the claims which might be taken to assert in part that the “interests” or plans of any commercial third party in the claim area should be prioritised at the expense of the traditional owners. It only needs that statement to demonstrate that it is contrary to the intent of the ALRA and not a position that the Minister is likely to espouse.

Maximus No. 82 Pty Ltd

- 7.7.11. Mr Rhett Walker is the director of Maximus No. 82 Pty Ltd (Maximus), one of the owners of the Lorella Pastoral Lease. In his statement, Mr Walker submitted that he has been the director of Maximus since 1987, when Maximus first took an ownership interest in Lorella Station (Lorella). I note that he did not participate in Commissioner Olney’s land claim inquiry in 2002.
- 7.7.12. Mr Walker is also the director of Lorella Springs Wilderness Pty Ltd, which owns the Lorella Springs Wilderness Park.
- 7.7.13. It is clear from Mr Walker’s detriment statements that the bulk of Maximus’ income is derived from tourism operations on the Lorella Pastoral Lease, not pastoral operations. The tourist operations were said to start in approximately 1988, yet the park itself was not incorporated until 2016.
- 7.7.14. It does not appear that Maximus presently has or ever had a non-pastoral use permit, as required by the *Pastoral Land Act*, though it submitted that the Northern Territory has been supporting its tourism operations since 1991.
- 7.7.15. Mr Walker estimated that he and his family have invested over \$4,000,000 in Lorella’s tourism operations, including recreational activity infrastructure. He submitted that his operations have expanded annually, providing that in 2017 Maximus re-invested \$500,000 of their revenue into tourism development and \$150,000 into developing cattle operations.

- 7.7.16. Mr Walker's detriment concerns regarding a grant of title to the traditional Aboriginal owners can be summarised as follows:
- Fences may be required to keep Maximus' cattle within the lease, as they sometimes graze along the intertidal zone. Fences along the coast would adversely affect Maximus' guests' tourist experiences.
 - Lorella's guests access the intertidal zone to hike, wade and go crabbing. Sometimes the scenic helicopter lands on the intertidal zone. In the event of a grant of title, access to the intertidal zone may be restricted and guest numbers will fall.
 - Future plans of Maximus' may be affected, including a coastal fishing lodge at the mouth of Wuraliqunty Creek which may include an airstrip, coastal quad tours, fishing expeditions, aquaculture, remote camping and prawn and fish farms.
 - Staff will be adversely affected if visitor numbers decrease, as Maximus will in turn have to reduce their staff numbers. The staff and their families' lifestyles will be affected too, as many chose to work at Lorella for the recreational fishing and camping opportunities.
- 7.7.17. Mr Walker submitted the following data to support his claims:
- 12,000 visitors stay annually (about 30,000 bed nights). The number has been increasing over the last several years, so much so that Lorella has bookings extending to 2020.
 - 80% of Lorella's guests would make use of the intertidal zone.
 - There are up to 40 staff members on Lorella at the peak of the dry season
 - There is an approximate 25km border between Lorella and the land claim area, where fences may be required to be constructed.
- 7.7.18. Attached to Maximus' intention to participate was a letter from Tourism Top End and Four Wheel Drive Australia expressing concerns about the detriment 4WDers may suffer in the event of a grant of title to the claim area and the detriment that may flow onto the tourism industry as a whole. The correspondence lacked particulars. Notwithstanding requests for more information, no response was received from either interest. Accordingly, a sufficient factual basis to warrant any assessment of substantial detriment is lacking.

NLC on behalf of the claimants

- 7.7.19. The NLC indicated that the claimants acknowledged that Maximus has invested a considerable amount of capital and time in developing its tourist enterprise. The claimants therefore agreed that in the event of a grant of title, they would propose that a licence is negotiated with Lorella, which enables it to continue conducting its tourism operations in the intertidal zone, subject to agreement on a licence fee.
- 7.7.20. The licence would be proposed on terms similar to that provided in earlier submissions by the NLC, and discussed earlier in this Chapter in relation to the Lower Daly River Land Claim No. 68. The difference would be that a fee would be required, reflecting the primary use of the area for tourist activities.
- 7.7.21. The NLC submitted that on Lorella Springs' website, Maximus already appears to charge a 'permit' fee to access the station itself, and camping fees for areas such as the banks of Rosie Creek.²⁷⁹ The NLC submitted that charging such a fee is at odds with s 79 of the *Pastoral Land Act*, which provides 'that a person without permission of the lessee has a right to be on perennial natural waters within or bounded by a pastoral lease (including the sea) and to camp temporarily on land within the prescribed distance (50 metres) of the waters.'²⁸⁰ There was no response from Maximus to justify its fees nor a response from the Northern Territory on this issue.
- 7.7.22. The NLC also responded that, in regards to Lorella's aquaculture plans, such cannot be considered detriment in the event of a grant of title because,
- ...the proponent would in any event be required to obtain a form of tenure (and environmental approvals) from government, which may or may not be forthcoming.²⁸¹
- 7.7.23. The NLC also submitted that Lorella's detriment concerns must be considered in context, stating that there are other substantial areas of water within the confines of Lorella or adjoin it that will remain available for guests to fish, including Rosie Creek, Wuraliwuntya Creek and a number of other tidal creeks, rivers and billabongs. Their detriment submissions should be considered as not significant, in light of this alternative.

²⁷⁹ See Attachment 1 to NLC, Submissions – Group 3 in *Detriment Review*, 18 August 2018.

²⁸⁰ NLC, Submissions – Group 3 in *Detriment Review*, 18 August 2018, [17].

²⁸¹ *Ibid* [18].

Consideration

- 7.7.24. Lorella do not have a non-pastoral permit for the extensive tourist operations that they conduct on the intertidal zone. The Northern Territory does not contest that state of affairs. I refer to the comments made in Chapter 5 about detriment interests that lack a legal basis. Nevertheless, the claimants have shown a preparedness to accept that the tourist activities might continue, and proposed a licence for the proprietors of Lorella in relation to their use of the claim area for both pastoral and tourism activities. One step the Minister might take, therefore, would be to make the grant on the basis that there is no lawful tourist activity being performed, and so the detriment depends on the Minister taking into account the unauthorised activity on the pastoral lease together with the extensive unauthorised use of the unalienated Crown land for profit making. That detriment should not, for obvious reasons, override the grant of the land to the traditional owners.
- 7.7.25. Alternatively, the Minister might, at the invitation of the traditional owners, accept that it is appropriate to assume that the tourist activities will become authorised, and should be considered in deciding whether to make a grant. On that basis, in any event, it would be appropriate to make the grant either because there will have been an agreement between the NLC on behalf of the traditional owners under s 11A or the good prospect of an agreement under s 19 of the ALRA after the grant to enable Maximus to continue its activities but on the basis of paying the traditional owners an amount for that access and use of their land. It would be quite inappropriate to allow Maximus to continue to use and make profits from the claim area without any benefit to the traditional owners. As the prospects of agreement are clear, the Minister might take the view that it is fairer to the traditional owners to negotiate their agreement after the grant (unless they choose to so do before the grant) to remove any undue leverage that Maximus might otherwise have.
- 7.7.26. In regards to Lorella's plans for future use of the claim area, no evidence was submitted that any steps have been made to implement the plans. Some of the ideas for future use submitted also appear to be outside the claim area. Further, several of the plans submitted are also rather extensive, like building an airstrip and developing prawn and fish farms. These would likely require a multitude of applications and approvals. I do not consider such tentative detriment concerns to be significant detriment so as to preclude the grant of the land. They are the classic future activities which, if authorised by the Northern territory, would be the subject of agreement between the traditional owners and Maximus.

Recreational fishing

AFANT

- 7.7.27. The claim-specific data is included in this discussion. For comments about recreational fishing detriment common to all 12 beds and banks and intertidal zone claims, it is preferable to refer to earlier discussions.
- 7.7.28. DPIR adopted the comments that were made in relation to the Maria Island and Limmen Bight River Land Claim No. 71. I have addressed that in Section 6 of this Chapter. The same applies to the submissions of AFANT.
- 7.7.29. In respect of the Lorella Region intertidal zone section, AFANT's community survey indicated that recreational fishers did access and use the area. The intertidal zone is usually accessed via the Lorella Springs property and the Mule Creek boat ramp.
- 7.7.30. AFANT submitted that recreational fishers also fished in the Bing Bong Creek section of the Lorella Region land claim area. This was usually accessed by the Mule Creek boat ramp. It was submitted that Lorella Springs Station and the King Ash Bay Fishing Club ramp were also frequented access points.
- 7.7.31. AFANT stated that their survey indicated that most people reported staying at Lorella Springs Station when fishing the claim area and others reported that they camped on their boats or stayed at the King Ash Bay Fishing Club or in Borroloola.
- 7.7.32. AFANT also submitted detriment concerns on behalf of its members in relation to recreational fishers accessing waters from pastoral/private land. It submitted that a number of these private properties require access fees and if in the event of a grant title, access arrangements are required, the costs of access to the waters may also increase for recreational fishers. This reasoning could be applied in relation to Lorella Springs/Lorella Station, discussed above. To state that recreational fishers should pay a fee to pastoralists to access fishing areas on the pastoral properties, but should not have to pay a fee to the traditional owners of the fishing areas themselves is obviously not an attractive one.

NLC on behalf of the claimants

- 7.7.33. NLC responded to AFANT's detriment concerns in relation to accessing waters from pastoral/private land by pointing out the irony. NLC referred to the access fee paid at Lorella Springs as an example, and asserted that,

If AFANT was consistent it would be as critical of pastoral lessees levying fees for access to and camping in areas covered by s 79, or imposing access restrictions to the same areas, as it is of the possibility of permits being

required to access areas that could become Aboriginal land as a result of these land claims.²⁸²

Consideration

- 7.7.34. Apart from the comment in the preceding paragraphs, any detriment to recreational fishers if the land claim areas become Aboriginal land would be minimised by the permit management system proposed by the NLC. In this instance, on the material available, it appears that the number of recreational fishers accessing these areas are relatively small in any event, and there are options for recreational fishing in the general area not impinging on the claim area. The Minister in any event in this particular set of circumstances might take the view that it is appropriate to make the grant notwithstanding the concerns expressed on behalf of recreational fishers.

Commercial fishing

- 7.7.35. DPIR again adopted its submissions in respect of the Maria Island and Limmen Bight River Land Claim No. 71 and part of Maria Island Land Claim No. 198.
- 7.7.36. NTSC's submissions expressed the same general concerns as submissions already discussed in this Review, as well as the same regional specific concerns as discussed in the Review for Maria Island and Limmen Bight River Land Claim No. 71 and part of Maria Island Land Claim No. 198.
- 7.7.37. It submitted that access to Rosie Creek was vital to maintaining commercial fishing flexibility. Although Rosie Creek is not part of the claim area per se, the mouth or a portion of the mouth appears to be included. Barramundi and Mud Crab fishing is said to occur in the mouth and it is obviously also accessed when navigating boats through to Rosie Creek from the sea.
- 7.7.38. The claimants' submissions were the same as those in relation to the Maria Island and Limmen Bight River Land Claim No. 71 and part of Maria Island Land Claim No. 198. Please refer to that part of this Chapter.
- 7.7.39. The available information about these particular land claims is sparse. There is no reason to depart from the general position reached in relation to commercial fishing, namely that a grant of the land should be made, and the relevant interests should follow the process of agreement making to secure access for commercial fishing purposes as contemplated by the ALRA.

²⁸² Ibid [25].

Tourism

- 7.7.40. DTC's submissions in respect of the land claim areas essentially repeated their submissions about the Maria Island and Limmen Bight River Land Claim No. 71 and part of Maria Island Land Claim No. 198. No information particular to the relevant land claim areas was received. The same can be said in relation to the submissions on behalf of the claimants.

Consideration

- 7.7.41. The asserted tourism detriment is relative to the extent of recreational fishing. It should be dealt with either on the basis that recreational fishing in these areas is not so great as to warrant the withholding of the grant in any event, or alternatively will not suffer material detriment if the proposed permit management system is put into place. In either event, the tourism interests follow those of the recreational fishers, who in essence make up the bulk of the tourist activities

Minerals and energy

- 7.7.42. DPIR repeat their comments submitted in relation the Maria Island and Limmen Bight River Land Claim No. 71 and part of Maria Island Land Claim No. 198.
- 7.7.43. They also advised that EP 161 was granted on 21 May 2012 and is currently held by Santos QNT Pty Ltd (76%) and Tamboran Resources Ltd (25%). The permit abuts a small area at the end of the inland portion of Land Claim No. 198²⁸³. It is to expire on 20 December 2018.
- 7.7.44. EP 184, which was mentioned in the discussion regarding the Maria Island and Limmen Bight River Land Claim No. 71 and part of Maria Island Land Claim No. 198, was also said to cover half of Land Claim No. 199.²⁸⁴

Consideration

- 7.7.45. I refer to my comments at the preceding part of this Chapter (Chapter 7.5), that the processes under Part IV of the ALRA make adequate provisions for such interests, so they should not impede the grant of the land.

Comments and recommendations

- 7.7.46. This is one claim where the Minister might decide upon a grant promptly. Alternatively, having regard to the summary of comments and recommendations in

²⁸³ See Attachment 10 and 3 to Northern Territory, Submissions – Group 3 in *Detriment Review*, 4 June 2018.

²⁸⁴ See Attachment 3 to *ibid*.

the Introduction to this section, the Minister may comfortably in due course to make such a grant.

7.8. McArthur River Region Land Claim No. 184 and part of Manangoora Region Land Claim No. 185, Report No. 62, Group 1

Introduction

- 7.8.1. For similar reasons to those discussed in relation to the Maria Island and Limmen Bight River Land Claim No. 71 and part of Maria Island Region Land Claim No. 198 (see Ch. 7.5.), the detriment concerns submitted in respect of McArthur River Region Land Claim No. 184 will be discussed with the detriment concerns submitted in respect of part of the Manangoora Region Land Claim No. 185
- 7.8.2. Date of Report
15 March 2002
- 7.8.3. Area
- i. Intertidal Zone in the Bing Bong Creek region
All that land in the Northern Territory of Australia between the high water mark and the low water mark from the northern-most point of the western boundary of NTP 4319, otherwise known as McArthur River Pastoral Lease to where the eastern bank of the McArthur River meets the seacoast.
 - ii. Beds and Banks of the McArthur River
All that land in the Northern Territory of Australia being the beds and banks of the McArthur River from the mouth of the said river to where the said river meets the northern-most point of the eastern boundary of NTP 2087, otherwise known as Narwinbi Aboriginal Land.
 - iii. Intertidal Zone in the Manangoora region
All that land in the Northern Territory of Australia between the high water mark and the low water mark commencing where the eastern bank of the McArthur River meets the seacoast to where the eastern bank of the Robinson River meets the seacoast.
- 7.8.4. Summary of comments and recommendations
- i. The claim areas, especially the McArthur River claim areas, are of high value to recreational fishers. In the absence of the permit management system or an agreement, significant detriment would flow to recreational fishers if the claims are granted. These adverse effects would also be felt by the local economy in

Borrooloola and around King Ash Bay. In relation to commercial fishers, the proper balance is to recognise the agreement making powers and processes allowed for in the ALRA, and to make the land grants despite the concerns expressed. That does not impede the general powers of the Northern Territory to regulate or control fishing management in the Northern Territory in the public interest, but that would not extend to preventing the traditional owners from having such fishing entitlements as are permitted in the areas and to agree to permit others to have the direct benefits of exercising those fishing rights by agreement.

- ii. In relation to the concerns of the KABFC and its members, and the service providers in King Ash Bay, and the concerns of the Northern Territory about tourist activities, the first step is to recognise that those concerns are largely derivative from the recreational fishing industry being permitted to continue. The above recommendation will secure that. It is not likely that the tourist numbers will therefore materially diminish as a result of granting the land.
- iii. The KABFC, on behalf of its members, has expressed concern about its financial viability if the land grants are made because of the level of its and its members' investment expenditure in King Ash Bay and its environs, unless it is given free and unrestricted use of the claimed land at the expense of the traditional owners. The opportunity to make out that claim was not taken up. It is an ambit claim with many assumptions, presumably including a significant drop in fishing numbers. Its claim is not a reason not to make the grants. First, the claim is not made out. Second, the claim arises from investments made in the face of the initial Land Claim Report, and with knowledge of the potential land grants. I have explained in detail in Chapter 5 why that is the case.
- iv. The submissions of Glencore asserted that there is no part of the claim areas which impinges on the BBLF area. The review of the supporting material tends to confirm the accuracy of that submission. That was the clear understanding of the developer at the time of the port development. Even if the survey for the grant of the claim areas exposes some slight overlap, my recommendation in the circumstances is that the area of any overlap be excised from the land to be granted.
- v. The interests of the pastoral leaseholders in their normal pastoral activities should be accommodated, despite little interest being expressed by each of them to the Review. If no such accommodation was made in the event of a grant of

title, then adjacent pastoralists would suffer significant detriment. However, I am of the opinion that the proposal by NLC to develop a pastoral licence, which reflects current pastoral usage, should sufficiently address the detriment concerns of adjacent pastoralists.

- vi. The King Ash Bay boat ramp, to the extent that after survey it falls within any part of the claimed areas, should be excluded from any land grant.

Land Claim Report

7.8.5. Land recommended

The two areas recommended for grant as those found to have traditional Aboriginal owners by Commissioner Olney following his inquiry into Land Claim No. 184 were:

- i. Intertidal Zone in the Bing Bong Creek region

All that land in the Northern Territory of Australia between the high water mark and the low water mark from the northern-most point of the western boundary of NTP 4319, otherwise known as McArthur River Pastoral Lease to where the eastern bank of the McArthur River meets the seacoast.

- ii. Beds and Banks of the McArthur River

All that land in the Northern Territory of Australia being the beds and banks of the McArthur River from the mouth of the said river to where the said river meets the northern-most point of the eastern boundary of NTP 2087, otherwise known as Narwinbi Aboriginal Land Trust.

7.8.6. The land claim area recommended for grant following Commissioner Olney's inquiry into Land Claim No. 185 was:

- iii. Intertidal Zone in the Manangoora region

All that land in the Northern Territory of Australia between the high water mark and the low water mark commencing where the eastern bank of the McArthur River meets the seacoast to where the eastern bank of the Robinson River meets the seacoast.

7.8.7. On the status of the land claimed, Commissioner Olney held that:

In summary, the whole of the claim area other than the part of area (i) in the McArthur River claim which is the subject of PPL 1051 is unalienated Crown

land within the meaning of the Land Rights Act and may be the subject of a traditional land claim application pursuant to s 50(1)(a).²⁸⁵

7.8.8. Traditional ownership

In respect of traditional ownership, Commissioner Olney concluded the following,

I am satisfied that each of the 8 claimant groups advanced in this inquiry as being traditional Aboriginal owners of one or more portions of the claim area is a local descent group of Aboriginals having common spiritual affiliations to a site on a portion of the claim area, being affiliations that place the group under a primary spiritual responsibility for that site, and for the relevant land, and are entitled by Aboriginal tradition to forage as of right over that land.²⁸⁶

7.8.9. Detriment at inquiry stage

Commissioner Olney's inquiry into Land Claim No. 184 and part of Land Claim No. 185 was the first inquiry into claims made to parts of the intertidal zone and to the beds and banks of a river, where in each case no other adjacent land either is claimed or the adjacent land is already Aboriginal land under the ALRA. In the Land Claim Report Commissioner Olney commented on the uncertainty regarding the legal rights of persons seeking to exercise the common law right to fish in waters overlaying Aboriginal land. The High Court has of course now ruled on this in BMB case

The central detriment concerns reported on at the inquiry stage related to the access and use of the river for recreational fishers, commercial fishers, the adjacent pastoral station lessee, the Northern Territory Parks and Wildlife Commission, and mineral tenement holders.

Commissioner Olney reported that the McArthur River was a popular destination for fishing. Commissioner Olney believed that if reasonable arrangements to allow fishers to access the claim area were not made, then recreational and commercial fishers would suffer significant detriment. This also extended to owners of businesses reliant on fishing tourism, such as the KABFC who held adjacent NTPs 3898 and 3899. Commissioner Olney commented that the extent of detriment to fishers and tourism reliant on fishing was dependent on whether the boat ramp at King Ash Bay was included in the grant.

²⁸⁵ *McArthur River Region Land Claim and part of Manangoora Region Land Claim Report* (No. 62), 15 March 2002, Olney J, 12, [32].

²⁸⁶ *Ibid* 33, [71].

In respect of adjoining pastoralists, Commissioner Olney found that they would suffer detriment if traditional Aboriginal owners denied them access to the claim area for pastoral and recreational purposes. Mining licence holders and any other potential users of the port facility at Bing Bong were predicted to suffer detriment if a grant of title included any part of land which the port facility was constructed. Commissioner Olney also commented that the Parks and Wildlife Commission of the Northern Territory's effective management of the coastal ecosystem may be adversely affected by a grant of title.

Updated detriment

Recreational fishing

Northern Territory

- 7.8.10. DPIR submitted that the McArthur River is a high value recreational fishing area. Evidence in support of this value is provided from the Survey of Recreational Fishing in the NT 2009-10, which indicated that more than 90% of fishing effort is attributed to interstate or overseas based visitors. This is in contrast to the average 40% in other parts of the Northern Territory. The survey estimated that there was total of 36,816 days fished in the lower McArthur area during April to November 2009.

AFANT

- 7.8.11. AFANT submitted the following by way of regional specific information:
- The East Coast / Gulf Area region accounted for approximately 7% of all fishing effort by Northern Territory Residents in 2009/10.
 - Northern Territory data indicated that fisher visitation to the McArthur River increased two and a half times from 2000/2001 to 2009/2010.
- 7.8.12. AFANT submitted the following in relation to Land Claim No. 184 area specific information:
- The community survey indicated that a significant portion of its respondents fished in the McArthur River section of the claim area
 - The community survey indicated that the KABFC boat ramp is the primary access point and the KABFC the main accommodation facility utilised by recreational fishers when fishing the area.

- The land claim area is an ‘iconic and special fishing location for recreational fishers.’²⁸⁷

- 7.8.13. AFANT claimed this was supported by their community survey which indicated the vast majority of respondents believed their enjoyment of fishing in the Northern Territory as a whole would suffer if they could not go fishing in the McArthur River claim area and that the fishing experiences in the claim area cannot be replaced by another location.
- 7.8.14. AFANT therefore submitted that if the area becomes Aboriginal land and the claimants restrict or limit recreational fishing access, then significant detriment would be suffered by the local and visiting recreational fishing community. Detriment would also be suffered in the form of social impacts and loss of amenity, considering the special importance of the claim area to many recreational fishers.
- 7.8.15. AFANT submitted the following by way of information specific to the Land Claim No. 185 intertidal section (coastline):
- Their community survey indicated that a significant portion of its respondents fished in the intertidal zone of the claim area, from the McArthur River mouth, north to Bing Bong.
 - The KABFC Boat Ramp and Mule Creek Boat ramp are used as primary access points
 - A significant number of respondents to the survey also indicated that they accessed the intertidal zone area via Manangoora Station and some via Greenback and Seven Emu stations.
- 7.8.16. AFANT submitted the following by way of information specific to the Manangoora Region Land Claim No. 185:
- Their community survey indicated that a significant portion of its respondents fished in the intertidal zone of the claim area, from the mouth of the McArthur River, south to the mouth of the Robinson River.
 - The KABFC boat ramp again is used as the primary access point.
 - A number of respondents to the survey also indicated that they accessed the intertidal zone area via Manangoora Station and some via Greenback and Seven Emu stations.

²⁸⁷ AFANT, Submissions – Group 1 in *Detriment Review*, 16 March 2018, [25].

- The KABFC is the main accommodation facility utilised by recreational fishers when fishing the area, secondary is Manangoora Station .
- A number of respondents also indicated that they camp on their boat when accessing the claim areas.

NLC on behalf of the claimants

7.8.17. The claimants' submissions did not comment on any of the area-specific information submitted. The submissions that they did make in respect of recreational fishing were general, common to all 12 beds and banks and/or intertidal zone claims to varying degrees. The primary relevant submission is the amelioration of this detriment by the proposed permit management system, as discussed in previous chapters of this Report.

Consideration

7.8.18. Commissioner Olney's comments regarding the exclusion of boat ramps mitigating detriment no longer hold the same relevance following the High Court's BMB case.

7.8.19. The claim areas, especially the McArthur River claim areas, are of high value to recreational fishers. If access is prohibited or restricted, then recreational fishers would suffer detriment. The proposed permit management system would likely satisfactorily alleviate this detriment, so that the grant of the land can be made. If permits require a fee after a time, the detriment that will be suffered by recreational fishers to the extent of the fee payable is an acceptable burden having regard to the primary purpose of the ALRA. Permits are proposed to be flexible. The permit fees, after a moratorium period, are intended to be realistic and reasonable. The reference point might be the fees paid to some pastoralists for access across the pastoral lease to the particular fishing location desired. The process of getting a permit is to be online and straightforward. However, on this point, it is notable that AFANT submitted that a number of recreational fishers access the claim areas via pastoral stations, who charge an access fee (i.e. Seven Emu, Manangoora). There is no legal justification such a charge for access: cf, s 79 of the *Pastoral Land Act*.

Commercial fishing

Northern Territory

7.8.20. DPIR submitted that the McArthur River area has strong commercial value. The key fisheries in the land claim areas include Mud Crab, Barramundi and King Threadfin.

- 7.8.21. In 2016 Barramundi catch was recorded as 15555 kg for the year, King Threadfin was recorded as 1153 kg and Mud Crab 47337 kg.²⁸⁸ I note that there was no supporting material provided to explain the methodology used to record catch figures, or what was in fact considered the ‘McArthur River area’ when collecting the data.

NTSC

- 7.8.22. The NTSC did not provide much by way of detriment information that was specific to the claim areas.
- 7.8.23. It submitted that the claim areas were used by a number of its members for the commercial fishing of barramundi, king threadfin and mud crabs, and that for those who fished the areas, the income derived from the areas represent the majority portion of their yearly revenue. No further information or supporting material was adduced to support those assertions.
- 7.8.24. NTSC submitted that their members who fish there usually access the claim areas from the Mule Creek Boat Ramp and sell their catch to venues in Borroloola and Darwin.
- 7.8.25. At a later date I agreed to the NTSC’s request to provide a letter by Mabunji Aboriginal Resource Indigenous Corporation (Mabunji) in support of their submissions. Mabunji submitted that, in the event a grant of title to traditional owners affects commercial fishing, then the town of Borroloola would suffer economic detriment.

NLC on behalf of the claimants

- 7.8.26. Again, the NLC’s response was generally applicable to commercial fishing and not specific to these land claims.

Consideration

- 7.8.27. In the absence of material factual issues, it is appropriate to proceed on the basis of there being not insignificant commercial fishing in the claim areas.
- 7.8.28. Notwithstanding further letters sent to the NTSC, including the memorandum asking for further particulars and a letter inviting their response to the submissions on behalf of the claimants, no further information was received.

²⁸⁸ See Northern Territory, Submissions – Group 1 in *Detriment Review*, 16 March 2018, 10, (f).

Tourism

Northern Territory

- 7.8.29. DPIR submitted that from 2008-2018, annual data has indicated that there are from one to four FTOs active in the McArthur River. DPIR claimed that fishing tourism generates a significant amount of economy activity in the region and thus if access arrangements are modified in the event of a grant of title, FTOs' operations may suffer detriment, which will flow onto the regional economy.

King Ash Bay Fishing Club and related interests

- 7.8.30. KABFC was involved in Commissioner Olney's land claim inquiry. It was submitted that KABFC has grown significantly since then. That certainly appears to be the case.
- 7.8.31. In a letter addressed to the Review dated 12 March 2018, the President of KABFC, Mr Self, requested that the land claimed be subject to the following exemption areas:
- The area from the low water mark to the high bank throughout the NT Portion 3898 and 3899.
 - Exemption from any restrictions relating to boat ramp access.
 - Exemption from any restrictions relating to the maintenance of the boat ramp.
 - The ability to anchor freely for protracted periods opposite the bank forming the KABFC lease.
 - Exemption from any restrictions relating to the use of the McArthur River, local coastal areas, islands and other rivers and creeks not mentioned in the above claim.²⁸⁹
- 7.8.32. Mr Self stated that, in the absence of any of the above exemptions, if the land is declared Aboriginal land KABFC would have to cease its operations, as they would be unprofitable.
- 7.8.33. Mr Self submitted that KABFC exists on NTP 3899 and NTP 3898, under Crown Lease in Perpetuity (No. 1476).²⁹⁰ He stated that much of KABFC and its members' investments have relied on the security of the perpetual lease. It should be noted that the security of the perpetual lease is not at risk. It is the adjoining land recommended for grant which gives rise to the KABFC concerns.
- 7.8.34. To demonstrate the levels of investment, the following values were estimated:

²⁸⁹ King Ash Bay Fishing Club Inc (KABFC), Submissions – Group 1 (Letter from Mr David Self) in *Detriment Review*, 12 March 2018, 1.

²⁹⁰ See Attachment 1 to KABFC, Submissions – Group 1 in *Detriment Review*, 16 March 2018.

- KABFC airstrip, maintained by the club: \$100,000
- Ablution blocks: \$500,000, largest facility built in 2016 at a cost of \$350,000
- Machinery shed housing an array of machinery²⁹¹: \$400,000
- Renovated kitchen and bar area: \$1,000,000
- New office and administration building, constructed in 2016: \$200,000
- Generator shed housing four generators (to generate KABFC electricity): \$600,000
- Diesel to power generators: \$200,000 in 2017.
- Bore, storage tanks, pumps and other infrastructure attached to the reticulated water supply: \$500,000
- KABFC service station and local store: \$2,000,000
- KABFC lodge: \$500,000

- 7.8.35. Other values were also submitted, but KABFC requested redactions for commercial reasons. In addition to the Club's investments, Mr Self claimed that many of KABFC's members have also invested significant amounts in their blocks, and he said some use their blocks as permanent residences. Many of the residences (or holiday dwellings) that have river frontage (26 dwellings) were also said to have floating pontoons or jetties, from which the members moor their boats to/gain access to the river. A potential issue to note is that a number of these river frontage dwellings may thus encroach onto the McArthur River claim area.
- 7.8.36. Mr Self said that KABFC has 770 members, most of whom have partners and that 96 dwellings have been constructed within the lease area.
- 7.8.37. The value of a membership to KABFC obviously arises from its location adjacent to the McArthur River and other high value recreational fishing areas. It is therefore submitted that any impact on the current free access that members have to the river will be disastrous for KABFC and its members.
- 7.8.38. It was submitted by KABFC's legal representatives in submissions dated 16 March 2018, that the High Court decision in the BMB case has magnified the potential detriment to be suffered by KABFC. KABFC's legal representatives however accepted that at the time of the Land Claim Report, Commissioner Olney acknowledged there was uncertainty concerning whether Aboriginal land included

²⁹¹ See *ibid* 2.

the tidal waters overlying Aboriginal land. Accordingly, it is appropriate to refer to my comments made in Chapter 5 about timing issues. Much of the development by KABFC and its members must have been in the knowledge that there may be a grant of the subject unalienated Crown land when the development took place. KABFC obviously knew that the claim areas had been recommended for grant to the persons found to be traditional Aboriginal owners, as KABFC was involved in the inquiry.

7.8.39. In respect of the amounts they invested in the years following the Commissioner's recommendation, KABFC submitted claimed:

Given the significant passage of time which has elapsed from when the land claims were recommended for grant the Club has been left no alternative but to move forward or risk jeopardising the thriving tourist centre it has become and the incomes and businesses that depend on it²⁹²

7.8.40. It is quite possible to read that sentence as acknowledging that the development was undertaken for commercial and social benefit, in the face of that knowledge. And therefore appreciating the effect of such a grant as could then have been, and might now be, made by the Minister. The sentence acknowledges, in effect, that KABFC and its members took a calculated risk.

7.8.41. However, in acknowledging the recommendation, KABFC claimed to have taken steps to develop a positive working relationship with the traditional Aboriginal owners. It referred to the Easter Barra Fishing Competition as one example, which was said to involve a number of local Aboriginal people and is supported by several Aboriginal organisations, including Mulandari, Mubunji and The Sea Rangers.

7.8.42. Other than the potential financial detriment claimed in relation to the investments made in the many years since the Land Claim Report, KABFC also claimed experiential detriment in the event of a grant of title. Experiential detriment is said to be in terms of how a grant of title may adversely affect the lifestyle KABFC's members have developed for themselves on the lease. Particular reference was made to the close, friendly community that exists at KABFC. Again, the knowledge of the Land Claim Report in 2002 would suggest that the expanded physical and social or lifestyle investment after 2002 was an informed choice, in the face of the risk that the Report might lead to a grant.

7.8.43. KABFC also submitted that, given the perpetual nature of the lease the Club, any restriction or limitation to public access to the claim areas would affect the existing

²⁹² KABFC, Submissions – Group 1 in *Detriment Review*, 16 March 2018, [26].

and proposed patterns of land usage in the region, as per s 50(3)(c) of the ALRA. That, too, is a contention which demands remark. It is saying that, because the KABFC has a lease of an area adjacent to unalienated Crown land that has been recognised by the Commissioner as land traditionally owned by the Aboriginal people identified, the traditional owners' interest in the unalienated Crown land should be subservient to the adjoining lessee's wishes about how the unalienated Crown land is, or has evolved over time to be, or may in the future, be used by them. The submission is further considered below.

Related entities

- 7.8.44. Several small businesses also operate within KABFC's lease area, including the King Ash Bay Service Station, the King Ash Bay Lodge, the Northern Territory Luxury House Boats, Borrooloola House Boats and Borrooloola Cabins. I note that submissions were received directly from King Ash Bay lodge, and accordingly its interests will be addressed separately.
- 7.8.45. A letter from King Ash Bay Service Station, dated 6 February 2018, was annexed to the submissions from KABFC's legal representatives. The King Ash Bay Service Station is a sublessee of the KABFC. It said it's sublease expires on 3 December 2022, with the option to renew for a further 6 years.
- 7.8.46. The proprietors claimed that, if restrictions to accessing and using the claim areas were to eventuate, then this may deter people from visiting King Ash Bay, which would therefore reduce the number of customers visiting the service station and related supermarket.
- 7.8.47. Annexed to KABFC submissions was also a letter from a proprietor of Borrooloola House Boats, Mrs Kylie Hallett. I note that Borrooloola House Boats was also involved in the land claim inquiry. It was submitted that Borrooloola House Boats is made up of four houseboats and six hire tinnies and cabins. Mrs Hallett submitted that in their first season in 1995, they had a total of 280 bed nights. In 2017 they had a total of 3998 bed nights and the numbers will likely increase this year. Mrs Hallett also expressed detriment concerns about the affect a grant of title will have on visitation to the area and thus her business.
- 7.8.48. No submissions were received from Borrooloola House Boats or Borrooloola Cabins, but on their behalf KABFC's legal representatives indicated that Borrooloola House Boats has five boats of varying size valued at approximately \$1,500,000 and Borrooloola Cabins has six self-contained cabins at an approximate value of \$300,000.

- 7.8.49. Two letters from other fishing clubs were also annexed to the submissions on behalf KABFC. The Tennant Creek Fishing Club Inc. submitted concerns about the effects a grant of title may have on recreational fishing at King Ash Bay, as it is an important fishing area for its members. Reference was also made to the popular Easter Classic fishing competition. The Alice Springs Outback Anglers Club (ASOAC) submitted similarly, claiming that its members consider King Ash Bay their closest option for fishing within the Northern Territory. ASOAC claimed that any restriction on access to the claim areas would likely cause an immediate reduction in membership to ASOAC and experiential detriment, in respect of the importance of the claim areas for many of the clubs' members.
- 7.8.50. Broad submissions were also made by KABFC and its related entities as to the adverse effects a grant of title may have on the regional and NT economy, in the event that title is granted and KABFC's members are no longer able to freely access the claim areas. It is in effect a derivative claim, and entirely understandable (as with the other claims just referred to). That is: if the fishers coming to King Ash Bay and nearby areas to it reduce significantly, then the service businesses in King Ash Bay will inevitably experience a drop off in business. The same may be said about the Northern Territory's understandable concern about the drop off in tourist activities and expenditure.

Fullham Pty Ltd

- 7.8.51. Fullham Pty Ltd own the Gulf Mini Mart in Borroloola. The proprietor, Ms Lesley Garner, wrote to the Review outlining her concerns about how a grant to the claim areas may result in public restrictions on accessing the McArthur River. She submitted that her business is situated very close to the river and relies on the passing trade of tourists from May to November visiting the river. She therefore feared that restrictions would deter tourists from visiting the river and therefore visiting her store. She also submitted that tourism would suffer if permits were required to access the claim areas.
- 7.8.52. Furthermore, Ms Garner expressed concern that restrictions on the river will cause hostility between the traditional Aboriginal owners and residents who live in Borroloola. Ms Garner submitted that she has a good relationship with the local Aboriginal community and that a grant of title and any restrictions on public access to the river would encumber her from making financial donations, supplying equipment and sponsoring Aboriginal events in the future. I do not see how that would be the case, except as a matter of personal choice (and subject to the available funds if her

business profits reduce). There is a further remark made in the ‘Consideration’ part of this section of the Report on that submission.

7.8.53. Ms Garner advised that she was not aware of the land claims until she was provided with a copy of the invitation to participate that had been sent to KABFC.

7.8.54. Notwithstanding requests for further information and supporting material to substantiate Ms Garner’s detriment concerns and claims of financial contributions to the local Aboriginal community, no further information was received.

King Ash Bay Lodge and NT Coastal Fishing

7.8.55. Mr Ashley Garner, the proprietor of King Ash Bay Lodge and NT Coastal Fishing Charters, which both operate from the King Ash Bay and Mule Creek boat ramp, wrote to the Review about how a grant of title may affect his businesses and broader tourism in the area. Mr Garner stated that he believed any fee for accessing the water would have significant adverse effects on visitation to the area, as the majority of those who currently visit the area are visiting retirees who can only just afford to make the trip in the present circumstances. That submission is partly of the same derivative character. It adds a new dimension by the assertion that many fishers who travel to the area (and it appears including from Tennant Creek and Alice Springs) could not afford to pay even a modest permit fee for fishing rights in the claim areas.

7.8.56. Notwithstanding requests for further information and supporting material to substantiate Mr Garner’s detriment concerns, no further information was received. That point was not developed by the Northern Territory or by KABFC. Having regard to what was put forward as the ‘premium’ character of the claim areas for fishing, and the absence of any factual support for the proposition, and to the apparent costs of coming to, and fishing in the areas, and the extent of the investment of individuals and businesses in the areas and of residents in the areas, it is not a proposition that is able to be accepted.

NLC on behalf of the claimants

In response to KABFC:

7.8.57. The NLC disputed the estimated figures and requested that un-redacted submissions be provided. Considering the timeframe for the Review, this challenge is unable to be dealt with further than merely acknowledging it in this Report, and noting that KABFC did not respond to NLC’s submissions, despite being invited to do so. Having seen the un-redacted material, it is supportive of the KABFC submissions about significant expenditure but there is ample data not redacted in the submissions

which would support the same propositions. It does not go specifically to the economic consequences of the loss of unrestricted and unregulated access to the claim areas.

- 7.8.58. In response to KABFC's submissions about the Club and its members' significant financial investment over the last many years and the financial detriment which might therefore flow from a grant of title, NLC submitted that the membership of the association has more than halved since the land claim inquiry (770 now, compared to 1629²⁹³) and that there is no clarity about who owns, constructed or enjoys the rights of occupancy for the residential/holiday house dwellings referred to in KABFC's submissions. The reduction in membership is not explained in reply by KABFC.
- 7.8.59. In addition, the NLC also referred to a number of inconsistencies and implied breaches arising from KABFC's submissions about its members' dwellings. The NLC referred to provisions from the Club's lease conditions, the *Crowns Lands Act* (NT), *Associations Act* (NT) and the *Planning Act* (NT) to argue that KABFC's members have no secure or even legal form of tenure to justify making such investments in the dwellings referred to in the submissions. In the absence of any occupancy rights, the NLC claimed that there can be no 'claim for detriment related to attrition to the value of their "investments"''.²⁹⁴
- 7.8.60. The NLC made the comparison between KABFC members and the block holders on Centre Island discussed by Commissioner Gray in the *Warnarrwarnarr-Barranyi (Borroloola No 2) Land Claim Report (No.49)*, submitting that Commissioner Gray's comments are equally applicable to KABFC's members:

The block holders are therefore in a very difficult position. They have expended monies in return for which they have acquired nothing. They have no interests in the lands concerned or in the houses which they have built.²⁹⁵

Section 50(3)(b) of the Land Rights Act obliges me to comment on "the detriment to persons....that might result if the claim were acceded to either in whole or in part". I am compelled to report that none of the block holders would suffer any detriment in the event that the claim were acceded to in whole or in part. This is because they have already suffered whatever detriment they can suffer. The expenditure of money on the purchase of the blocks, which could not lead to the acquisition of any interest in them, and on

²⁹³ NLC, Submission – Group 1 in *Detriment Review*, 18 August 2018, 16 [65].

²⁹⁴ *Ibid* [78].

²⁹⁵ *Warnarrwarnaa-Barranyi Land Claim Report (Borroloola No. 2) (No. 49)*, March 1996, Gray J, [6.1.1].

the construction of buildings which have become part of the real estate, has already occurred.²⁹⁶

7.8.61. The NLC therefore submitted that the claims of detriment arising from the investments made by KABFC's members into the "dwellings" must be considered in light of the absence of tenure and possible breach of statutory provisions.²⁹⁷ Reference was made to these comments of Commissioner Gray' in the discussion at Chapter 5 about detriment interests that lack a legal base.

7.8.62. The NLC submitted that there are other reasons to reject KABFC's valuation estimates too, including the following:

- KABFC estimated the service station to have a value of \$2,000,000, yet the sublease (No. 883974) has less than four and a half years left of its current term, with an option of a further term of six years, subject to the Minister's consent under the *Crowns Land Act*. There is no option of alternative premises if the lease is not renewed, as there is only a single 'landlord' for the KABFC lease.
- Northern Territory Luxury Houseboats was submitted to have a value of \$750,000, yet at the time NLC provided the submissions on behalf of the claimants (16 July 2018), Northern Territory Luxury Houseboats was advertised for sale for \$429,000 ONO on the Gumtree website and another website for \$400,000 ONO.²⁹⁸

Consideration

7.8.63. In respect of Ms Garner's comments as to potential hostility between traditional owners and Borroloola residents, Commissioner Gray's comments in the *Ngaliwurru/Nungali (Fitzroy Pastoral Lease Land Claim and Victoria River (Beds and Banks) Land Claim Report (No. 47)* come to mind:

The suggestion that to grant the claim would have a detrimental effect on race relations. This was a recurrent assertion in the submissions. It seems to amount to the proposition that I should refrain from recommending a grant or grants of the lands claimed to a land trust because some members of the non-Aboriginal community would be upset by such grants and would make their feelings known to Aboriginal people. To state the proposition in this way is to demonstrate its falsity; it would be unjust to deprive Aboriginal people of

²⁹⁶ Ibid [6.1.7].

²⁹⁷ NLC, Submission – Group 1 in *Detriment Review*, 18 August 2018, 16 [84].

²⁹⁸ See Attachments 6a and 6b to *ibid*.

what is otherwise their statutory entitlement because of the irrational opposition of others to those entitlements. The answer to this issue lies in education, and in the acceptance by the community in general of the reality of Aboriginal entitlement.²⁹⁹

- 7.8.64. I note also that no response was received by KABFC and nothing was said about NLC's submissions in Northern Territory's reply.
- 7.8.65. The primary focus of the detriment concerns under the heading of 'Tourism' really related to recreational fishing in the land claim areas. It is not about what may be done on the KABFC leased land, but what may be done in the Land Claim areas by visitors to King Ash Bay to enhance or complement what is done within the leased area.
- 7.8.66. Putting aside the material about expenditure and investment in the areas since the Land Claim Report, and the experiential detriment asserted, it is a proper starting point to acknowledge that recreational fishing was taking place in the claim areas for a lengthy period of time and prior to 2002. In that circumstance, it would be an appropriate step for the Minister and this Review to adopt the balancing of the interests of recreational fishers with the important interests of the traditional owners by adopting the NLC permit management system. That would mean the land would be granted to the traditional owners, and the Minister would first be satisfied that they have in place an effective permit management system (probably through the NLC) with the features elsewhere referred to. The recreational fishers could fish in the area, subject to avoiding important and sacred sites, and on payment of an appropriate fee. Such an approach would seem largely to meet the concerns of AFANT. I have discussed that above.
- 7.8.67. It is then necessary to consider whether the additional matter raised by the KABFC should lead to any different recommendation. It would seem that largely, if not entirely, the claim is made that, by reason of that very large investment KABFC and its members, and members of the public who visit King Ash Bay and surrounds should be entitled to unrestricted use of the claim areas for fishing and boating and related activities, including boat ramp access and anchoring of boats. It is said (but not a developed proposition with supporting material) that the alternative would render the KABFC unprofitable. I do not consider that that proposition has been

²⁹⁹ *Ngaliwurru/Nungali (Fitzroy Pastoral Lease Land Claim and Victoria River (Beds and Banks) Land Claim Report (No. 47)*, 22 December 1993, Gray J, [6.12.2], (f).

made out. It is based on a number of apparent assumptions which can readily be challenged.

- 7.8.68. There is not one of the 23 members of KABFC who apparently expended money on property development who came forward to explain the reasons for the expenditure. It may be that each was, or would be, content to continue to reside on holiday at King Ash Bay even if access to the claim areas were regulated by the permit management system. Many may understand the significance of the claim areas to the traditional owners. It may be that each would have expended the money (as perhaps is the case with KABFC or other who incurred other expenditure on improvements and services in King Ash Bay). So one answer to the proposition put by Mr Self on behalf of KABFC is that the claim is simply not made out to any level of satisfaction. For that conclusion, it is not necessary to consider in detail the NLC challenges to the expenditure assertions themselves.
- 7.8.69. The second reason to reject the detriment asserted as supporting the prioritisation of the interests of KABFC and its members at the expense of the traditional owners is also a strong one. Where that expenditure was incurred largely, if not entirely, in the face of the Land Claim Report in 2002 and its potential to result in a grant of the areas to the traditional owners, it is a case of the expenditure being incurred on a risk/reward assessment, that is – the potential benefits of progressing that way are worth the risk, because there may never be a grant or because the any proposed grant may be refused because the detriment evidenced by the expenditure will be sufficient to prevent the grant. I have explained why I would reject that approach as showing relevant detriment. It is like saying: I know of the traditional owners' interests but they must defer to whatever I presently do or may do in the future over my own land so that I can have unrestricted and unimpeded superior interests over the claimed land as well.
- 7.8.70. It is not necessary to draw any conclusion about the legal status of the land on which the 23 members of KABFC have built dwellings. At present, there is much to be said for the conclusion that they have no legal foundation for their buildings, and so cannot suffer detriment. In any event, as noted, none individually has asserted detriment. And it would be very difficult to do so where the expenditure occurred after 2002.
- 7.8.71. There is no suggestion of KABFC having sought any agreement with the traditional owners through the NLC under s 11A.

- 7.8.72. Consequently, the users of the claimed land under a permit management system will also have to deal with the traditional owners in the case of a grant for such arrangements as they wish about individual boat ramps, mooring facilities and anchoring facilities.
- 7.8.73. In any event, it is not possible to determine whether there will be any drop at all in visitor numbers to King Ash Bay and surrounds. Recreational fishing should be able to take place as previously under a permit management system. If the fishing is as good as suggested, a drop off is really speculative. If there is a drop off, it is a consequence that the local tourist and service businesses will have some reduced clientele. It is not possible to conclude that the adverse effect, if any, will be significant. Accordingly, the derivative detriment claims discussed would not be a reason why the grant of the land claims should not be made to the traditional owners.

Minerals and energy

Northern Territory

- 7.8.74. DPIR submitted that the following mineral titles are in or adjacent to the Land Claim No. 184 claim area³⁰⁰:
- MLN 1126, held by MIM and operated by MRM
 - ML 29628, held by Britmar (Aust) Pty Ltd (Britmar)
 - Access Authority (AA) 29692, held by MIM
 - MLA 29881, held by MIM
- 7.8.75. DPIR submitted that MRM use the Bing Bong port Facility³⁰¹, which is on the intertidal zone adjacent to McArthur River Station for the McArthur River mine project. They advised that Britmar also propose to use the BBLF for their Nathan River Resources Project. DPIR therefore stated that any restrictions or denial of access to the intertidal zone might adversely affect both MRM and Britmar.
- 7.8.76. DPIR also submitted that MRM's Bing Bong Dredge Spoil Emplacement Facility is located directly adjacent to MLN 1126 on McArthur River Station. They advised that although the facility is not situated on a mineral title, MRM previously operated the facility under a non-pastoral use approval (NP033), under the *Pastoral Land Act*. DPIR advised that this approval has now expired but that in 2013, MRM applied for a mineral lease for the facility. The mineral lease is still under application. DPIR

³⁰⁰ Attachment 1 to Northern Territory, Submissions – Group 1 in *Detriment Review*, 16 March 2018.

³⁰¹ Subsequently referred to as Bing Bong Loading Facility (BBLF), consistent with Glencore's submissions.

claimed potential detriment for MRM in the event a grant of title leads to restrictions or a denial of access and use of the intertidal zone area. It is not entirely clear why the grant of the mineral lease would include, or necessarily address, the use of the presently unalienated Crown land that is adjacent to it. No further information was provided as to why MRM's application has not been granted over the last five years.

7.8.77. DPIR advised that there are no mineral titles over or adjacent to the area subject to Land Claim No. 185.

7.8.78. In respect of energy tenements, Armour Energy have the following interests in the Land Claim No. 185 area³⁰²:

- EP 190, expired but an application for suspension and extension is under assessment
- EP 193, granted consent to negotiate, vetoed pursuant to s 48 of the ALRA. Moratorium ending December 2019.
- EPA 173, situated over NT Portion 3975, held by Garrawa Aboriginal Land Trust.
- EP 171 situated on McArthur River Station, south of the land claim area.

7.8.79. DPIR submitted that the location of any infrastructure constructed in relation to the above tenements and applications will depend on further exploration. If Armour Energy Ltd's 'project' comprising the above tenements was to continue, detriment may arise in respect of transporting any petroleum resources from the area, which may depend on existing and future land-based pipelines or on an offshore facility, which would require access to the intertidal zone. In my view, such a claim of potential detriment is too remote for the purposes of the Review and in any event, such activities are contemplated and provided for by the ALRA.

7.8.80. DPIR also submitted that proposed patterns of land usage, as per s 50(3)(c) of the ALRA, would be impacted if the most practical approach to transporting resources could not be attained.

Armour Energy Ltd

7.8.81. Armour Energy Limited (Armour) provided their own detriment submissions to the Review for Land Claim Nos. 184, 185 and 186. Armour stated that they hold the following petroleum exploration permits:

- EP 171

³⁰² See Attachments 2-4 of *ibid*.

- EP 174
- EP 176
- EP 190
- EP 191
- EP 192

7.8.82. They also have applied for the following petroleum permits:

- EP 172
- EP 173
- EP 177
- EP 178
- EP 179
- EP 193
- EP 194
- EP 195
- EP 196

7.8.83. Armour submitted that since 2012, they have invested \$32 million on studies and fieldwork to identify the prospective resources in the Armour EPs. Armour submitted that a grant of title would mean the areas within EP 174 and EP 190 would become Aboriginal land and thus restrictions will be placed on Armour's ability to access these areas. They also submit detriment concerns in relation to uncertainty as to their rights to access the areas and detriment in the sense that they will be required to comply with the process under s 46 of the ALRA. As I have explained in previous Chapters, I do not believe uncertainty or the requirement to comply with legislation to be relevant detriment interests under the ALRA.

7.8.84. The question of Armour accessing their EPs will be protected under s 70(2) of the ALRA, read with s 66.

Glencore PLC

7.8.85. MIM is now the sole owner of the MRM and the McArthur River Pastoral Lease. MRM operates the MRM. Colinta Holdings Pty Ltd (Colinta) is the operator of the McArthur River Pastoral Lease. MIM, MRM and Colinta are all wholly owned subsidiaries of the Glencore Group, headed by Glencore PLC.

- 7.8.86. Glencore Australia Holdings Pty Ltd (Glencore) provided submissions on the question of whether any part of the BBLF is within the area of the McArthur River Region Land Claim No. 184.
- 7.8.87. The BBLF was constructed on ML 1126 in 1993 and 1995, prior to the land claim application being lodged in 1997. The swing basin was excavated into the shore and foreshore and flooded in 1995.
- 7.8.88. In Commissioner Olney's 2002 inquiry, no final determination was made as to the legal issues regarding whether the facility is within the land claim area. However, Glencore submitted to the Review that the Land Claim Report made it clear that the BBLF, including a small area of intertidal zone within the swing basin and channel, is entirely within the boundaries of the McArthur River PPL 1051, and therefore not available for claim. Glencore did not produce further evidence on this matter, but sought to clarify the findings and recommendations of Commissioner Olney. Its submissions conceded that the precise location and area of intertidal zone within the swing basin and channel has not been determined.
- 7.8.89. Glencore's submissions advised that the *McArthur River Project Amendment (Ratification of Mining Authorities) Act* (NT) enacted in 2007, ratified an extension of ML 1126 (the BBLF) until 2043. Glencore repeated its original submissions that it may suffer detriment if a grant of Aboriginal land prevents them renewing or expanding the ML or expanding the scope of activities under the ML, in light of the projected life of the mine.
- 7.8.90. It was claimed that detriment may be suffered by third parties currently licenced or permitted by contract to use BBLF for a fee payable to MIM. Such licences or permits are not estates or interests in land for the purposes of s 70(2) of the ALRA, which would protect their rights to enter any part of ML 1126 that becomes Aboriginal land. Glencore's submissions referred to only one current third party agreement with Britmar. It claimed that the ability of MIM to expand third party use may be restricted or prevented by an 'inability to guarantee access to any areas within ML 1126 that may become Aboriginal land'.³⁰³ Additional detriment was claimed should MIM not be able to exercise contractual rights as desired; or if it were required to make operational changes, or lose the benefit of being able to recover costs.

³⁰³ Glencore Australia Holdings Pty Ltd (Glencore), Submissions – Group 1 in *Detriment Review*, 16 March 2018, 6.

- 7.8.91. Glencore claimed that detriment may result from the possible closure of seas adjoining Aboriginal land within two kilometres of the area granted, following any application made by Aboriginal landowners under s 12 of the *Aboriginal Land Act* (NT).
- 7.8.92. Glencore submitted that the continued availability of the BBLF for transporting mineral concentrates to market is critical for the continued viability of the MRM. It claimed that new projects are likely rely on the facility to be economically viable. It was claimed that significant detriment would result in respect of continued mining operations and future projects if the loading facility becomes unavailable, or if operations on ML 1126 cannot be expanded or modified. Detriment to continued operations of the BBLF would risk investments in the mine to date of more than \$360,000,000 (in the Phase 3 expansion) and \$34,000,000 in construction costs in relation to the loading facility. Whilst it is an understandable concern, the broadness of that proposition is somewhat confronting. It asserts detriment, which somehow should be accommodated, no matter how or where Glencore might expand or modify its operations in the future. The ALRA is not designed to accommodate such a broad and non-specific claim because there is, in effect, a need to keep a broad blank page of unalienated Crown land in case there is a future need on the part of Glencore against the land, which has been determined under the ALRA to be traditionally owned.
- 7.8.93. Detriment submissions made in respect of the possible future uses of the port facility included new projects which require bulk loading facilities for their economic viability. Glencore contended that such uses may include mining projects, cattle export and fishing industry development. At present those uses are somewhat speculative, and the extent of the claim areas potentially affected by them, and in what manner (other than exclusivity in favour of Glencore) is hard to discern. Possible increased pressure on the BBLF as the only such facility in the region was also noted in light of the exclusive rights to the intertidal zone that flow from the BMB case. No evidence was provided in support of possible projects and uses of the port facility described above.
- 7.8.94. Glencore claimed that it intends to leave the Bing Bong wharf, swing basin and channel in situ following expiry of ML 1126, for ongoing commercial usage in the long term. Glencore asserted that MIM and MRM would suffer detriment, should the above proposal be threatened by a grant of Aboriginal land. No evidence was adduced in support of the possible commercial demand or financial value of the facility at that time.

- 7.8.95. The submissions noted that detriment described above would inhibit industry in the region over the long term which may have a material effect on the region and the Northern Territory as a whole, and effect the existing or proposed patterns of land usage in the region per s 50(3)(c) of the ALRA.
- 7.8.96. In a letter dated 30 April 2018, in response to the memorandum asking for further particulars, Glencore provided information about its contributions to the Northern Territory economy. The submission outlined information about its recruitment programs, which aim at employing and training people from the local area. Glencore submitted that at 31 December 2017, MRM provided direct employment for 1021 people. It also claimed that MRM has invested almost \$2.3 billion into the economy over the six years from 2013 to 2017. Glencore also invests a significant amount of money to the MRM Community Benefits Trust, which has funded the following projects:
- 1.5 million to Roper Gulf Regional Council for multi-purpose Borroloola Sports Courts to provide a focal point for youth and community activities;
 - \$1 million to Mabunji Aboriginal Resource Indigenous Corporation towards the construction of a new creche, allowing for local people to take up jobs;
 - \$920,000 partnership with Borroloola School to encourage senior students through employment pathways;
 - \$730,000 support for sea rangers and associated infrastructure, environmental and tourism initiatives;
 - . \$326,000 for the Song People Sessions and follow up musicology and Gulf Country song book projects;
 - . \$543,000 to upgrade Malandari store; and
 - \$253,000 for school breakfast programs³⁰⁴
- 7.8.97. Glencore submitted that these contributions should be considered by the Minister in making any decision under s 11.

Carpentaria Shipping Services Pty Ltd (CSS)

- 7.8.98. CSS is a joint venture between Mawa Riinbi Pty Ltd, CDC Nominees (McArthur River Shipping Pty Ltd) (an investment arm of Indigenous Business Australia (IBA)) and P&O Maritime Services Pty Ltd).

³⁰⁴ Glencore, Submissions in reply to memorandum – Group 1 in *Detriment Review*, 30 April 2018, 4.

- 7.8.99. CSS own a transshipment vessel, the MV *Aburri*, which tranships MRM's resources from the BBLF to ocean-based vessels anchored in the Gulf of Carpentaria.
- 7.8.100. CSS submitted detriment concerns about a grant of title negatively affecting MRM's operations, which would in turn impact CSS' operations. They claimed that this would have flow-on detrimental effects to regional and local communities and IBA's efforts to assist other Aboriginal organisations.
- 7.8.101. To substantiate such detriment claims, CSS submitted the following:
- The consistent returns from CSS' operations have allowed the joint venture partners to reinvest in the region and other communities
 - For Mawa Riinbi, CSS is the largest source of income³⁰⁵
 - The Aboriginal partners are fully integrated into the Company's board and mentor young Aboriginal employees
 - Profits from the joint venture have assisted IBA in growing its capital base, thus allowing IBA to facilitate other joint ventures with Aboriginal organisations.³⁰⁶
- 7.8.102. Following the receipt of these submissions, I requested more information and supporting particulars. However, CSS replied that it was unable to provide any information as to its financial contributions to communities and the broader region, for the information is commercially sensitive and providing it would breach their strict privacy provisions.
- 7.8.103. This concern on the part of CSS is really a derivative claim, seeking to protect its business with MRM. The resolution of the survey issue, and the decision of the Minister about how far to accommodate the expectations of MRM will address the concerns. There is no reason to think the business of CSS will not continue.

Britmar (Aus) Pty Ltd

- 7.8.104. Britmar's detriment concerns were discussed in the Review of detriment issues for Maria Island and Limmen Bight River Land Claim No. 71 and part of Maria Island Region Land Claim No. 198 (Chapter 7.5).
- 7.8.105. Britmar's interest in the McArthur River Region Land Claim No. 184 and part of Manangoora Region Land claim No. 185 arises out of NRRP's intended use of the BBLF. This intended use was explained as follows,

³⁰⁵ See Attachment 2 to Carpentaria Shipping Services (CSS), Submissions – Group 1 in *Detriment Review*, 30 April 2018.

³⁰⁶ See Attachment 1 to *ibid*.

Western Desert Resources Ltd (WRD) constructed some of its own facilities at BBLF that were amongst those acquired by Britmar. Britmar's plan is to use the existing swing basin and loading facility to load 4000 dead weight tonne onto barges using a hopper and conveyor system from ore stockpiled on tenements owned by Britmar at Bing Bong. Barges would then be towed by tug boat and unloaded at anchorage in the Gulf of Carpentaria using bulk carrier gears and grabs.³⁰⁷

- 7.8.106. Detriment is claimed in respect of the effect any restrictions on accessing BBLF may have on Britmar's Project, including the negative impacts any cost to access BBLF would have on the Project. Britmar also submitted that this would have flow on detrimental effects to the Northern Territory economy as well as the public interest in respect of environmental remediation. See the discussion at Chapter 7.5 for more detail.

NLC on behalf of the claimants

In response to the Northern Territory

- 7.8.107. The NLC agreed that there are three mining tenements that would possibly be affected by a grant of title: ML 29268 and AA 29692, both held by Britmar and ML 1126 held by MRM.
- 7.8.108. The NLC however questioned whether MRM's Dredge Spoil Emplacement Facility would be affected by a grant to any part of the intertidal zone, as the facility appears to lie within ML 1126 and the transporting of dredged material would presumably take place across the intertidal zone within ML 1126. In any event, it was not a detriment matter raised by Glencore and can therefore be put aside
- 7.8.109. The NLC referred to the provisions in the ALRA³⁰⁸ that address access issues for mining tenement holders. It also submitted that any on-water operations over the intertidal zone (in respect of the detriment submitted regarding AA 29692 and ML 1126) could be secured by agreement under s 11A of the ALRA.
- 7.8.110. In respect of the detriment the Northern Territory claimed on behalf of petroleum tenements holders, the NLC referenced the same comments already made in this Report about the processes prescribed and the operation of the ALRA not being a detriment resulting from acceding to a claim.

³⁰⁷ Britmar, Submissions – Group 1 in *Detriment Review*. 16 April 2018, 3.

³⁰⁸ See, for example, *ALRA 1976* (Cth) ss 70(2); 66(a); (3)(1).

- 7.8.111. The NLC also noted that agreements are available and that s 70(4) provides for arbitration in the event that agreement is not reached. Further, the NLC submitted that, ‘the costs of an access agreement would be derisory in comparison to the average costs for petroleum exploration wells.’³⁰⁹

In response to Britmar:

- 7.8.112. I refer to my discussion earlier at Chapter 7.5

In response to Glencore/ MRM:

- 7.8.113. In their reply, the NLC noted that Commissioner Olney made observations based on Mr Hendry’s ‘uncontradicted’ evidence, and drew the conclusion that the swing basin and channel is ‘landward of the high water mark as it existed when PPL 1051 was granted’³¹⁰, but that he made no determination on the matter. Further, it noted there was no finding as to the location of the boundary of PPL 1051. The NLC produced a Google Earth image of the area which, it suggests, indicates a likelihood that the line of the high water mark would intersect the facility. It noted the advice of the NT Surveyor-General that it would now be possible to establish the high water mark, although it could involve a complicated survey procedure.
- 7.8.114. The NLC submitted that the claimants (as native title holders) have agreements with Britmar in respect of its operations at the port, giving the claimants a strong stake in ensuring the continued operation of the port, and noted that Commissioner Olney did not have the benefit of such knowledge when reporting on the land claim. Reference was also made to two letters sent by the claimants to BBLF representatives during the hearing, which indicate ‘a high level of probability that an agreement could be reached to enable MIM/MRM to continue its operations in the tidal waters at Bing Bong port in the event of a grant of an area or part of it to a Land Trust’.³¹¹
- 7.8.115. In the NLC’s submissions, Glencore’s updated detriment claims in relation to future mining or general uses for the port facility are considered speculative, and therefore not matters of detriment. They further claimed that non-mining uses would be inconsistent with uses allowed under ML 1126, and that there has been no requirement, as yet, for a non-mining port facility. The NLC also observed that despite the exploration interest in the region, there have been no new base metal

³⁰⁹ NLC, Submission – Group 1 in *Detriment Review*, 18 August 2018, [63].

³¹⁰ Ibid.

³¹¹ Ibid.

mines developed in over 16 years: the MRM and Britmar's iron ore project are the only mines in the region.

In response to Armour Energy

- 7.8.116. NLC submitted that Armour's detriment concerns regarding access and use of their tenements are protected by s 70(2) and (4). If they intend to conduct future operations in waters overlying the intertidal zone area or riverbeds, they can seek a production permit and Part IV of the ALRA will apply. Taking advantage of these provisions and complying with these provisions is not a relevant detriment.

Consideration

- 7.8.117. The Northern Territory responded that it is prepared to investigate further regarding whether ML 29698 overlaps into claim area if NLC provides them with mapping that indicates otherwise. It is an appropriate and helpful suggestion. It is not appropriate to speculate on such a matter when a survey would resolve it.
- 7.8.118. The Northern Territory also made comments about Glencore in their reply to the effect that petroleum interests should be considered differently than mining interests under Part IV of the ALRA by reason of ss 59 and 61-63.
- 7.8.119. As previously discussed, in regards to petroleum tenement holders, including Armour, I do not consider the requirement to comply with the ALRA processes to constitute as a relevant detriment. I note that in their submissions in reply to the claimants, the Northern Territory appears to agree with this. I adopt the comments I made at Chapter 6.
- 7.8.120. Whether any part of the BBLF is located on unalienated Crown land available for claim was not finally settled, according to the Land Claim Report. Commissioner Olney's comments point to the strong likelihood that the facility, including the small portion of intertidal zone that is the sloping wall around the swing basin, is entirely within PPL 1051. On the material presented to the Review, in particular the letter from MRM (a subsidiary of Glencore) of 16 March 2018 and its enclosures and the statements it refers to, it is very likely that the area of doubt (as identified by Commissioner Olney) is within the area of PPL 1051, known as McArthur River Pastoral Lease, held by MIM. It was granted to the then lessee in 1995 and the area in question was established as part of the facility by flooding in that year. The relevant land claim was made on 4 June 1997, after that date.
- 7.8.121. As the submission in the letter says, the consequence is that the particular residual area in issue was not then available for claim as unalienated Crown land. The

response of the NLC on behalf of the traditional owners did not add reference to any substantial primary contradictory material.

- 7.8.122. Even if there remains some room for doubt, and the McArthur River Pastoral Lease is shown, after survey, not to entirely encompass the area under question, so there is some small area of available land to be claimed, the history of the development of the facility and the understanding of the developer as explained might well lead the Minister to conclude that any such available area should be excluded from any grant.
- 7.8.123. In the event that part of the BBLF does overlap the claim areas, and the Minister does not decide to exclude that area from a grant of Aboriginal land, it is likely that the existing interests of Glencore in respect of ML 1126 will be preserved under the relevant provisions of the ALRA.³¹²
- 7.8.124. If I am wrong in my consideration of the above, and in any case upon expiry of ML 1126, the extent of any detriment suffered would depend upon the negotiation of any agreements between Glencore or other interests and the claimants enabling the continued operation of the port facility. NLC has advised the strong likelihood that such agreements would be made. Glencore's response countered that view, and claimed that any such agreement is speculative and should be given no weight. Glencore also claimed, and I agree, that in any event detriment would result from any amount payable under such an agreement. Glencore further commented on their disadvantaged negotiating position, should they require an agreement with an Aboriginal Land Trust to continue their operations, due to the fact that they are already heavily invested in the relevant operations. The leverage would be heavily weighted in favour of the traditional owners.
- 7.8.125. The Minister may consider therefore excluding the contentious area of the BBLF from any grant in any event.
- 7.8.126. I have addressed the other detriment claims in my earlier comments.

Pastoral

Northern Territory

- 7.8.127. DENR advised that the adjacent landholders to Land Claim No. 184 are MIM / Glencore and the Anderson family. As explained earlier, MIM held NTP 4319 under

³¹²See ALRA 1976 (Cth) ss 70, 66; also, *Seven Years On: Report by Mr Justice Toohey to the Minister for Aboriginal Affairs on the Aboriginal Land Rights (Northern Territory) Act 1976 and Related Matters*, December 1983, Toohey J, [467] and [468].

PPL 1051 (McArthur River Station) and had a non-pastoral permit for the lease. The Anderson family hold NTP 812 under PL 685 (Manangoora Station).

- 7.8.128. Notwithstanding the invitation to participate that was sent to the Anderson family, no response was received.
- 7.8.129. Manangoora Station is also adjacent to the relevant part of Land Claim No. 185 (the ITZ area). Also adjacent to the Land Claim No. 185 area is Greenbank Station, held by John Henry Keighran under PL 684. Notwithstanding my invitation to participate, no response was received from Mr Keighran either.
- 7.8.130. The Northern Territory submitted the same general detriment concerns about how a grant of title may affect pastoral operations as they have in regards to other claims.
- 7.8.131. They also advised that Manangoora charges a gate fee for fishers and campers accessing the river through the property. I note that this is opportunist considering s 78 of the *Pastoral Land Act*.
- 7.8.132. DENR also submitted that Manangoora previously held a non-pastoral use permit for tourism, but it has now expired. DENR submitted that Manangoora have applied to have it renewed and in the meantime, tourism activities are still being untaken.
- 7.8.133. Furthermore, DENR noted that the Anderson family were included as part of the native title holding group in the native title consent determination over Manangoora Station in 2015 and that Mr Keighran and his family were included in the native title holding group in the consent determination over Greenback Station. DENR submitted that though this may mean the lessees no longer have the detriment interests they expressed in the land claim inquiry, the proposed patterns of land usage might be impacted if the pastoral lease were sold to another party not affiliated with the traditional Aboriginal owners.

Colinta Holdings Pty Ltd (Colinta)

- 7.8.134. Glencore submitted that the McArthur River Pastoral Lease continues to operate as a working pastoral property. The pastoral property is managed by Colinta, which is a subsidiary of the Glencore Group.
- 7.8.135. Glencore advised that the nature and extent of the pastoral operations remains much the same as the operations at the time of the inquiry. Glencore submitted that Colinta will suffer detriment in the event of a grant of title if cattle are unable to graze along the coastal parts of the property and fencing is required, or if permits are required to access the claim area, Colinta will suffer to the extent of the fees payable. In addition,

Glencore submitted that the claim area is accessed from the station for recreational usage too.

NLC on behalf of the claimants

- 7.8.136. The NLC proposed the same licence which was outlined in their submissions on behalf of the claimants for Lower Daly Land Claim No. 68.
- 7.8.137. The NLC indicated that in recent consultations, the claimants expressed support for the proprietors of Greenbank and Manangoora stations and accordingly, it is likely they would make accommodations to enable the proprietors to continue all of their current activities on the claim areas in the event they are granted as Aboriginal land.
- 7.8.138. In response to the Northern Territory comments outlined above, the NLC submitted that the claimants' proposal for a non-exclusive licence would alleviate these concerns, as the licence is proposed to be fully transferable with the term of the lease.

Consideration

- 7.8.139. I am of the opinion that the proposal by NLC to develop a pastoral licence which reflects current pastoral usage should sufficiently address the detriment concerns of adjacent pastoralists. If no such accommodation was made in the event of a grant of title then adjacent pastoralists would likely suffer significant detriment.

Roads and Infrastructure

Northern Territory

- 7.8.140. The Northern Territory submitted that the Minister should consider excluding the King Ash Bay boat ramp from any proposed grant of Aboriginal land on the basis that it is a "road over which the public has a right of way". My comments made earlier, in Chapter 6 are apposite.
- 7.8.141. It would be appropriate for the Minister to exclude it from any land grant if, after survey, any part of it is on the claimed areas.

Comments and recommendations

- 7.8.142. The comments and recommendations, which should be read with the forgoing text are contained in the part of this section at the Introduction, under the subheading "Summary of comments and recommendations".

7.9. Garrwa (Wearyan and Robinson Rivers Beds and Banks) Land Claim No. 178, Report No. 64, Group 1

Introduction

7.9.1. Date of Report

30 July 2002

7.9.2. Area

- i. All that land being the bed and left bank of the Wearyan River lying between the boundaries of NTP 3975 and NTP 814; (Spring Creek Station) and
- ii. All that land being the bed and right bank of the Robinson River lying between NTP 3975 and NTP 1351 (Seven Emu Station).

7.9.3. Summary of comments and recommendations

- i. The main detriment issues to consider in acceding to a grant of Land Claim No. 178 are the use and access of the claim areas by the pastoralists of Seven Emu and Spring Creek stations and the interests of recreational fishers.
- ii. Providing that the claimants propose a licence as proposed by the claimants generally in relation to normal pastoral activities in accordance with the NLC submissions, no relevant detriment should be suffered by the proprietors of Seven Emu Station or Spring Creek Station, nor should there be any impact on the existing or future proposed patterns of land usage in the region.
- iii. Recreational fishers might suffer detriment if the land claim areas are granted as Aboriginal land and no agreement or system for access to the parts of the rivers under claim is established. Again, provided the permit management system proposed by the NLC is in place and operating as intended, there is no reason not to grant the land to the traditional owners.
- iv. The other activities engaged in on the unalienated Crown land do not give rise to detriment which should impede the grant of the land.

Land Claim Report

7.9.4. Land recommended

The areas recommended for grant to the persons found to be traditional Aboriginal owners by Commissioner Olney following his inquiry into Land Claim No. 178 were:

- i. All that land being the bed and left bank of the Wearyan River lying between the boundaries of NTP 3975 and NTP 814; (Spring Creek Station) and
- ii. All that land being the bed and right bank of the Robinson River lying between NTP 3975 and NTP 1351 (Seven Emu Station).

7.9.5. Traditional ownership

In the Land Claim Report, Commissioner Olney held that,

...The local descent groups which are identified above (pg 11-15 of Report) satisfy all of the elements of the statutory definition of traditional Aboriginal owners in respect of the relevant parts of the claimed land.³¹³

7.9.6. In commenting on the extent of traditional attachment, he referred to conclusions he had made in previous reports,

In the Garawa/Mugularrangu³¹⁴ report I wrote (at paragraph 7.8):

The long history of endeavour by the claimant groups and their forebears to obtain security of tenure in this region is evidence enough of their strong traditional attachment to the land and there can be no reason to doubt the genuineness of their desire to use the land for a variety of traditional uses as well as a place for many of them to live.

There is no reason to doubt that the present claimants continue to have strong traditional attachments to the claimed land. Indeed, evidence has been tendered to the inquiry...attesting to the numerical growth of the Robinson River community since the grant of title to the Garrwa Aboriginal Land Trust and the continued ceremonial life and other traditional activities of beneficiaries of the grant.³¹⁵

7.9.7. Detriment at inquiry stage

The main detriment issues identified by Commissioner Olney in his inquiry into Land Claim No. 178 related to pastoral access to the claim areas. He reported that the pastoralists operating Spring Creek Station and Seven Emu Station might suffer detriment if agreements cannot be made for the access and use of the Wearyan and Robinson rivers. Commissioner Olney however commented that agreements were likely, as both stations were operated by Aboriginal families who had connections with the claimant groups. Commissioner Olney reported that, in absence of a

³¹³ *Garrwa (Wearyan and Robinson Rivers Beds and Banks) Land Claim Report (No. 64)*, 30 July 2002, Olney J, [49].

³¹⁴ *Garawa/Mugularrangu (Robinsons River) Land Claim Report (No. 33)*, 14 March 1990, Olney J,

³¹⁵ *Ibid* [50].

satisfactory arrangement between the traditional Aboriginal owners and pastoralists, the grant of title might have an effect on the existing and proposed patterns of land usage.

Updated detriment

Pastoral

Northern Territory

7.9.8. DPIR said that the following pastoral leases are adjacent to the land claim areas:

- NTP 814 – Spring Creek Station PL 687 – held by the Mawson Family. The property sits adjacent to the eastern bank of the Wearyan River;
- NTP 1351 – Seven Emu Station, PPL 1215 - held by Mr Francis Thomas Shadforth. The property sits adjacent to the western bank of the Robinson River.

7.9.9. DPIR further said that on Seven Emu Station, there are tourism camp spots located along Robinson River and Shark Creek, which are known as ‘prime fishing spots’³¹⁶ and that Seven Emu Station operates a minor tourism business on the pastoral lease. DPIR did not indicate whether Mr Shadforth had a non-pastoral permit lease to do so and there is no information to support any such entitlement.

7.9.10. On behalf of both Spring Creek and Seven Emu Stations, DPIR submitted the same broad pastoral detriment concerns as previous submissions about other land claims subject to the Review, including that regarding weed and feral animal control, access to the river for water and the retrieval of cattle and future pastoral diversification activities.

7.9.11. As with the proprietors of Manangoora and Greenbank Stations, the proprietors of both Spring Creek and Seven Emu Stations were included as part of the native title holding groups in the consent determinations over their respective stations.

Seven Emu Station

7.9.12. Mr Shadforth submitted that Commissioner Olney’s findings about detriment to the Shadforth family in the event of a grant of title to the claimed land and in the absence of any suitable agreements, are still relevant today.³¹⁷

³¹⁶ Northern Territory, Submissions – Group 1 in *Detriment Review*, 16 March 2018, 25, (d).

³¹⁷ See Olney’s comments in *Garrwa (Wearyan and Robinson Rivers Beds and Banks) Land Claim Report (No. 64)*, 30 July 2002, Olney J, 60 and 66.

- 7.9.13. He also updated Seven Emu’s detriment concerns, submitting that his family’s present activities on the claim areas involve cattle, tourism, commercial bush tucker and Ti Tree paperbark harvesting.
- 7.9.14. Mr Shadforth explained that the bush tucker he harvests and sells consists of bush plums and ink berries. Ink berries mainly occur along waterways so access to the beds and banks of the rivers are integral for this operation. He also stated that the Ti Trees he cuts paperbark from grow along the waterways. Mr Shadforth submitted that this paperbark is sold and then used for such things as ‘indigenous’ tablemats in restaurants. It therefore appears that Mr Shadforth is harvesting on the unalienated Crown land for commercial purposes.
- 7.9.15. He also submitted that access to the Robinson River is critical for his cattle operations, as it is Seven Emu Station’s principal source of water for cattle graze. Mr Shadforth claimed that if he were not able to access the Robinson River in the event of a grant of title, he would have to build at least two more bores on the lease, which would cost upwards of \$150,000.
- 7.9.16. Finally, Mr Shadforth advised that he charges tourists camp and fishing fees to access areas along the south eastern bank of the Robinson River. These are accessed through the Seven Emu Station homestead. I again note that this is rather opportunistic considering s 79 of the *Pastoral Land Act*. It is apparently not authorised, and the commercial activities include use of the unalienated Crown land for revenue, as distinct from the social use by him and his family.
- 7.9.17. Mr Shadforth requested that, in the event of a grant of title to the claim areas, I recommend that the traditional Aboriginal owners grant him and his successors a licence at no cost, to enable him to continue undertaking the same activities on Seven Emu Station as he undertakes now.

Submissions on behalf of the claimants

- 7.9.18. The NLC had not undertaken consultations with the claimants groups in relation to the detriment concerns of Spring Creek and Seven Emu stations when they submitted the submissions on behalf of the claimants for Garrwa (Wearyan and Robinson River Beds and Banks) Land Claim No. 178, McArthur River Region Land Claim No. 184, Manangoora Region Land Claim No. 185, Seven Emu Region Land Claim No. 186 and Wollogorang Area II Land Claim No. 187. However, the NLC expressed confidence that a similar recognition of pastoral interests, like the licence reflecting current usage explained in previous sub-chapters, would be proposed.

- 7.9.19. The NLC also submitted that they had a useful and positive meeting with Mr Shadforth of Seven Emu Station to discuss the proposition of the proposed licence.
- 7.9.20. The NLC repeated its comments, in response to the Northern Territory concerns about the potential future transfer of the pastoral leases to persons without traditional connections to the claimant groups.

Consideration

- 7.9.21. Providing that the claimants propose a licence similar to that proposed by the claimants generally, no detriment should be suffered by the proprietors of Seven Emu Station or Spring Creek Station in the light of the consideration earlier expressed.
- 7.9.22. If the licence is transferable with title, as the NLC has said that it would be, then there should also be no impact on the proposed or existing patterns of land usage as per s 50(3)(c).
- 7.9.23. I do not regard the activities of Mr Shadforth in using the unalienated Crown land for commercial activities as significant to the decision to grant the land to the traditional owners. It is not authorised. Nor, apparently are his other commercial activities on the Station itself authorised. They may be of such little magnitude as to mean little to him. I do not suggest any deliberately improper action on his part. If he wishes to continue those profit making activities and the land the subject of the claim, the proper course is to seek agreement with the traditional owners for the right to do so.

Recreational fishing

Northern Territory

- 7.9.24. DPIR advised that there is no specific recreational fishing data for the claim areas but that it is known that these areas provide bankside camping opportunities, which anglers utilise during the dry season to fish. No further information or supporting particulars were provided.

AFANT

- 7.9.25. In the absence of claim specific data, AFANT relied on its community survey to establish that recreational fishing occurred in the claim area. The survey indicated that a relatively small number of respondents fished in the claim area.
- 7.9.26. According to the survey, those who access the claim area for fishing indicated that they did so via Manangoora, Greenbank and Seven Emu Stations, as well as the KABFC.

- 7.9.27. AFANT also advised that it is aware its members often pay camping and access fees at the adjacent pastoral stations. AFANT therefore submitted that if a grant of title leads to extra fees on accessing the claim areas, recreational fishers would suffer further financial detriment. I do not consider it an inappropriate fee for the traditional owners to recover. In all respects the proposed permit management system of the NLC on behalf of the traditional owners is conceptually satisfactory, provided it operates as intended.

Consideration

- 7.9.28. On the material before me and relative to other claims subject to the Review, it does not appear that recreational fishing is a significant detriment issue in considering a grant of title for the Garrwa (Wearyan and Robinson Rivers Beds and Banks) Land Claim No. 178. In any event, the NLC's proposed permit management system should mitigate any minor detriment that might flow to the recreational fishing community from the foreshadowed fee, after the moratorium period.
- 7.9.29. I do not consider the existence of pastoral access fees to compound the detriment that might be suffered by recreational fishers in terms of a permit fee, considering s 79 of the *Pastoral Land Act*. If that is authorised by the Pastoral Lands Board, it is an additional fee for the fishers for the benefit of the pastoralist. It is not relevant to the reasonableness of the proposed system. In fact, the willingness of recreational fishers to pay these pastoralists access fees suggests that if such costs were incurred under the permit system down the track, they are unlikely to affect recreational fisher visitation.

Commercial fishing

NTSC

- 7.9.30. NTSC indicated that there are barramundi fishing closure lines upstream in both the Robinson and Wearyan Rivers and thus the claim areas are not accessed by commercial fishers.
- 7.9.31. NTSC submitted that its members harvest mud crabs in the intertidal zone of the Robinson and Wearyan Rivers. They submitted that there are three established land-based camps on the Wearyan River and that their members travel in their vessels from these camps to the intertidal zone to fish for mud crab. This product is then generally sold at Borroloola and Darwin.

7.9.32. No specific data was submitted in regards to the catch in the claim areas or how many NTSC members operate in the areas, or the level of activity of the crab fishers, or the benefits taken from the claim area as a part of their respective enterprises.

7.9.33. No crab fishers responded to the invitation to participate in the Review.

Consideration

7.9.34. On the scant material provided to me by the NTSC and in the absence of any submissions or information from the Northern Territory or the mud crab fishers, there is an additional reason why this aspect should not impede the grant of the land. It is simply that the asserted detriment is not shown to be significant. In any event, as I have generally suggested through this Report, the position of commercial fishers is that, at the expiry of their current licences, they should negotiate with the traditional owners for the continuing right to fish in the claim area. Again, that is not to impede the Northern Territory exercising its powers to control fishing generally, including to closure of fisheries and the control of fish stocks.

Minerals and energy

7.9.35. DPIR advised that there are no current petroleum titles in or adjacent to the claim areas, though an application for EP173, which abuts the eastern bank of the claim area³¹⁸, was submitted by Armour Energy Ltd (Armour) on 24 December 2009. Armour apparently received an extension to the consent to negotiate period until 31 October 2018. Therefore, this information may have very well changed when the Minister comes to read this Report.

7.9.36. In any event, the ALRA has provisions to address Armour's potential interests in the claim area.

Roads and infrastructure

7.9.37. DIPL advised that the two following roads, or parts of roads, require exclusion in the event of a grant of title, under s 12(3) of the ALRA:

- 'Seven Emu Property Access from Manangoora intersection to Seven Emu: Rural Local Road: 100m wide road corridor: the part of the road including the causeway which crosses the Robinson River'³¹⁹
- 'Wollogorang causeway over Robinson River: rural secondary road: 100, wide corridor'³²⁰

³¹⁸ Attachment 5 to Northern Territory, Submissions – Group 1 in *Detriment Review*, 16 March 2018.

³¹⁹ See Northern Territory, Submissions – Group 1 in *Detriment Review*, 16 March 2018, 29, [2], (a).

³²⁰ Ibid 29, 2, (b).

Comments and recommendations

- 7.9.38. This is a straightforward claim to address. Once the permit management system is in place as proposed by the NLC and provided that the option of the pastoral licence in the general terms proposed by the NLC is made available to individual pastoralists, there is no reason not to grant the land. I refer to my summary of comments at the Introduction of this part.

7.10. Seven Emu Region Land Claim No. 186 and Wollogorang Area II Land Claim No. 187 and part of Manangoora Region Land Claim No. 185, Report No. 66, Group 4

- 7.10.1. For similar reasons to those discussed in regards to the Maria Island and Limmen Bight River Land Claim No. 71 and part of Maria Island Region Land Claim No. 198 (see Chapter 7.5.), the detriment concerns submitted in respect of Seven Emu Region Land Claim No. 186 will be discussed with the detriment concerns submitted in respect of Wollogorang Area II Land Claim No. 187 and part of the Manangoora Region Land Claim No. 185. Where it is practicable to discuss the detriment claims per specific land claim area, I have done so.

Introduction

- 7.10.2. Date of Report

17 April 2003

- 7.10.3. Area

- i. The land between the high watermark and the low watermark from where the eastern bank of the Robinson River meets the seacoast to the Queensland border;
- ii. The bed and banks of the Calvert River upstream from the mouth of the said river for so far as it is adjacent to the south-eastern boundary of NTP 1351; and
- iii. The bed and banks of the Robinson River upstream from the mouth of the said river for so far as the river is adjacent to both the eastern boundary of NTP 811 and the western boundary of NTP 1351, that is from the mouth of the river to where it meets the northern boundary of NTP 3975.

7.10.4. In addition, the following is taken from [2] of the Land Claim Report and adopted by the Northern Territory although it is not in the Recommendations of the Report. In the event, nothing turns on the additional descriptions for the purpose of the Review.

- i. the intertidal zone adjacent to NTP 1351 (otherwise known as Seven Emu Station);
- ii. the intertidal zone adjacent to NTP 674 (otherwise known as Wollogorang Station);
- iii. the bed and banks of the Calvert River upstream from the mouth of the river for so far as it is adjacent to the south-eastern boundary of NTP 1351; and
- iv. the bed and banks of the Robinson River upstream from the mouth of the river for so far as it is adjacent to both the eastern boundary of NTP 811 (otherwise known as Greenbank Station) and the western boundary of NTP 1351.

7.10.5. Summary of comments and recommendations

- i. The primary recommendation to the Minister is that, upon the Minister being satisfied as to recreational fishers that the proposed permit management system is in place and operating satisfactorily, and as to the pastoralists (including AWC) that the proposed licence to enable the range of normal pastoral activities to be carried out in relation to the claim areas will be made available by the traditional Aboriginal owners, a grant of the claimed land should be made.
- ii. The other claims of detriment are not such as to lead to the conclusion that the grant of the claim areas should not be made or should be further delayed.
- iii. The particular reasons for that recommendation are:
 - a. In respect of adjacent pastoral operations, the detriment claimed by Pardoo Beef Company Pty Ltd (Pardoo) and the AWC in respect of its purchase of Pungalina should be considered in light of the fact that they acquired their interests well after the publication of the Land Claim Report. There is no basis for concluding that, if they had known of that Report and its recommendations, they would not have acquired those adjacent interests in any event. In addition, whether on the basis that they would have sought an agreement with the traditional owners under s 11A at the time, or would have chosen to take the risk of the land grants not being made, they would now be in the same position of having to negotiate with the traditional owners for agreements to carry out the non-pastoral or extended pastoral activities they now propose to carry out. In the case of AWC, for somewhat

similar reasons, the now extended activities which it seeks to carry out in relation to the claim areas should have been, and will have to be, the subject of agreement with the traditional owners. The primary or normal pastoral activities of the pastoralists (including AWC) in relation to the claim areas will be preserved by the proposed licence. The respective lessees of Manangoora Station and Seven Emu Station both have connections with the claimant groups. In addition to NLC's proposed pastoral licence, it is therefore likely that the claimants will accommodate them by agreeing to their non-pastoral activities on the claim areas. However, I note that neither lessee appears to have a current non-pastoral licence under the *Pastoral Land Act* or has permission from the Northern Territory to use the unalienated Crown land for profit-making activities, so there can be no issue that the claim to perform those activities on the claim areas would give rise to any legitimate detriment so as to defer the grant or to refuse the grant.

- b. On the material provided to me, and relative to other claims subject to the Review, it does not appear that recreational fishing is a significant detriment issue. In any event, the NLC's proposed permit system should mitigate any minor detriment that might flow to the recreational fishing community. If the proposed permit system does not allow for access or use of the areas under claim, then the local economy would also suffer detriment to the extent that recreational fishing decreases and impacts visitation to the areas. However, there is no basis for suspecting that the recreational fishers will not continue to use the claim areas and surrounding waters as they have in the past, at least to a significant extent once the permit management system is in place.
- c. The information provided to me in respect of commercial fishing was quite limited. On the limited information provided in respect of commercial fishing, it appears the area is used for mud crab harvesting. If that is correct, detriment may be suffered if the areas become Aboriginal land and the traditional Aboriginal owners make no provision for commercial fishing licence holders. There is really not sufficient material to conclude that the commercial fishing activities are of such a character as to amount to detriment to them warranting the refusal or deferral of the grant of the claim areas. The commercial fishers have the right to seek agreement with the traditional owners after the grant if they wish to continue their activities over the granted land. There is no reason why such agreement would be withheld

on appropriate terms, giving the commercial fishers the right to fish and the traditional owners the opportunity to derive some revenue from their land.

- d. There are provisions of the ALRA that address the potential detriment suffered by mineral and mining tenement holders, including Armour Energy Ltd.
 - e. There are two access roads in the claim areas that are most likely used by the proprietors of Greenbank and Seven Emu Stations and other persons visiting those stations. Given the claimants' relationship with the proprietors of Greenbank and Seven Emu Stations, it is probable that a suitable agreement can be reached under s 11A or s 67B of the ALRA prior to a grant of the claimed area, or through s 19 of ALRA subsequent to a grant.
- iv. As noted in the Conclusion, the submissions of certain of the stakeholders in relation to this Report, and indeed elsewhere, make it desirable that the Minister, upon such Departmental advice as the Minister considers appropriate, should form the view about the adequacy of the documentation for, and the operation of, the permit management system, and also of the proposed terms of the licence proposed for the pastoral lessees. It would be inappropriate, having regard to the terms of some submissions, and to avoid unnecessary delay, to give stakeholders (perhaps other than the Northern Territory) the opportunity to negotiate with the traditional owners about the content of those documents or the drafting of those documents. Their purpose is to provide such concession as the NLC has identified to minimise any detriment to the classes of recreational fishers and pastoralists, and the content of the documents. The Minister, on advice, can be satisfied that the documents fulfil their intended function.

Land Claim Report

7.10.6. Land recommended

The areas recommended for grant to the persons found to be the traditional Aboriginal owners by Commissioner Olney following his inquiry into Land Claim No. 186 and Land Claim No. 187 and part of Land Claim No. 185 were:

- i. The land between the high watermark and the low watermark from where the eastern bank of the Robinson River meets the seacoast to the Queensland border;
- ii. The bed and banks of the Calvert River upstream from the mouth of the said river for so far as it is adjacent to the south-eastern boundary of NTP 1351; and

- iii. The bed and banks of the Robinson River upstream from the mouth of the said river for so far as the river is adjacent to both the eastern boundary of NTP Portion 811 and the western boundary of NTP 1351, that is from the mouth of the river to where it meets the northern boundary of NTP 3975.

7.10.7. Traditional ownership

In respect of traditional ownership, Commissioner Olney reported that,

‘I am satisfied from the written and oral evidence that has been put before the inquiry that each of the claimant groups identified in Appendix 3 is a local descent group of Aboriginals which in respect of relevant parts of the claim area satisfies all of the elements of the statutory definition of traditional Aboriginal owners.’³²¹

I note that at paragraph 79 of the Land Claim Report, Commissioner Olney included the names of a number of further claimants he believed should be included in the list of claimants referred to at Appendix 3.

7.10.8. Detriment at inquiry stage

In performing his functions under s 50(3)(c), Commissioner Olney reported that, in absence of appropriate arrangements between traditional Aboriginal owners and adjoining pastoralists, the operations of Seven Emu, Wollogorang, Greenbank and Pungalina Stations would likely suffer detriment. Commissioner Olney also reported that the claim areas contained popular fishing and camping spots which were frequented by recreational and commercial fishers. He held that unless suitable arrangements were made to access the claim areas, then commercial and recreational fishers would suffer detriment. However, Commissioner Olney noted that in regards to access for pastoralists and fishers, it was likely appropriate arrangements could be made with the traditional Aboriginal owners that would reflect the continued use of the claim area in accordance with the current practice at the time. Despite the submission that several fishing tourism businesses were operating in the area, Commissioner Olney did not believe a grant of title would affect tourism operations in the region. He also did not find there to be evidence that a grant of title would affect the conservation activities carried out by the Parks and Wildlife Commission of the Northern Territory.

³²¹ *Seven Emu Region Land Claim and Wollogorang Area II Land Claim and part of Manangoora Region Land Claim Report* (No. 66), 17 April 2003, Olney J, 22, [79].

Updated detriment

Pastoral

Northern Territory

- 7.10.9. DPIR advised that the following adjacent pastoral stations to the claim areas may be affected by a grant of title:
- NTP 811 – Greenbank Station, PL 684, held by John Henry Keighran
 - NTP 1351 – Seven Emu Station, PPL 1215, held by Francis Thomas Shadforth
 - NTP 674 – Wollogorang Station, PPL 1113, held by Pardoo Beef Company Pty Ltd
 - NTP 1352 – Pungalina Station, PPL 774, held by AWC
- 7.10.10. DPIR submitted the same general pastoral detriment concerns which have been discussed in previous chapters. They will not be repeated here.
- 7.10.11. Notwithstanding the invitation to participate that was sent to Mr Keighran of Greenbank Station, no response as to any detriment concerns was received. I note that Mr Keighran was involved in Commissioner Olney’s inquiry. The detriment concerns raised on his behalf by DPIR were the same as those discussed in relation to other claims.
- 7.10.12. Mr Shadforth’s detriment interests were also addressed by DPIR in Chapter 7.8. I refer back to those comments and will discuss his concerns in more detail when addressing the submissions he provided for this Review.
- 7.10.13. Pardoo and the AWC also provided their own submissions to the Review. Their concerns will be dealt with when discussing the submissions they submitted.

NTCA

- 7.10.14. The NTCA provided two detriment submissions in relation to Land Claim Nos. 185, 186 and 187. These submissions addressed detriment issues that have already been discussed in this Report, including pastoral diversification, investor insecurity and agreement making.
- 7.10.15. Some regional specific information was provided, which argued that it is important for pastoral leaseholders to diversify their operations in the south-western Gulf region, due to the limited viability of the Gulf region for pastoral activities.³²²

³²² See NTCA, Submissions – Group 4 in *Detriment Review*, 2 May 2018 and Attachment 1 to Submissions.

Seven Emu Station

- 7.10.16. Most of Mr Shadforth's detriment issues were similar to those discussed at Chapter 7.8.
- 7.10.17. Specific to these land claim areas, Mr Shadforth submitted that he takes ink berries from the Calver River beds and banks for his 'Bush Tucker' operation. Mr Shadforth also submitted that he plans to extend his operations to the north-western bank of the Calvert River (Seven Emu's south eastern boundary), subject to agreement with his current sublessee, AWC. I note that AWC have submitted its own detriment submissions as sublessee.

Australian Wildlife Conservancy (AWC)

- 7.10.18. AWC is a non-for-profit charity. AWC indicated that it acquired Pungalina PPL 774 (NTP 1352) and entered into a sublease of Seven Emu PPL 1215 (NTP 1351) from Mr Shadforth in 2008. It said that part of this sublease is licenced back to Mr Shadforth for pastoral and related tourism operations. AWC submitted that this partnership between Mr Shadforth and AWC is 'historic', in that Seven Emu was the first parcel of 'indigenous pastoral land' to be leased by a private conservation group. It stated that this was an important new model for conservation which has now been replicated in Western Australia.
- 7.10.19. AWC reported that the Commonwealth subsidised AWC's acquisition of Pungalina and Seven Emu.
- 7.10.20. AWC further said that it was not aware that the land claim areas were subject to claim or had been recommended for grant under the ALRA when it entered into a contract to purchase Pungalina on 27 September 2007 or entered into the sublease of Seven Emu on 24 December 2008. It stated that it has been confirmed with Clayton Utz that no such information was provided or identified in due diligence enquiries, when Clayton Utz was advising them on these transactions. It is appropriate to proceed on that basis, although that does not mean that AWC could not have been made aware of the existence and status of the Land Claim Report.
- 7.10.21. AWC expressed concern that any restriction on its access to the Robinson and Calvert Rivers will impact the market value of AWC's interest in Pungalina and Seven Emu. AWC also expressed concern that if it is able to access the rivers, yet must pay licence fees in order to do so, then it will suffer financial detriment as well as detriment arising from additional administration requirements and delays to process such access requests. This financial detriment may be compounded if their

stock capacity is reduced and/or any additional costs for fencing and weed and fire management are incurred.

7.10.22. AWC also submitted that access to the river banks and intertidal zone areas is integral for their operations at Seven Emu and Punaglina for the following reasons:

- Water and stock feed
- Fire, weed and feral animal management (such as Parkinsonia, a water-borne weed)
- To retrieve grazing and wandering stock
- To carry out protection and monitoring activities for a number of threatened species, including the Gouldian Finch, Gulf Snapping Turtle, Crested-Shrike-tit, Carpentaria False Antechinus, Ghost Bat, Flatback Turtle and Green Turtle. AWC noted that all these species are listed either as endangered or vulnerable under the *Environment Protection and Biodiversity Conservation Act 1999* (Cth).
- To carry out protection and monitoring activities for shorebirds, including the critically endangered Eastern Curlew and Great Knot, and threatened species like the Lesser Sand Plover. AWC noted that the coastline of Seven Emu, which is subject to claim, was identified as a nationally significant area for shorebirds in 2016.³²³

7.10.23. AWC submitted that the wider community might suffer detriment if AWC are denied access to the claim areas, as the conservation activities aimed at protecting the aforementioned species will be compromised.

7.10.24. Based on the detriment outlined, AWC requested that any grant of title be subject to conditions that allow AWC to retain its access to the claim areas without any costs or conditions for the following uses:

- a. access to water and food for stock;
- b. land management activities;
- c. monitoring and research;
- d. pastoral and related tourism activities, including authorised visitor programs; and
- e. all other activities permitted in accordance with the pastoral lease³²⁴

³²³ See Annexure D to AWC, Submissions – Group 4 in *Detriment Review*, 4 June 2018.

³²⁴ AWC, Submissions – Group 4 in *Detriment Review*, 4 June 2018, 5, [7].

- 7.10.25. I also asked AWC to provide information about their relationship, if any, with the local Aboriginal community. AWC responded that through the lease of Seven Emu, they provide Mr Shadforth and his family funds to support their continued pastoral and tourism operations. AWC also submitted that they have been working with the Garawa rangers to survey the ecological health of the sanctuary and undertake fire management activities.

Pardoo Beef Company Pty Ltd (Pardoo)

- 7.10.26. Pardoo own Wollogorang pastoral lease, PPL 1113. Wollogorang Station was submitted to be approximately 5761 square km. It is adjacent to the intertidal zone area that is subject to Land Claim No. 187 and the beds and banks of the Calvert River, which are subject to Land Claim No. 186.
- 7.10.27. In a statement provided by Pardoo's legal representatives, the Australian director of Pardoo Mr Darrel Jarvis expressed concern that a grant of title to the claim areas would affect his rights to take water from the Calvert River for domestic purposes, watering stock and garden irrigation³²⁵, as well as his, the stock's, employees' and family's rights to access the banks.
- 7.10.28. Mr Jarvis advised that there are currently about 25,000 head of cattle at Wollogorang. Cattle are bred at Wollogorang for the live export market through Darwin port. He submitted that cattle frequently wander along the banks of the Calvert River to drink water from the river and during the wet season graze along the tidal flats and intertidal zone. He therefore submitted that in order to contain cattle, fencing would be required. However, Mr Jarvis fretted that fencing is not practical considering floodwaters, the speed of the current and the associated debris that flows down the river during the wet season. He estimated that if such fencing were required it would cost \$5000 per km and then \$150,000 annually in repairs and maintenance.
- 7.10.29. Mr Jarvis also submitted that Pardoo relies on accessing the river for stock water and that if it was no longer able to in the event of a grant of title, then it may have to reduce its carrying capacity. This would in turn cause financial detriment.
- 7.10.30. In respect of feral animal management on the claim areas, Mr Jarvis submitted that Pardoo contract a bull catcher to cull scrub bulls in the north-western portion of Wollogorang, including on the bank of the Calvert River. Pardoo intend to restock that area of the property with a controlled herd in 2019. It was submitted that in the

³²⁵ *Water Act* (NT) s 11.

event of a grant of title, if the contractor cannot access the banks of the river to cull scrub bulls, those efforts might be delayed.

7.10.31. As an update to the Land Claim Report, Mr Jarvis advised that tourism activities on the lease are modest. He estimated that Pardoo provides access for a maximum of 300 people, who are almost entirely fishers. Before allowing the fishers access, Pardoo require them to take a short course and sign an agreement to respect the station. He also submitted that Pardoo have plans to establish a formal facility for tourists and recreational fishers.

7.10.32. In response to questions about when the detriment interests were acquired, and if after the land was claimed or recommended for grant, whether any professional advice was sought as to the acquisition, Mr Jarvis advised that Wollogorang was purchased in 2015. He also stated that,

To the best of my knowledge, the Land Claim was not declared to Pardoo at that time. The due diligence that was provided at that time also did not identify the Land Claim. Thus, Commissioner Olney's recommendation in Report No. 66 was not considered in the owners' decision to purchase the property.³²⁶

7.10.33. Accordingly, as there is no contradictory material, it is appropriate to proceed on that basis. I refer to the comments I made in Chapter 5 about timing issues.

NLC on behalf of the claimants

7.10.34. In respect of Mr Shadforth's interests, the NLC's submissions were the same as those for Garrwa Land Claim No. 178: see Chapter 7.8.

7.10.35. NLC also said that they had a conversation with Ms Ruth Cairns, counsel for AWC and signatory to AWC's submission dated 4 June 2018 and provided her with information about the proposed pastoral licence, as explained in previous chapters. The NLC stated that they had not yet had consultations with the claimants about AWC's operations, but considering the nature of AWC's work, their involvement with the Garawa Rangers and the claimants' relationship with Mr Shadforth, they expected that the traditional Aboriginal owners would be amenable to granting AWC a licence to continue all their current activities in the claim areas adjacent to Seven Emu and Pungalina, including conservation and research activities.

³²⁶ Pardoo Beef Company Pty Ltd (Pardoo), Submissions – Group 4 in *Detriment Review*, 1 May 2018, [22].

- 7.10.36. In response to Pardoo's detriment concerns, the NLC proposed that they would seek instructions from the traditional Aboriginal owners to offer Pardoo a licence consistent with that previously outlined.

Consideration

- 7.10.37. In respect of the acquisition of detriment, there is no reason to challenge the actual state of knowledge of AWC and Pardoo. But that is not the end of such consideration for the reasons explained in Chapter 5. In the consideration of detriment claims, the balance between the traditional owners and the persons who subsequent to the Land Claim Report acquired the adjacent interests is different from those who held the adjacent interest before that Report. Otherwise, it would be desirable in all cases to endeavour to accommodate the adjacent interests at the expense of the traditional owners.
- 7.10.38. Detriment issues for Pungalina and Seven Emu Stations were both clearly identified in Commissioner Olney's Land Claim Report, a report that is publicly available online. The Northern Territory, the Commonwealth and the NLC were all aware of Commissioner Olney's recommendation that the areas be granted as Aboriginal land. The traditional Aboriginal owners should not now routinely be put in a position of significant disadvantage as a result of the due diligence enquiries on behalf of purchasers and their legal representatives not exposing that Report and its content. In this instance, there is also nothing to indicate what either AWC and/or Pardoo would have done had they each known of the recommendations of the Report, so it is not possible to say with any confidence that their post-Report actions would have been any different had they been aware of the Report. It is one option that each of them would have sought, and as Commissioner Olney contemplated, probably have achieved agreement with the traditional owners under s 11A, so as to cover any concerns they might have entertained if the detail of the Report were known. So one attractive answer is that they should not now be better off in the assessment of the significance of their detriment than if they had followed that path. On the other hand, the only circumstance in which they might be able to take advantage of the detriment based on their lack of appreciation of the Report at the time would be if they were able to establish that they would not have gone ahead with their acquisition in that case. There is no material to support that. The third option is that they would have gone ahead with the acquisition in the face of the prospect of a land grant in any event, taking the risk of the grant taking place at a later point in time. That is the option which, in my view, would mean that the grant should be made and they should

then have to negotiate with the traditional owners to better secure any particular access to or use of the land. Overall, there is not much difference from the Minister's perspective in the case of the first and third options, and the second option is not a realistic one to adopt. So, in my view, the land grant should be made notwithstanding their lack of knowledge of the Report. They can negotiate with the traditional owners for the rights which they seek over the unalienated Crown land, when granted. There is no special reason why that would not be a successful process.

- 7.10.39. In any event, if the areas are granted as Aboriginal land and the traditional owners agree to providing a licence consistent with the terms outlined earlier in this Report, there will be no real disadvantage to the traditional owners as their decision related to all pastoral interests. It is unlikely that additional rights beyond those provided by the common licence would be needed for Pardoo, and Mr Shadforth (subject to the profitability of his non-pastoral activities). AWC seeks additional rights, and will have to negotiate to secure them.
- 7.10.40. As noted, the proposed licence does not account for the pastoral diversification activities of Mr Shadforth, but in considering his relationship with the claimants, it is unlikely further terms could not be negotiated to reflect his non-pastoral activities, or that an agreement would not be reached under s 19 of the ALRA after the grant.
- 7.10.41. I note that in a response to the submissions on behalf of the claimants, Pardoo's legal representatives submitted that the proposed licence is not workable or reasonable to address the detriment Pardoo may suffer, as:
- a. It only refers to current usage of the claim area. It does not provide for future activity that may legally be undertaken on the property.
 - b. It only addresses current pastoral uses, specifically access for mustering and maintenance/repair of fencing. It does not address future pastoral activities that may not be occurring at this time.
 - c. There are no provisions for non-pastoral uses, either current or future. As noted in Mr Jarvis' statement of 20 April 2018, there is current, albeit modest, tourism and recreational activity at Wollgorang and the owners of Pardoo have committed to establishing a formal facility for tourism and amateur fishing in the medium term.
 - d. As noted in Mr Jarvis' statement, Wollgorang is intended to be integrated pastoral operation with Wentworth Station, adjacent to the east in Queensland. It would create operational difficulties to have a Land Trust affecting the intertidal zone of one station, but not the other.

- e. NLC has offered that any licence would be fully transferable without further consent of the Land Trust. Ministerial consent, however, would still be required. While Pardoo has no plans to sell Wollogorang, there is no assurance that NLC or the Land Trust would not oppose Ministerial consent if it did.³²⁷

7.10.42. I will respond to each of the above points in course.

- a. b. Pardoo's first two points appear to say the same thing. In response, I do not see any real significance in the concern, unless it is to expand 'pastoral activities' beyond those commonly understood. In that event, additional agreement should be required of Pardoo. 'Future activity' as a mere concept is too remote to be considered a meaningful detriment under the ALRA, and amounts to a claim to a white page to be filled in by Pardoo to have any future activity take precedence over the interests of the traditional owners..
- c. No adequate information or supporting material was submitted to substantiate that Pardoo has 'committed' to establishing a formal facility for tourism and amateur fishing. In any event, such a formal facility would require the Pastoral Land Board to accede to a non-pastoral use permit application by Pardoo under the *Pastoral Land Act*³²⁸. Nothing was submitted to suggest Pardoo has taken any steps to apply for the requisite permit and therefore the ability to acquire such detriment is dependent on being granted a non-pastoral permit first. Accordingly, this potential harm is too speculative to be considered 'detriment' under the ALRA, and would not be considered by the Minister as a 'detriment' which ought in any significant way to preclude the grant of the land.
- d. There is nothing of significance to suggest that a grant of Aboriginal land would adversely affect the planned integration of Wentworth and Wollogorang Stations or that any difficulties would be incurred because one station is adjacent to Aboriginal land and the other is not. This is especially in light of the proposed pastoral licence that is proposed to reflect Pardoo's current usage of the intertidal zone area.
- e. There is nothing to indicate that the NLC or Land Trust would oppose Ministerial consent. Unreasoned incredulosity on the part of Pardoo does not suffice as detriment. Indeed it suggests a degree of lack of confidence in the traditional owners who are prepared to provide the licence discussed. It is a strong argument

³²⁷ Pg 1-2 of Pardoo's Response to the submissions on behalf of the claimants, dated 2 August 2018

³²⁸ See s 86 and Northern Territory Non-Pastoral Use Guidelines

why the Minister should not permit the terms of the licence to be the subject of detailed negotiation or drafting between the NLC and the pastoralists or the NTCA. Rather the Minister should be satisfied, after Departmental advice, that the proposed licence is a simple document and is satisfactory for the purpose for which it is intended.

7.10.43. Pardoo's legal representatives also commented that NLC's proposed licence appears to be trying to replicate the status quo and if that is the case,

...then Pardoo sees no practical reason for the claim areas to be alienated as sought by the claimants.³²⁹

7.10.44. To this, I refer Pardoo and its legal representatives to Commissioner Gray's comments in the Malngin and Nyinin Claim to Mistake Creek Land Claim Report (No. 50)³³⁰ referred to elsewhere in this Report. It is frankly an inappropriate submission.

7.10.45. Finally, Pardoo's legal representatives advised that they have an Indigenous Land Use Agreement with the Garawa people over the neighbouring Wentworth Station, which defines 'the interface between Indigenous land uses and pastoral activities and outlining reciprocal rights and responsibilities'³³¹. Pardoo said that it would 'not be adverse' to a similar arrangement with the claimants. It is not for Pardoo to attempt to impose some alternative and perhaps lesser rights on the traditional owners. That reflects an incorrect assumption that recognised non-exclusive rights under the *Native Title Act 1993* (Cth) are the equivalent of a grant under the ALRA. They are not.

Recreational fishing

Northern Territory

7.10.46. DPIR do not have any claim area specific data for recreational fishing but submitted regional data as an indication that recreational fishers do frequent the claim areas. It was submitted that:

- Northern Territory residents fished the area surrounding the Robinson River for a total of 72 days in a 12 month period from 2009 to 2010³³².
- Northern Territory residents spent a total of 38 days fishing in the Calvert River in the 12 month period from 2009-2010.

³²⁹ Pardoo, Submissions in reply to the NLC – Group 4 in *Detriment Review*, 2 August 2018, 3.

³³⁰ See *The Malngin and Nyinin Claim to Mistake Creek Land Claim Report* (No. 50), 18 June 1996, Gray J, [6.2.3].

³³¹ Pardoo, Submissions in reply to the NLC – Group 4 in *Detriment Review*, 2 August 2018, 2.

³³² Northern Territory, *Survey of Recreational Fishing in the Northern Territory 2009-2010*.

- DPIR noted that there is no estimation of visitor fishing effort for any of the land claim areas (including Land Claim No. 187), but it is likely to be significant considering 98% of the effort expended at King Ash Bay is from visiting anglers.

AFANT

7.10.47. In respect of claim area specific information, AFANT submitted the following for Land Claim No. 185:

- AFANT's community survey indicated that a relatively small number of recreational fishers accessed the claim area.
- Access to the claim areas is often gained through adjacent pastoral leases for a fee.

7.10.48. In respect of claim area specific information, AFANT submitted the following for Land Claim No. 186 and No. 187:

- AFANT's community survey indicated that a very small number of recreational fishers accessed the claim areas.
- The survey indicated that the small number of those who accessed the claim areas did so via adjacent pastoral stations or via boat.

Consideration

7.10.49. On the material and relative to other claims subject to the Review, it does not appear that recreational fishing is a significant detriment issue in considering grants of title for the Seven Emu Region Land Claim No. 186 and Wollgorang Area II Land Claim No. 187 and part of Manangoora Region Land Claim No. 185.

7.10.50. In any event, the NLC's proposed permit management system would be available to apply to the claimed areas, and would mitigate any minor detriment that might flow to the recreational fishing community

7.10.51. This issue does not justify refusing to grant the land, once the permit management system is operating.

Commercial fishing

Northern territory

7.10.52. DPIR submitted that significant levels of mud crab harvesting occurs in the claim areas, particularly in the Robinson River. In 2017, it submitted that approximately 7,229 kg of mud crabs were caught in the area, though I note this area is not specifically identified by reference to the particular areas under claim.

NTSC

- 7.10.53. In respect of claim area specific detriment, NTSC submitted that the land claim areas have good stocks of barramundi and king threadfin, as well as other species, and therefore their members will usually spend part of the fishing season in the region. No other information or supporting material was adduced to support this.
- 7.10.54. NTSC also submitted that mud crabs are harvested in the land claim areas, especially in the ITZ. NTSC stated that there are operators who have vessel-based operations in the areas and moor their boats in sheltered parts of the claim areas during day and night when they are not harvesting mud crab. Again, no further information or supporting material was adduced to indicate the extent of those activities or their significance to the commercial fishers, as distinct from the wider area and other fishing areas

Consideration

- 7.10.55. The submissions on behalf of the claimants did not refer to commercial fishing and so DPIR's and NTSC's submissions were unchallenged. However, on the limited information provided, and lacking any supporting material, it is difficult to be satisfied that the grant of the land would cause any material detriment to the commercial fishers using the claim areas. In any event, there is no foundation to suggest that the grant of the land should be refused in deference to the interests of the commercial fishers. They are in a position to negotiate with the traditional owners for access to the claim areas, as contemplated by the ALRA. Again, that approach does not impede the Northern Territory exercising its powers to control fishing in this and other areas (as it is already doing) in the interests of fisheries management.

Minerals and energy

Northern Territory

- 7.10.56. DPIR submitted that the land claim areas are considered prospective for oil and gas, following the Glyde 1 (ST1) gas discovery made by Armour Energy Ltd (Armour) in 2012 and the Lamont Pass 3 well, which was said to result in Armour reporting an oil and gas discovery.³³³
- 7.10.57. DPIR advised that the following petroleum titles are in or adjacent to the Land Claim No. 185 area:

³³³ See Attachment A to Northern Territory, Submissions – Group 4 in *Detriment Review*, 4 June 2018.

- EP 190, granted to Armour on 11 December 2012. Extension has been applied for, if accepted EP 190 will expire on 10 December 2019³³⁴
- EP 174, granted to Armour on 10 December 2012. Extension has been applied for, if accepted EP 190 will expire on 10 December 2019³³⁵
- Armour applied for EP(A) 173, which is situated over the Garawa Aboriginal Land Trust, on 24 December 2009.³³⁶ A consent to negotiate (CTN) was issued to Armour on 28 May 2010. This CTN has been extended five times and in its current period, is due to end 31 October 2018. DPIR submitted that this application overlaps the south western corner of the Land Claim No. 185 claim area.

7.10.58. DPIR advised that the following petroleum titles are in or adjacent to the Land Claim No. 186 area and the Land Claim No. 187 area:

- EP 190, as above. DPIR submitted that EP 190 covers the entirety of Land Claim No. 186 and Land Claim No. 187.³³⁷

7.10.59. The broad detriment DPIR claimed in relation to these interests has been discussed in previous chapters.

7.10.60. DPIR also claimed that,

The geology surrounding the land claim areas is considered highly prospective and under explored for a range of mineral and petroleum commodities. It is possible that grant of title may cause detriment to potential future transport of commodities along or across the identified watercourses

7.10.61. However, no further information or evidence was adduced to support this.

7.10.62. Attachment F to the Northern Territory submissions listed the mining tenures that lie within the claim areas:

Land Claim No. 186:

- a. ELs 31546, 31547, 31548 and 30495 held by Mangrove Resources Pty Ltd

Land Claim No. 187:

- b. ELs 31547 and 31548 held by Mangrove Resources Pty Ltd.

³³⁴ See Attachment C to *ibid.*

³³⁵ See Attachment C to *ibid.*

³³⁶ See Attachment E to *ibid.*

³³⁷ See Attachment C to *ibid.*

- 7.10.63. DPIR advised that there are no existing mineral tenures in respect of Land Claim No. 185.

Armour

- 7.10.64. Armour's detriment concerns have been discussed in Chapter 7.7

NLC on behalf of the claimants

- 7.10.65. NLC's response to Armour was outlined in Chapter 7.7.
- 7.10.66. I have not included their general comments in relation to petroleum interests, nor the Northern Territory submissions in reply about the same matters, as they have been addressed already in Chapter 6.

Consideration

- 7.10.67. I adopt the comments I made in Chapter 7.7 for the McArthur River Region Land Claim No. 184 and part of Manangoora Region Land Claim No. 185. They are to the effect that the interests of Armour are appropriately accommodated by use of the provisions of Part IV of the ALRA. Any concern about having to submit to those processes by reason of the time or cost involved is a consequence of the ALRA, and not of the grant of the land.

Roads and Infrastructure

Northern Territory

- 7.10.68. Commissioner Olney found there to be no roads in the claim areas to which the public has a right of way in his Land Claim Report No 66. DPIR advised that the following two station roads may be impacted by the claim areas: Seven Emu Property Access Road and Greenback Road. Seven Emu Property Access Road traverses Land Claim No. 185, whilst Greenbank Road traverses part of Greenbank Station and ends at the western bank of the Robinson River.³³⁸
- 7.10.69. DPIR submitted that if Land Claim No. 185 was granted and resulted in restrictions to or denial of access to the Seven Emu Property Access Road, then detriment would arise for the lessee and others requiring road access.
- 7.10.70. DPIR submitted that users of both roads might seek to access the claimed land, so as to access the river. Detriment may therefore result to the pastoral lessees, their invitees, and other road users in the event that access to the Robinson River is restricted (including by permit and/or imposition of fees) or denied.

³³⁸ See Attachments H, I, J and K to *ibid.*

Consideration

- 7.10.71. An access and use agreement would be required under s 11A of the ALRA prior to a grant of the claimed area, or through s 19 of the ALRA subsequent to a grant. Given the claimants' relationship with both proprietors, an amenable agreement is likely. Detriment may be suffered to the extent that any costs are payable under such agreements but it is not of such significance as to impede the grant of the land.

Tourism

Northern Territory

- 7.10.72. The following is only a summary of detriment information submitted in relation to the specific claim areas. The same regional / Northern Territory wide detriment concerns have been submitted about multiple claims subject to the Review. I do not consider that further discussion is required.
- 7.10.73. DTC said that the Savannah Way Four Wheel Drive touring route is in close proximity to the claim areas. It also submitted that the Manangoora bush camping site and Seven Emu Station campsites are both in the land claim areas and are frequented by tourists for camping and fishing in the Robinson River.
- 7.10.74. DTC therefore submitted that any limitations to accessing the coastal areas and rivers along the Savannah Way, including the camping sites, may reduce visitation to the areas. They stated that this would then have a flow on effect to the regional towns of Mataranka and Katherine if visitors choose to take the alternative route through Top Springs and Timber Creek.
- 7.10.75. It was also submitted that if any restrictions on access to the rivers are introduced as a result of grants of title, then the local economy may also suffer if recreational fishing visitation decreases.
- 7.10.76. In addition, DTC provided a list of seven tourism operators³³⁹, yet no information was provided as to whether or how these operators have used or still use the claim areas in particular, or as to what their particular detriment claims may be if a grant of the land is made.

Consideration

- 7.10.77. The recreational fishing effort in the claim areas appeared relatively small on the material provided by AFANT and the Northern Territory. However, I accept that any

³³⁹ Northern Territory, Submissions – Group 4 in *Detriment Review*, 4 June 2018, 19, (i).

reduction of visitors to the areas may impact the local economy. If the claim areas are granted to the traditional owners, the permit management system will have been introduced to ensure that majority of recreational fishers presently fishing in the claim areas from time to time will continue to do so, and there may be other new fishers utilising the claim areas. Hence, as the recreational fishers are the main foundation for the tourist services in the area, it is unlikely there will be flow on detrimental effects to the local economy by the grant of the land.

- 7.10.78. In respect of tourism operations in the claim areas, a sufficient factual basis to warrant any separate consideration is not made out. To the extent that camping facilities are located on the unalienated Crown land, if that is the case, they have no present entitlement to be there. It cannot be said that their presence unlawfully can give rise to a relevant detriment so as to preclude the grant of the land to the traditional owners. The issues of access to pastoralists and their families from the Savannah Way is, it would appear, is available in any event. The proposed licence will accommodate access of the pastoralists and their families to the two rivers. There is no other clear detriment which needs to be addressed and which might impede the grant of the land to the traditional owners.

Comments and recommendations

- 7.10.79. The conclusions with respect to these land claims are relatively straightforward. They point to the Minister making a grant of the land at a time when the Minister is satisfied that, firstly with respect to recreational fishers that the proposed permit management system is in place and operating satisfactorily, and secondly with respect to the pastoralist normal pastoral activities a form of licence has been prepared in accordance with the NLC proposal and will be granted to the pastoralists. In other respects, there is no sufficient reason to defer the grant of the land notwithstanding the claimed detriment.
- 7.10.80. One matter which clearly emerges from the submissions is that it is appropriate for the Minister, after such Departmental advice as the Minister considers appropriate, to form the view as to whether the proposed permit management system and the proposed licence are 'fit for purpose'. It would be an inappropriate step to invite those claiming detriment to give them the opportunity to negotiate with the traditional owners as to the content and drafting of those documents, perhaps with the exception of the Northern Territory.
- 7.10.81. The detailed remarks and recommendations are found in the Introductory section of this part of the Report.

7.11. Upper Roper River Land Claims comprising Mataranka Area (NT Portion 916) Land Claim No. 129, Western Roper River (Beds and Banks) Land Claim No. 141, Roper Valley Area Land Claim No. 164 and Elsey Region Land Claim No. 245, Report No. 68, Group 5

- 7.11.1. A single inquiry was conducted in respect of the above four land claim applications, which are separate areas but closely related. For convenience, the combination of claims was referred to as the Upper Roper River Land Claims in the Land Claim Report. Accordingly, in advertising the Detriment Review for these claims, I did not endeavour to seek submissions on the claims separately and therefore many of the responses received dealt with the claims together, sometimes also including Lower Roper River Land Claim No. 70, which was also included in ‘Group 5’. Again, in discussing the detriment submissions, I have where practicable distinguished detriment information relating to the four separate claims.

Introduction

- 7.11.2. Date of Report

24 March 2004

- 7.11.3. Area

- i. NTP 916 (Mataranka Area (NT Portion 916) Land Claim No. 129);
- ii. The bed and banks of the Roper River adjacent to the northern boundary of NTP 5417 (Mangarrayi Aboriginal Land Trust) including the northern channel of the river adjacent to NTP 916 (Western Roper River (Beds and Banks) Land Claim No. 141);
- iii. The bed and banks of the Roper River adjacent to NTP 4972 (Lonesome Dove) and NTP 4775 (Flying Fox) (Roper Valley Area Land Claim No. 164);
- iv. The bed and banks of the Roper River adjacent to NTP 4972 (Lonesome Dove) and NTP 4973 (Big River)) (Roper Valley Area Land Claim No. 164);
- v. The bed and banks of the Roper River upstream from Roper Bar adjacent to NTP 2632 (Yutpundji-Djindiwirritj Aboriginal Land Trust) and NTP 745 (Urapunga Aboriginal Land Trust)) (Roper Valley Area Land Claim No. 164);
- vi. NTP 5604 (Old Elsey Homestead) (Elsey Region Land Claim No. 245)

- 7.11.4. Summary of comments and recommendations

- i. I agree with Commissioner Olney that in absence of appropriate arrangements between traditional Aboriginal owners and adjoining pastoralists, the operations

of Goondooloo, Moroak, Flying Fox, Lonesome Dove and Big River stations would likely suffer detriment if not able to use the claimed areas for their pastoral use, as has occurred in the past. The appropriate arrangements can be found in NLC's proposed pastoral licence, which is to reflect current pastoral activities. So that detriment has been satisfactorily accommodated.

- ii. However, the adjacent landholders who submitted detriment interests also mainly had the objective of securing an entitlement to develop post acquisition diversified activities on their pastoral leases and using the claimed areas to support those activities. There are a range of reasons why those claims should not impede the grant of the claimed areas, and the pastoralists left to negotiate with the traditional owners any entitlement to use the granted land for such purposes. Briefly, the proposed uses all evolved after the relevant Land Claim Report, so the pastoralists should be taken to have known of the claims. There is, in any event, nothing to suggest that the acquisitions of the pastoral leases would not have occurred if the pastoralists had actual knowledge of the claims at the time of their acquisitions so no real detriment can flow by having to seek agreement for such further activities on the claim areas. To an extent, such activities at present are not authorised under the *Pastoral Land Act* or by any permission to use the presently unalienated Crown land for commercial profit-making activities. It is inherent in the detriment claims that any such activities, whether planned now or in the future, should take precedence over the recognised entitlement of the traditional owners reflected in the recommendation of the Commissioner. I refer to my comments at Chapter 5.
- iii. Finally, in respect of valid pastoral diversification interests, there seems to be no reason why future terms could not be negotiated to address these interests.
- iv. In respect of commercial and recreational fishing, I accept that it occurs in the areas subject to the Upper Roper River land claims. The NLC's proposed permit management system when introduced will accommodate recreational fishers, who will then only suffer the minor detriment to the extent of the fee payable for the permit. In my opinion this detriment will be slight and may be even further mitigated by what NLC has referred to as 'regional permits' and/or by the delegation of permit sales to local vendors. Such permits should also address the detriment claimed regarding the potential flow on impacts to tourism if the various areas of the Roper River are available to recreational fishers. On the other hand, to the extent that there is commercial fishing in the areas, it is not of

such significance as to delay or decline the grant of the claimed areas, and the commercial fishers should be left to negotiate with the traditional owners agreements for access to their traditional land on terms to be agreed, having regard to their respective but probably complementary interests.

- v. The Northern Territory submitted that there are a number of roads in the claim areas and that detriment may be suffered in the event access to and use of the roads is restricted. When the areas of the claims are surveyed, it will be apparent what roads are public roads to be excluded from the grants and what roads are not public roads and which will require some agreement to accommodate their use. I do not anticipate any difficulty with those processes.

Land Claim Report

7.11.5. Land recommended

The areas recommended for grant to those persons found to be the traditional Aboriginal owners by Commissioner Olney following his inquiry into the Upper Roper River Land Claims were:

- i. NTP 916 (Area 3(B));
- ii. The bed and banks of the Roper River adjacent to the northern boundary of NTP 5417 (Mangarrayi Aboriginal Land Trust) including the northern channel of the river adjacent to NTP 916 (Areas 3(A), 3(B));
- iii. The bed and banks of the Roper River adjacent to NTP 4972 (Lonesome Dove) and NTP 4775 (Flying Fox) (Area 4);
- iv. The bed and banks of the Roper River adjacent to NTP 4972 (Lonesome Dove) and NTP 4973 (Big River) (Area 5);
- v. The bed and banks of the Roper River upstream from Roper Bar adjacent to NTP 2632 (Yutpundji-Djindiwirritj Aboriginal Land Trust) and NTP 745 (Urapunga Aboriginal Land Trust) (Area 6);
- vi. NTP 5604 (Old Elsey Homestead) (Area 1);
- vii. NTP 4456 (Closed road through NTP 1508) (Area 2 (A)).

I note that Commissioner Olney assigned Area numbers to each claimed parcel to assist the drafting of his Land Claim Report. These have been included above to aid readers in interpreting Commissioner Olney's Land Claim Report. There is a map provided at the end of his report, the link to which is provided on the Aboriginal Land Commissioner's website.

I also note that on 21 August 2015, the NLC wrote to the Minister formally withdrawing the claim in respect of NTP 4456 ((vii) above)).

7.11.6. Traditional ownership

In his Land Claim Report, Commissioner Olney found that,

...each claimant group is a local descent group of Aboriginals who are the traditional Aboriginal owners of the respective areas of land claimed by such group in this inquiry.³⁴⁰

In respect of the strength of traditional attachment, Commissioner Olney commented that,

The long history of claims made by the claimant groups in respect of their traditional countries is evidence of a strong traditional attachment to the claimed land. The evidence in this and the other related applications to which reference has been made establishes that many of the claimants have been born on the land and have continued to reside on or close to it and further have actively participated in the cultural activities associated with their traditional responsibilities relating to the land. In the Lower Roper report, I observed that there can be few areas in Australia where the traditional attachment of the indigenous people to their land exceeds that of the present claimant groups. The same observation is appropriate in the present inquiry.³⁴¹

7.11.7. Detriment at inquiry stage

Commissioner Olney reported that in absence of appropriate arrangements between traditional Aboriginal owners and adjoining pastoralists, the operations of Goondooloo, Moroak, Flying Fox, Lonesome Dove and Big River stations would likely suffer detriment. Commissioner Olney also provided that, although the Roper River is popular for fishing, most of the fishing spots identified by submissions during the inquiry were not within the claim areas. He therefore concluded that any impact a grant of title would have on recreational fishing and tourism in the area would be slight. Commissioner Olney also advised that it was likely suitable arrangements could be made with traditional Aboriginal owners for the continued use of the claim areas but that consideration should be given to making a grant of title

³⁴⁰ *Upper Roper River Land Claims: Comprising Mataranka Area (NT Portion 916) Land Claim, Western Roper River (Beds and Banks) Land Claim, Roper Valley Area Land Claim and Elsey Region Land Claim Report (No. 68) (Upper Roper River Land Claims)*, 24 March 2003, Olney J, [40].

³⁴¹ *Ibid* [41].

conditional upon the area of the Old Elsey Homestead being declared an open area pursuant to s 11 of the *Aboriginal Land Act (NT)*.

Updated detriment

Pastoral

Northern Territory

7.11.8. DENR adopted the same general submissions in relation to the potential detriment that pastoral leaseholders may suffer in the event adjacent land becomes Aboriginal land, particularly in regards to the access and use of adjacent waterways.

7.11.9. It said that the adjacent pastoral landholders are as follows:

Land Claim No. 141:

- i. Northern bank of the Roper River:
 - a. Goondooloo Station, NTP 1287: subject to PPL 1068 held by the Moroak Pastoral Company as trustee for the Moroak Trust;
 - b. Moroak Station, NTP 1288: subject to PPL 1067 held by Moroak Pastoral Company as trustee for the Moroak Trust.

Land Claim No. 164 (i) and (ii):

- i. Northern bank of the Roper River (west of the Roper Bar crossing, being the tidal extent of Roper River)
 - a. Lonesome Dove Station, NTP 4972 subject to PPL 1185 held by DK Pastoral Company Pty Ltd as a trustee for the DK Family Land Trust;
 - b. Flying Fox Station, NTP 4775 subject to PPL 1179 held by Fly Fox Pty Ltd as trustee for the Mark Scott Sullivan Family Trust; and
 - c. Big River Station, NTP 4973 subject to PPL 1160 held by Daniel Tapp³⁴²

7.11.10. I note that since the close of submissions for the Review, I was notified that Flying Fox Station has been sold to new owners. It is not known who the purchasers are and no information other than the occurrence of the sale has been received. Fly Fox Pty Ltd provided detriment submissions to the Review, without mention of an intent to sell the station. In the absence of any clear information, I have proceeded in my Report as if the detriment concerns of Fly Fox Pty Ltd are still valid. The position of

³⁴² Northern Territory, Submissions – Group 5 in *Detriment Review*, 22 June 2018, 21, (d).

the new owner cannot be more advantageous, for the purpose of this Review, than that of Fly Fox Pty Ltd.

- 7.11.11. DENR advised that Flying Fox Station has a non-pastoral use permit, granted to it for accommodation purposes. It was submitted that the guests access the part of the Roper River subject to the claim for recreational purposes, and so if this access was restricted or forbidden, this may impact the proposed patterns of land usage in the region, to the extent that the tourism operations are negatively impacted.

NTCA

- 7.11.12. NTCA submitted the same general pastoral concerns as addressed previously in this Report, as well as submissions of principle about the scheme of Aboriginal land rights.
- 7.11.13. In regard to the Upper Roper Land Claims specifically, NTCA submitted that they are aware of ongoing pastoral diversification efforts are undertaken at Flying Fox and Big River Stations. NTCA also submitted that investor insecurity might be magnified in the case of Flying Fox, Lonesome Dove and Big River Stations, because in addition to the Upper Roper River Land Claims, they may also be impacted by the Mataranka Land Claim No. 69. That land claim is the subject of section 7.2 of this Chapter of the Report.
- 7.11.14. Notwithstanding the invitation to participate that was sent to the proprietors, no response or submissions were received on behalf of Big River Station. The Northern Territory did not advise that it currently holds a non-pastoral permit to undertake diversification activities. In respect of the claims about detriment being magnified by the existence of additional adjacent claims, I refer to my comments in Chapter 5.

DK Pastoral Company Pty Ltd (DK Pastoral)

- 7.11.15. The legal representative of DK Pastoral provided a statement by Ms Kelly White, a director of DK Pastoral, on 29 May 2018. DK Pastoral hold the Lonesome Dove PPL 1185, which is adjacent to two areas subject to Land Claim No. 164 (Area 4 and Area 5).
- 7.11.16. Lonesome Dove is also adjacent to the Mataranka Area Land Claim No. 69 (Urapunga stock route) and DK Pastoral claims that the detriment it might suffer in the event of a grant of title is magnified because of this. I do not accept this claim for reasons explained previously.

- 7.11.17. Ms White advised that DK Pastoral acquired Lonesome Dove in early 2016 and were not aware of the land claims adjoining the property when it was acquired. I refer to my comments at Chapter 7.2 and Chapter 5 on this topic.
- 7.11.18. Ms White submitted that there are approximately 5500 head of cattle at Lonesome Dove. To move cattle from the grazing lands to the stockyards within Lonesome Dove, the cattle are taken along the river at the boundary with Flying Fox Station. If the area is granted Aboriginal land and DK Pastoral are no longer able to access it, their current pastoral operations will be adversely affected.
- 7.11.19. DK Pastoral accesses the Roper River for domestic purposes and to water stock. If it were unable to continue doing so, it would have to install pumps and pipes to access a different section of the river. Ms Kelly estimated that 5km of pipes would be required, which would cost approximately \$10,000.
- 7.11.20. Ms White also submitted that both areas subject to claim are popular for recreational fishing amongst DK Pastoral's directors, their family and friends.

Fly Fox Pty Ltd (Fly Fox)

- 7.11.21. Mark Sullivan submitted detriment concerns to the Review as the director of Fly Fox. At the time of the submissions (29 May 2018), Fly Fox owned Flying Fox Station, which is adjacent to Roper Valley Area Land Claim No. 164. As noted, recently the station has changed hands.
- 7.11.22. Mr Sullivan submitted that the claim area is critical to Fly Fox's pastoral operations, as they access two pumps within the claim area to supply water to three paddocks for stock. Fly Fox also access the adjacent part of the river under claim for recreational fishing and camping, as do family and staff.
- 7.11.23. Fly Fox has a non-pastoral permit under the *Pastoral Land Act*, allowing Fly Fox to operate a 32-room commercial accommodation facility, the guests of which also access the claim area for recreational activities. The station's proximity to the river is likely a drawcard for many of the guests. Mr Sullivan submitted that if access to the river was restricted or denied, then this pastoral diversification activity would be adversely affected too.
- 7.11.24. Mr Sullivan also submitted that he has plans to develop a broad acre agricultural irrigation system, which would rely on water from the Roper River. He submitted that he is in the process of applying for a non-pastoral permit in order to do so. No further information or supporting material was provided about these agriculture development plans.

Mr Simon Hoar

- 7.11.25. Mr Simon Hoar is the proprietor of Goondooloo and Moroak Stations (the Stations). On 29 May 2018, his legal representative submitted a detriment submission on Mr Hoar's behalf, which said that Land Claim Nos. 141 and 129 form part of the stations' southern boundaries and are accessed by Mr Hoar and his staff for both pastoral and domestic uses.
- 7.11.26. Mr Hoar was not aware of either land claim when he purchased the properties in May 2015. It was submitted that Mr Hoar has informal arrangements in place with the NLC and various elders and other representatives of traditional Aboriginal owner groups to allow him to retrieve wandering cattle from adjacent Aboriginal land trust areas. Mr Hoar's legal representatives included the names of Mr Terrence Willie and Ms Shelia Conway as examples. They were both found to be traditional Aboriginal owners by Commissioner Olney in his Land Claim Report. It was also submitted that Mr Hoar has informal arrangements with traditional Aboriginal owners from the Mangarrayi Aboriginal Land Trust, who he allows to enter his stations to access fishing points and to hunt turtle. Mr Hoar's legal representative added that, notwithstanding his dealings with the NLC and traditional Aboriginal owners, the prospect of grants of title over the adjacent parts of the Roper River had not been raised in communications. On this basis, Mr Hoar's legal representative claimed that Mr Hoar should not be presumed to have known that the areas were subject to Aboriginal land claims or that those land claims had been recommended for grant.
- 7.11.27. Mr Hoar uses the Roper River as a water source for both cattle and domestic uses. There are two pumps within the claim areas that supply water to both Stations' homesteads, as well as eight paddocks. If Mr Hoar was no longer able to access the Roper River as a water source, the financial viability of subdividing or selling either Station would be detrimentally affected.
- 7.11.28. Mr Hoar controls weeds in the claim area with help from the Roper River Land Care rangers. If he was unable to continue doing so, his pastoral operations may be adversely affected. In addition, it was submitted that the wider community might also suffer detriment if the weeds are not contained.
- 7.11.29. Mr Hoar, his staff, family and guests also access the claim areas for recreational fishing. Furthermore, the Moroak homestead, which Mr Hoar lives in, opens up onto the embankment, which is subject to claim. Any restriction on being able to access the embankment or the river would likely affect the stations' amenity value.

- 7.11.30. Finally, I add that Mr Hoar's submissions expressed an eagerness to commence discussions with the NLC and traditional Aboriginal owners to negotiate an agreement.

NLC on behalf of the claimants

- 7.11.31. In respect of whether it should be expected that purchasers were aware of the land claim status of an area, the NLC conceded that, in regards to Land Claim Nos. 164 and 141, information as to the status of land is not as readily accessible. No explanation or further information was provided as to why this is so.
- 7.11.32. The NLC proposed the same pastoral licence as has been previously discussed to address the landholders' concerns, including to Big River Station, which made no submissions to the Review. In response to DK Pastoral's concerns about having to deal with multiple traditional Aboriginal owners in the future, the NLC advised that they would undertake any such consultations and negotiations between traditional Aboriginal owner groups and proprietors.

Consideration

- 7.11.33. If the areas are granted and no licence (or other arrangement) is made available to reflect the pastoralists' current access and usage of the adjacent claim areas, then significant detriment will likely be suffered by the proprietors of Fly Fox, Lonesome Dove, Goondooloo and Moroak stations. Although no submission was received from the proprietor of Big River Station, it can be assumed it would hold similar detriment interests if the land claim areas were granted.
- 7.11.34. However, Fly Fox, Mr Simon Hoar and DK Pastoral should be deemed to have constructive knowledge that the areas were recommended for grant as traditional Aboriginal land and, in my view, the Minister could bear this in mind when considering their detriment concerns. I accept that it is rather onerous to expect persons to know that an area is subject to an Aboriginal land claim, but I do not think the same can be said of areas which have been recommended for grant. I have explained why I take this position throughout this Review. There is another consideration. At the time of the acquisition of these interests, the actual or proposed diversification activities were not being conducted. They have evolved subsequently. There is no material on which it could be said that, if the purchasers of the several interests had known of the recommendations for grant, they would not have purchased their interests because there may be difficulty in diversifying the activities. Consequently, there is no case of detriment of significance because (it should be assumed) the purchases would have taken place and the pastoralists would have been

in the same position of seeking approval under the *Pastoral Land Act*, and for the conduct of profit-making activities on the unalienated Crown lands which were and are recommended for grant. In any event, when assessing the detriment asserted against the interests of the traditional land owners, there is a point at which it is sensible to make the grant of the claimed land and leave the adjacent lessees to negotiate with the traditional owners for permission to utilise that land for such purposes. The Minister's role is not to accommodate all claimed detriment at the expense of the traditional owners' interest.

- 7.11.35. In the event of grants of title, I consider the NLC's proposed pastoral licence would to a meaningful extent address the pastoral detriment concerns relating to normal pastoral activities. I note that positive responses were received on behalf of both Mr Hoar and Fly Fox in regards to negotiating the proposed licence. So the significance of the comments in the preceding paragraph is that no significant detriment has been shown in respect of the proposed or existing diversified activities. In each case too (apart from Fly Fox) the proposed diversification activities are not authorised under the *Pastoral Land Act* and there is no specific approval to utilise the unalienated Crown lands for commercial profit-making activities.
- 7.11.36. However, in regards to non-pastoral detriment concerns, Fly Fox would suffer detriment in respect of its commercial accommodation activities, which are undertaken as per their non-pastoral licence. Of course, it is unclear as to whether Fly Fox still has an interest in the Review and what, if any, are the concerns of the purchasers. At this stage, Fly Fox should have informed the purchaser of the extant Land Claim Report and of this Review, if it was not already aware of those matters. Therefore, it is appropriate to expect that the purchasers have bought the property with full knowledge of the recommendations to grant and any potential detriment that may flow from them. That is but a further small step which is adverse to the Minister prioritising the asserted detriment issues of the pastoralists (apart from those to be accommodated under the proposed licence) over the interests of the traditional landowners.
- 7.11.37. In respect of the non-pastoral concerns of DK Pastoral and Mr Hoar, no evidence was adduced as to whether either proprietor held a non-pastoral permit. In the absence of the requisite permits, any projections of potential non-pastoral detriment that may be suffered is detriment which I doubt should be given any weight by the Minister for the reasons given. I have not overlooked the submission of the Northern Territory in response to the claimants stating that future diversification activities should be considered a detriment with reference to the non-pastoral use provisions of the

Pastoral Land Act. I do not find this submission persuasive. Indeed it is rather surprising that, despite the ALRA and the underlying policy, the submission should support the proposition that whatever a pastoral lessee might want to undertake on a pastoral lease, which may also rely on the commercial use of adjacent unalienated Crown land recommended for grant, should be given priority over the interests of the traditional owners of the adjacent land. That would frustrate any grant of land as recommended where there is an adjacent pastoral lease.

- 7.11.38. I also received submissions in reply to the submissions on behalf of the claimants by DK Pastoral's legal representative. The responses provided were much the same as those he provided on behalf of Pardoo Beef Company Pty Ltd in relation to Land Claim No. 187 and Land Claim No. 186 and those on behalf of DK Pastoral responding to the claimants' submissions for Land Claim No. 69. Accordingly, I refer to the comments made in Chapter 7.2 and in Chapter 7.9 of this Chapter. The tenor of those submissions also fortifies my observations to the Minister cautioning against inviting stakeholders to participate in negotiations about the terms of, and the drafting of, the proposed permit management system and the proposed licence for pastoral lessees.

Recreational fishing

Northern Territory

- 7.11.39. DPIR submitted that if access to and use of the claim areas and/or Roper Bar crossing were limited or prohibited in the event of a grant of title, then recreational fishing and tourism would be adversely affected. DPIR conceded that there is no discrete data for recreational fishing in the claim areas but noted that the 2010 NT Recreational Fishing Survey estimated that NT resident fishers spend a total of 1442 days annually in the upper Roper area. Of course, this figure must be considered in light of the fact that the upper Roper area entails a much larger area than what is subject to the claim. DPIR also submitted that the Roper Bar crossing is very popular for both resident and visiting land-based anglers and anglers with small vessels.

AFANT

- 7.11.40. AFANT submitted that recreational fishers would suffer detriment if the claim areas became Aboriginal land under the ALRA. This was supported by their community survey which indicated that a number of their members accessed the areas under claim for recreational fishing, either with the permission of pastoral lease holders or traditional Aboriginal owners.

- 7.11.41. In respect of the Roper Valley Area Land Claim No. 164 (iii), their community survey responses indicated that recreational fishers launched boats off the Roper Bar crossing in order to fish the claim area.

NLC on behalf of the claimants

- 7.11.42. The NLC pointed out that unlike previous groups' surveys submitted to the Review, AFANT's community survey for Group 5 asked respondents the following question,

‘Can you tell us how you accessed the river and where you got permission from?’

- 7.11.43. The NLC noted that the responses about access being sought from pastoralists and access being sought from traditional Aboriginal owners, and the absence of any complaint about seeking such access, was in contrast to the fierce opposition of AFANT and many of the stakeholders to dealing with and the proposal of a permit management system by the NLC and the traditional Aboriginal owners. It is a fair comment by the NLC that the contrast suggests that respondents have been misinformed or have a false conception of how likely it is access to Aboriginal land will be restricted or denied. The NLC submitted that this misplaced expectation was nourished by how AFANT's survey questions were framed. The contrast is evident, whatever its explanation. It is not necessary to analyse in detail the quality of the AFANT survey, save to say that it encourages affirmative responses by a number of its questions.

- 7.11.44. The NLC also added that most of the claim areas are only accessible via land held under a pastoral lease or owned by an Aboriginal land trust, so that under either option there is presently access to fishing areas in the 12 beds and banks and ITZ claims. There was no suggestion that access through land held by an Aboriginal land trust was inappropriately impeded. Nor was there any significant adverse comment by AFANT or by the survey respondents about the fees charged by some pastoralists for access through their land.

Consideration

- 7.11.45. In the absence of the proposed permit management system, recreational fishers will suffer detriment in the event grants of title lead to restrictions to access and use of the Roper River. If the NLC's proposed permit management system is introduced, recreational fishers will only suffer detriment to the extent of the fee payable for the permit and potentially in relation to the time spent acquiring a permit. In my opinion this detriment will be slight and may be even further mitigated by what NLC has

referred to as ‘regional permits’ and/or by the delegation of permit sales to local vendors, as well as the suggested moratorium.

Commercial fishing

NTSC

- 7.11.46. The NTSC provided one submission in respect of the claims grouped together as Group 5: Lower Roper River Land Claim No. 70; Mataranka Area (NT Portion 916) Land Claim No. 129, Western Roper River (Beds and Banks) Land Claim No. 141, Roper Valley Area Land Claim No. 164 and Elsey Region Land Claim No. 245. The submission did not explicitly differentiate between information that is relevant to specific claim areas, or information which differed between that identified in Report No. 65 (Lower Roper) or that identified in Report No. 68 (Upper Roper). On that basis I refer to the comments I made in Chapter 7.4 about commercial fishing.

Tourism

Northern Territory

- 7.11.47. For area (iii) of Land Claim No. 164, DTC adopted the submissions it made about the Lower Roper River Land Claim No. 70 in regards to the tourism value of the area, arising from its popularity for recreational fishing, camping and four-wheel driving.
- 7.11.48. The area of Land Claim No. 245 contains the original location of the Old Elsey Homestead, which was the subject of Jeannie Gunn’s novel ‘We of the Never Never’. The DTC therefore claimed that the area is a site of historic significance and due to its proximity to the Stuart Highway and Elsey Creek, a potential location for future historic Northern Territory trails and self-drive tourism guides. If access to the area was denied or restricted, tourism to the area may be adversely affected, as would the opportunity for such tourism ventures.
- 7.11.49. DTC added that if grants of title were made, they do not foresee any detriment arising if suitable arrangements are put in place in the claim areas for continued park management and public access.

NLC on behalf of the claimants

- 7.11.50. NLC submitted that the Old Elsey Homestead (Land Claim No. 245) is but rubble and bush, other than a bronze plaque on a cairn, which explains that the site was that of the Old Elsey Homestead.³⁴³ NLC submitted that a replica homestead has been built at the Mataranka Homestead Tourist Park, which is listed on the Northern

³⁴³ See Attachments 1 and 2 to NLC, Submissions – Group 5 in *Detriment Review*, 1 September 2018.

Territory Tourism website, whilst the site of the Old Elsey Homestead is not. On this basis, counsel for the claimants stated that,

The building of a replica homestead elsewhere and the apparent absence of promotion of the site would arguably have reduced tourist interest and visitation to it. The NT's implication that loss or restriction of access would reduce tourism in the region and impact the economy is not accepted.³⁴⁴

- 7.11.51. Notwithstanding the NLC's contentions, it was submitted that the claimants are agreeable to continued tourist access to the Old Elsey Homestead site. In the event of a grant of title, it is proposed that access is managed by the automated online permit system, which the NLC has said it will implement by late 2018/early 2019 (now early 2019).
- 7.11.52. The claimants do not consider an Open Area Declaration under the *Aboriginal Land Act* (NT) to be suitable³⁴⁵, as it does not allow for conditions preventing or restricting people from such activities as camping, trail and quad bike use and fires. It was submitted that the claimants use the claim area (NTP 5604) to access an important area immediately to the south located on the Mangarrayi Aboriginal Land Trust, for fishing, camping and to access a sacred site nearby. Access under that Act is therefore said to be unlike a permit system, where conditions could be used to enable respectful co-access to the area.

Consideration

- 7.11.53. The Northern Territory responded to the submissions on behalf of the claimants, stating that the Mataranka Tourist Park promote visitation to the Old Elsey Homestead site and that the site is well visited by travellers from Alice to Darwin who go to both the Cemetery and Old Elsey Homestead site. However, no specific evidence was adduced to support this statement. In response to the permit proposal, the Northern Territory submitted that,

The lack of access to Wi-Fi at or near the site to enable a permit to be granted almost instantly would mean spontaneous visitation would not be possible, and is likely to mean fewer visitors are able to access and experience the site.³⁴⁶

³⁴⁴ NLC, Submissions – Group 5 in *Detriment Review*, 1 September 2018, [4].

³⁴⁵ See *Upper Roper River Land Claims*, Olney J, 24 March 2003, [73], (h).

³⁴⁶ Northern Territory, Submissions in reply to NLC – Group 5 in *Detriment Review*, 1 October 2018, 3.

- 7.11.54. Elsey Homestead presents a particular problem. There is common ground between the Northern Territory and the traditional owners (albeit with some caution) that it may be of such historical significance that it is preferable that tourist access be available. There is also common ground that it is not such an attraction that it is likely to attract much more than the passing tourist interest; it is certainly not put forward by the Northern Territory as a destination. There are reasonable grounds for the traditional owners wanting to control the levels of access and the activities permitted at the site. In my view, in that state of affairs it would be reasonable for the Minister to take the view that the grant of the land should be made, and to leave it to the traditional owners together with the Northern Territory to fashion an agreement to regulate acceptable access to the site, or permit access by permit provided under delegation by the nearest Park Ranger locations, as it is said that internet access is not readily available. The case for the public access to the site is not so strong that it would be appropriate to defer the grant of the land while such negotiations were carried out.
- 7.11.55. In all other respects, in the event of a grant of title and in the absence of any agreement or permit management system allowing access to the claim areas, local tourism that is generated from recreational fishing, camping and 4WD driving may be affected. However, the proposed permit management system is likely to substantially address this detriment, especially considering that access to most of the claim areas requires prior planning and permission from adjacent landholders due to the remoteness of the areas. Consequently, it is not necessary to take into account the possible detriment to tourism generated activities to the local economy, because the suggested detriment will largely, if not entirely, be resolved by the proposed fishing permit management system.

Roads and infrastructure

Northern Territory

- 7.11.56. In an addendum to its submissions to the Review, DPIR submitted that the following information regarding roads and infrastructure in or adjacent to the claim areas which might give rise to detriment issues.
- 7.11.57. Land Claim No. 141:

- The Roper Bar Jetty Road, which starts from Roper Highway to Roper Bar Jetty, traverses the Land Claim No. 141 (and Land Claim No. 70) area.³⁴⁷
- The new road alignment for the New Roper River Road³⁴⁸ traverses through Land Claim No. 141 (and Land Claim No. 70). Exclusion of the New Road alignment (including the bridge) would be required in the event Land Claim No. 141 was granted.
- Moroak Property Access Road, which runs from Roper Highway to Moroak Station, crosses the Roper River within Land Claim No. 141 to provide access to the Moroak community on Moroak pastoral lease (NTP 1288). The road consists of a concrete bridge to the top of the bank of the Roper River.³⁴⁹ DPIR submitted that s 70(4) of the ALRA should apply to protect the right of way for the holder of PPL 1067 to nominate a road across the area to access Moroak, subject to the claimants' agreement. DPIR submitted that in the event that agreement could not be reached under s 70(4) and/or the grant of Land Claim No. 141 resulted in restrictions (including by requirement for permit and/or imposition of fees for access) or denial of access to the Moroak Property Access road users through the claim area, then detriment would result to the lessees and other uses of the leased land requiring road access via this road.
- Goondooloo Station road, which traverses through the claim area from the Roper Highway to Goondooloo Station (NTP 1287, PPL 1068) and is used as an access road through to Goondooloo Station by the lessees of Goondooloo and their visitors. DPIR made the same submissions regarding s 70(4) as above.

7.11.58. Land Claim No. 245:

- The Old Stuart Highway road reserve running north south abuts the eastern boundary of the claim area (NTP 5604)³⁵⁰. I note that the road does not traverse the claim area and therefore no detriment issues should arise.

Consideration

7.11.59. I am unable to make any meaningful comments about roads in or adjacent to the claim areas until the areas are surveyed. In the event that the road or roads are not considered a road over which the public has right of way, then an agreement would

³⁴⁷ See Attachments 10 and 11 to Northern Territory, Addendum to Submissions – Group 5 in *Detriment Review*, 29 June 2018.

³⁴⁸ See Attachments 6 and 7 to *ibid*.

³⁴⁹ See Attachments 18 and 19 to *ibid*.

³⁵⁰ See Attachments 20 and 21 to *ibid*.

be required under s 11A prior to a grant, or s 19 post grant. Detriment will be suffered to the extent of any costs payable under such agreement. That should not be a significant reason to impede the grant of the land, as it should be apparent to both the traditional owners and the Northern Territory after the survey as to what is required.

Minerals and energy

Northern Territory

7.11.60. The following information was provided as to the energy tenements in the claim areas:

- Land Claim No. 129:
 - o EP 162 was granted to Santos QNT Pty Ltd (75%) and Tamboran Resources Ltd (25%) on 21 August 2012, with an expiry date of 30 May 2020³⁵¹

Land Claim No. 141

- o EP 162, as above
- o EP 154 has been partially granted to Jacaranda Minerals Ltd (50%) and Minerals Australia Pty Ltd (50%). The permit is subject to 11 non-consent areas determined by traditional Aboriginal owners as per a five-year moratorium ending this year. One of the non-consent areas is EPA 353, which covers half of the southern-border of the land claim area³⁵².

Land Claim No. 164, area (i):

- o EP 162, as above

Land Claim No. 164, area (ii):

- o EP 162, as above

Land Claim No. 164, area (iii)

- o EPA 182 was applied for by Imperial Mining Group Ltd on 12 April 2012. Imperial has entered into a consent to negotiate (CTN) period with the traditional Aboriginal owners, which is currently due to end this year.

³⁵¹ See Attachments 6 and D to Northern Territory, Submissions – Group 5 in *Detriment Review*, 22 June 2018.

³⁵² See Attachments 7 and D to *ibid*.

7.11.61. The following information was provided as to the mining tenements in the claim areas³⁵³:

Land Claim No. 129:

- EL 29349, held by Ronald Edwards, Rodney Johnson, Scriven Exploration Pty Ltd, Kaylan Resources Pty Ltd, Thomas Redcliff
- EL 28343, held by Australian Ilmenite Resources Pty Ltd
- EL 30115, held by Ronald Edwards, Rodney Johnson, Scriven Exploration Pty Ltd, Kaylan Resources Pty Ltd, Thomas Redcliff
- EL 29490, held by Ronald Edwards, Rodney Johnson, Scriven Exploration Pty Ltd, Kaylan Resources Pty Ltd, Thomas Redcliff
- EL 26971, held by Australian Ilmenite Resources Pty Ltd

Land Claim No. 141:

- EL 26973, held by Australian Ilmenite Resources Pty Ltd
- EL 26971, held by Australian Ilmenite Resources Pty Ltd
- EL 28891, held by Australian Ilmenite Resources Pty Ltd
- EL 28347, held by Australian Ilmenite Resources Pty Ltd
- EL 28894, held by Australian Ilmenite Resources Pty Ltd
- EL 28896, held by Australian Ilmenite Resources Pty Ltd
- EL 30115, held by Ronald Edwards, Rodney Johnson, Scriven Exploration Pty Ltd, Kaylan Resources Pty Ltd, Thomas Redcliff
- EL 29490, held by Ronald Edwards, Rodney Johnson, Scriven Exploration Pty Ltd, Kaylan Resources Pty Ltd, Thomas Redcliff

Land Claim No. 164, area (i):

- EL 30385, held by Australian Ilmenite Resources Pty Ltd

Land Claim No. 164 , area (ii):

- EL 31142, held by Roper Ilmenite Pty Ltd

Land Claim No. 164, area (iii)

- EL 23500, held by Australian Ilmenite Resources Pty Ltd

³⁵³ See Attachment G to *ibid.*

- EL 28344, held by Australian Ilmenite Resources Pty Ltd
- EL 31142, held by Roper Ilmenite Pty Ltd

Consideration

7.11.62. For reasons previously explained, I do not consider there to be any detriment issues arising out of the above information to which the Minister is to have regard in making decisions under s 11 of the ALRA.

Comments and Recommendations

7.11.63. In the case of these land claims, there are some straightforward matters common to other claims, and one matter which may require an approach specific to the circumstances.

7.11.64. I recommend that the grants should be made by the Minister following the establishment and operation of the proposed permit management system to preserve the interest of the recreational fishers, and the arrangements to grant the proposed licence to the pastoralists to preserve their existing and normal pastoral use of the claim areas.

7.11.65. The matter of access to Elsey Homestead, for the reasons given, should not delay the grant, but the Minister should expect the traditional owners and the Northern Territory then to agree to access for passing tourists on as practical a basis as possible, but having regard to the need to control tourist entry and usage.

7.11.66. In other respects, the claimed detriment is not of sufficient significance for the various reasons explained to impede the grant of the land.

7.11.67. The summary of comment and recommendations at the end of the Introduction to this section contains a little more detail of those conclusions.

8. Conclusions

- 8.1.1. The Terms of Reference identify 16 longstanding land claims under the ALRA recommended for grant but not yet finalised and not currently the subject of settlement negotiations. They concern Reports of the Commissioner from time to time between 1981 and 2004. Obviously, the detriment reported to the Minister in those Reports may have changed in the many years since the reports themselves.
- 8.1.2. The Review undertook that task, with particular focus on 12 claims which are called the beds and banks and ITZ land claims by reason of the decision of the High Court of Australia in the BMB case in 2008.
- 8.1.3. It is appropriate to remark to the Minister the extensive and constructive efforts of all stakeholders to provide to the Review the detriment concerns as now current, and the efforts each made to ensure that those concerns were properly understood and considered. Obviously the work load lay heavily with the Northern Territory itself and then the NLC charged with the responsibility of responding to all those concerns. The representatives of particular interest groups: AFANT, NTSC, and NTCA all played a large part in the Review. Those efforts made the task of providing this Report a manageable one. They are much appreciated.
- 8.1.4. As the Minister has requested in the Terms of Reference, this Report includes comments and recommendations with respect to the relevant land claims focussed on addressing as the Review considers appropriate the opportunities and challenges to resolving the outstanding land claims. There are several areas where there is a clear path for the Minister to follow to properly take account of certain detriment concerns and to proceed to a grant of the land concerned, in particular in relation to recreational fishing interests and to the interests of lessees of pastoral properties in the routine conduct of their pastoral operations. The course of action proposed in this Report for those groups and on those topics involves some not inconsiderable, but sensible, concessions on the part of the traditional Aboriginal owners. There are also some areas of detriment where it is suggested to the Minister that the appropriate course is to make the grant of the land notwithstanding the detriment asserted. Those matters are explained in the body of this Report.
- 8.1.5. I am grateful to the Minister for the opportunity to have considered these important matters. It represents an important step in the consideration of the outstanding claims, where there has been a firm recommendation by the Commissioner to recognise the traditional Aboriginal owners of the subject land and to make a grant of that land to them.

Annexures

INDEX

Annexure No.	Title:	Date:	Author:
1.	Letter to Minister requesting an extension of time to complete the report	15 March 2018	Aboriginal Land Commissioner
2.	Response from Minister re: extension of time	11 April 2018	Senator the Hon Nigel Scullion, Minister for Indigenous Affairs
3.	List of participants	Undated	Aboriginal Land Commissioner
4.	Detriment Review update and corresponding schedule	6 June 2018	Office of the Aboriginal Land Commissioner
5.	Detriment Review memorandum and corresponding schedule	20 April 2018	Aboriginal Land Commissioner
6.	NT News newspaper notice – invitation to provide submissions	19 May 2018	Aboriginal Land Commissioner
7.	Letter to stakeholders re: extension of time and revised timetables	13 April 2018	Aboriginal Land Commissioner
8.	Letter to stakeholders re: conclusion of submissions	22 October 2018	Aboriginal Land Commissioner
9	Index of Submissions	Undated	Aboriginal Land Commissioner
10.	Northern Territory's submissions on detriment acquired post land claim	17 May 2018	Northern Territory
11.	Northern Land Council's submissions on detriment acquired post land claim	25 May 2018	Northern Land Council
12.	Northern Territory's response to NLC's submissions on detriment acquired post land claim	6 June 2018	Northern Territory



Australian Government
Office of the Aboriginal Land Commissioner

Phone: (08) 8928 6458
Email: AboriginalLandCommissioner@network.pmc.gov.au

Level 4, Jacana House, 39-41 Woods Street, DARWIN NT 0800
GPO Box 9932 DARWIN NT 0801

15 March 2018

By email

Senator the Hon Nigel Scullion
Minister for Indigenous Affairs
PO Box 6100
Senate, Parliament House
Canberra ACT 2600
Nigel.Scullion@ia.pm.gov.au

Dear Minister,

Land Claims Detriment Review – Update

I am writing to you to update you on the review under section 50(1)(d) of the *Aboriginal Land Rights (Northern Territory) Act 1976*, of 16 land claims previously recommended for grant but not yet finalised.

Specifically, this update also requests an extension of time to complete the review from 6 July 2018 (as specified in the Terms of Reference) to 30 April 2019.

I have completed an analysis of the 16 land claims, and identified the key sectoral stakeholders.

I have also initiated the next step, inviting those persons or entities who have or may have interests which would or might give rise to a relevant detriment, and to address with the traditional owners and with those claiming detriment the ways that such claimed detriment might be resolved or reduced.

I am undertaking this task in a sequential process so as not to impose too great a workload on those who represent sectoral interests, such as Amateur Fisherman's Association NT.

My experience to date is that, understandably, such sectoral representations have had difficulty in meeting the response timeframes due to time and resourcing constraints. That is in part because the process of addressing outstanding claims by way of inquiries also necessarily involves the same representatives. I understand such concerns have been expressed directly to you.

I have, to date, granted some extensions to providing submissions. It is in my mind necessary, to secure a reliable report to you, that those who participate are given enough time to do so fairly and effectively.

Annexure 1

In addition, notification of 'detriment' concerns to date has indicated that some of those asserting 'detriment' do so on the bases of interests acquired after the making of the relevant claim and in some instances after the report and recommendation to the Minister by the Aboriginal Land Commissioner. I am also seeking submissions on the significance of such claims, that is, whether any such post claim / report 'detriment' should be considered or disregarded by you.

In my view, an extension of time to report to you to 30 April 2019 will be sufficient to accommodate the proper participation of stakeholders and others in this process, so as to ensure its integrity.

I await your response. I would, of course, be happy to discuss the above with you.

Yours sincerely

A handwritten signature in black ink, appearing to read 'John Mansfield', with a long horizontal flourish extending to the right.

The Hon John Mansfield AM QC
Aboriginal Land Commissioner



MINISTER FOR INDIGENOUS AFFAIRS

Reference: MC18-018211

The Hon John Mansfield AM QC
Aboriginal Land Commissioner
GPO Box 9932
DARWIN NT 0801

Dear Commissioner

Thank you for your letter of 15 March 2018, providing an update on your review of detriment issues in respect of 16 land claims previously recommended for grant but not yet finalised.

I appreciated the opportunity to talk with you about your current program of land claim inquiries and the detriment review when we both attended the Vernon Islands handover ceremony on the Tiwi Islands recently.

To ensure respondents are afforded procedural fairness, I have agreed an extension of time until 31 December 2018 for completion of the detriment review. I ask that you seek my approval if further extensions are required with an update on your work over the coming months.

In the interim, I would appreciate further periodic updates on progress.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Nigel Scullion'.

NIGEL SCULLION

11 April 2018

Participants - Detriment Review

Alice Springs Outback Anglers (as part of King Ash Bay Fishing Club's submissions)
Amateur Fishermen's Association of the Northern Territory
Armour Energy Ltd
Australian Wildlife Conservancy
Britmar (Aust) Pty Ltd
Carpentaria Shipping Services, P&O Maritime
Daly River Barra Resort
Department of Industry, Innovation and Science (Cth)
DK Pastoral Company Pty Ltd (Lonesome Dove Station)
Doe Run Company
Estate of Veronica Januschka (deceased)
Fly Fox Pty Ltd (Flying Fox Station)
Four Wheel Drive Australia Inc. (as part of Maximus No. 82's submissions)
Fullham Pty Ltd, Gulf Mini Mart Borroloola
Glencore Australia Holdings Pty Ltd
King Ash Bay Fishing Club Inc
King Ash Bay Service Station & Supermarket (as part of King Ash Bay Fishing Club's submission)
Limmen Bight Fishing Camp
Mabunji Aboriginal Corporation (as part of Northern Territory Seafood Council's submissions)
Maximus No. 82 (Lorella Springs Station)
Moroak Pastoral Company Pty Ltd (Goondooloo and Moroak Stations)
Mousie's Barra and Bluewater Charters
Mr Frank Shadforth, Seven Emu Station
Northern Land Council
Northern Territory Cattlemen's Association
Northern Territory Iron Ore Pty Ltd
Northern Territory Resources Ptd Ltd
Northern Territory Seafood Council
NT Coastal Fishing Charters/ King Ash Bay Lodge
Pardoo Beef Company Pty Ltd (Wollogorang Station)
Solicitor of the Northern Territory, Northern Territory Government
Tennant Creek Fishing Club (as part of King Ash Bay Fishing Club's submissions)
Tipperary Group of Stations, Litchfield Station
Tourism Top End Inc. (as part of Maximus No. 82's submissions)



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Office of the Aboriginal Land Commissioner

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Level 4, Jacana House, 39-41 Woods Street, DARWIN NT 0800
GPO Box 9932 DARWIN NT 0801

06 June 2018

Dear stakeholders,

Aboriginal Land Commissioner's Detriment Review – Update and Procedure

In November 2017, the Aboriginal Land Commissioner (Commissioner) commenced his review into the status of detriment issues associated with 16 land claims recommended for grant but not yet finalised. The Terms of Reference for the Detriment Review (Review) were issued by the Minister for Indigenous Affairs (Minister) on 6 July 2017 and can be accessed at:

<https://www.pmc.gov.au/resource-centre/indigenous-affairs/terms-reference-review-detriment-aboriginal-land-claims-recommended-grant-not-yet-finalised>

On 13 April 2018, the Minister granted the Commissioner an extension of time until 31 December 2018 for completion of the Review.

The Commissioner has now written to those stakeholders who participated in the land claim inquiries and to new stakeholders who may have an interest in the Review. A schedule of those who were contacted is enclosed at Annexure 1.

The Commissioner also published notices in four Northern Territory newspapers inviting submissions from any persons and entities who might have a potential interest in the Review and who were not identified when the invitations to participate were sent out.

These notices were published in the following newspapers on the following dates:

- NT News on 19 May 2018
- Centralian Advocate on 18 May 2018
- Katherine Times on 23 May 2018
- Tennant & District Times on 18 May 2018

A copy of the newspaper notice is enclosed at Annexure 2.

The 16 land claims subject to the Review have been addressed in 6 groupings. These land claim groupings reflect the groupings in the land claim reports as well as geographical factors. The

Commissioner has staggered his requests for submissions in respect of each land claim grouping, so as to assist those stakeholders intending to provide detriment submissions on multiple land claims and to assist the Northern Land Council (NLC), who have been asked to respond to the claims of detriment concerning each land claim. The land claim groupings are as follows:

Grouping 1: Garrwa (Wearyan and Robinson Rivers Beds and Banks) Land Claim No. 178; McArthur River Land Claim No. 184 and Manangoora Land Claim No. 185.

Grouping 2: Lower Daly Land Claim No. 68

Grouping 3: Maria Island & Limmen Bight River Land Claim No. 71; Maria Island Region Land Claim No. 198 and Lorella Region Land Claim No. 199

Grouping 4: Seven Emu Region Land Claim No. 186 and part of Wollogorang Area II Land Claim No. 187

Grouping 5: Lower Roper River Land Claim No. 70 and the Upper Roper River Land Claims comprising: Mataranka Area (NT Portion 916) Land Claim No. 129; Western Roper River (Bed and Banks) Land Claim No. 141; Roper Valley Area Land Claim No. 164 and Elsey Region Land Claim No. 245

Grouping 6: Finniss River Land Claim No. 39 and Mataranka Land Claim No. 69

The final date for the provision of detriment submissions from potential stakeholders who were contacted directly has elapsed for groupings 1 to 5.

Submissions received in relation to these groupings have been provided to the NLC and circulated amongst other stakeholders participating in the Review for the relevant grouping. A schedule of those who have provided detriment submissions in respect of these five groupings are enclosed at Annexure 3.

The NLC is yet to respond to the detriment submissions provided to them. In formulating their responses, they are holding on-country consultations with claimants and traditional Aboriginal owners. Their current deadline to respond to detriment submissions in respect of all six groupings is 31 August 2018.

In addition to detriment submissions, the Office of the Aboriginal Land Commissioner has received the following submissions in relation to matters of legal principle and procedural issues:

- NLC's submission on legal principles in respect of detriment interests acquired post land claim dated 25 May 2018;
- Northern Territory Government's (NTG) submission on legal principles in respect of detriment interests acquired post land claim dated 17 May 2018;
- NTG's letter to the Commissioner in respect of considering section 50(3)(c) and section 50(3)(b) of the Land Rights Act in his report and recommendations to the Minister dated 22 January 2018; and
- NLC's letter to the Commissioner's Associate in regards to the matter of contacting and consulting with Aboriginal ranger groups on the question of detriment dated 18 December 2017.

The Commissioner has also sent the following letters concerning general matters in respect of the Review. These have been sent, as necessary, to stakeholders who have confirmed an interest in an area or areas recommended for grant:

- Letter of the Commissioner in respect of extension requests for detriment submissions; Memorandum of the Commissioner – Claims of detriment by stakeholders to be supported by particulars and documentary material with the annexed Schedule;
- Letter of the Commissioner considering section 50(3)(c) and section 50(3)(b) of the Land Rights Act in the Review (sent to those stakeholders who confirmed an interest in Groupings 1 and 2).

If there is anything further that you believe the Commissioner should have regard to, please contact me by email at Elena.Zola@network.pmc.gov.au or by mail addressed to the Office of the Aboriginal Land Commissioner, 4th Floor, 39-41 Woods Street, DARWIN, NT 0800 or GPO BOX 9322, DARWIN NT 0801.

This letter has been sent to all persons and entities that have, to date, made any submissions to the Commissioner for the purposes of his Review. It can also be accessed on the Aboriginal Land Commissioner's website, at: <https://www.pmc.gov.au/indigenous-affairs/land/aboriginal-land-commissioner>

Yours sincerely,



Elena Zola
Associate to Aboriginal Land Commissioner Mansfield

Annexure 1

Schedule of persons and entities that were sent invitations to participate per grouping

Grouping 1: Garrwa (Wearyan and Robinson Rivers Beds and Banks) Land Claim No. 178; McArthur River Land Claim No. 184 and Manangoora Land Claim No. 185

Australian Border Force

Australian Communications and Media Authority

Australian Fisheries Management Authority

Commonwealth Department of Agriculture

Australian Institute of Marine Science

Australian Maritime Safety Authority

Bureau of Meteorology

Commonwealth Scientific and Industrial Research Organisation

Commonwealth Department of Defence

Director of National Parks, Commonwealth Department of Environment

Commonwealth Department of Finance

Geoscience Australia

Commonwealth Department of Infrastructure

Solicitor for the Northern Territory, Northern Territory Government

Northern Territory Seafood Council

Amateur Fishermen's Association of the Northern Territory

Northern Territory Cattlemen's Association

Northern Territory Guided Fishing Industry Association

Association of Mining and Exploration Companies

Minerals Council of the Northern Territory

Roper Gulf Council

The Australian Petroleum Production & Exploration Association

Borrooloola Hotel Motel

Borrooloola Houseboats

Savannah Way Motel Borrooloola

McArthur River Caravan Park

McArthur River Charters

NT Coastal Fishing Charters

Savannah Way Motel
Carpentaria Shipping Services, P&O Maritime
Britmar (Aust) Pty Ltd
Glencore/Mount Isa Mines Ltd
Greenback Station
Spring Creek Station
Manangoora Station
Seven Emu Station
McArthur River Station
King Ash Bay Fuels
King Ash Bay Fishing Club
Lianthwirriyarra Rangers
Mabunjii Association
Waanyi Garawa and Garawa Rangers
Waralungku Arts
Sandfire Resources NL
Molyhil Mining Pty Ltd

Grouping 2: Lower Daly Land Claim No. 68

Australian Border Force
Australian Communications and Media Authority
Australian Fisheries Management Authority
Commonwealth Department of Agriculture
Australian Institute of Marine Science
Australian Maritime Safety Authority
Bureau of Meteorology
Commonwealth Scientific and Industrial Research Organisation
Commonwealth Department of Defence
Director of National Parks, Commonwealth Department of Environment
Commonwealth Department of Finance
Geoscience Australia
Commonwealth Department of Infrastructure
Solicitor for the Northern Territory, Northern Territory Government
Northern Territory Seafood Council
Amateur Fishermen's Association of the Northern Territory
Northern Territory Cattlemen's Association
Northern Territory Guided Fishing Industry Association

Association of Mining and Exploration Companies
Minerals Council of the Northern Territory
Roper Gulf Regional Council
The Australian Petroleum Production & Exploration Association
Daly River Barra Resort
Fishabout
Mousie's Barra
Litchfield Station

Grouping 3: Maria Island & Limmen Bight River Land Claim No. 71; Maria Island Region Land Claim No. 198 and Lorella Region Land Claim No. 199

Australian Border Force
Australian Communications and Media Authority
Australian Fisheries Management Authority
Commonwealth Department of Agriculture
Australian Institute of Marine Science
Australian Maritime Safety Authority
Bureau of Meteorology
Commonwealth Scientific and Industrial Research Organisation
Commonwealth Department of Defence
Director of National Parks, Commonwealth Department of Environment
Commonwealth Department of Finance
Geoscience Australia
Commonwealth Department of Infrastructure
Solicitor for the Northern Territory, Northern Territory Government
Northern Territory Seafood Council
Amateur Fishermen's Association of the Northern Territory
Northern Territory Cattlemen's Association
Northern Territory Guided Fishing Industry Association
Association of Mining and Exploration Companies
Minerals Council of the Northern Territory
Roper Gulf Regional Council
The Australian Petroleum Production & Exploration Association

Sandfire Resources NL

Britmar (Aust)

Limmen Bight Fishing Camp

Maximus No. 82 (Lorella Springs Station)

Grouping 4: Seven Emu Region Land Claim No. 186 and part of Wollogorang Area II Land Claim No. 187

Australian Border Force

Australian Communications and Media Authority

Australian Fisheries Management Authority

Commonwealth Department of Agriculture

Australian Institute of Marine Science

Australian Maritime Safety Authority

Bureau of Meteorology

Commonwealth Scientific and Industrial Research Organisation

Commonwealth Department of Defence

Director of National Parks, Commonwealth Department of Environment

Commonwealth Department of Finance

Geoscience Australia

Commonwealth Department of Infrastructure

Solicitor for the Northern Territory, Northern Territory Government

Northern Territory Seafood Council

Amateur Fishermen's Association of the Northern Territory

Northern Territory Cattlemen's Association

Northern Territory Guided Fishing Industry Association

Association of Mining and Exploration Companies

Minerals Council of the Northern Territory

Roper Gulf Regional Council

The Australian Petroleum Production & Exploration Association

Armour Energy Ltd

Australian Wildlife Conservancy (Pungalina-Seven Emu Wildlife Sanctuary)

McArthur River Charters

Australian Sportfishing Charters J & A Fishing Charters

NT Coastal Fishing Charters

Mr Darryl Everett

Seven Emu Station

Greenback Station

Manangoora Station

Pardoo Beef Company Pty Ltd (Wollogorang Station)

Mr Peter Anderson

Grouping 5: Lower Roper River Land Claim No. 70 and the Upper Roper River Land Claims comprising: Mataranka Area (NT Portion 916) Land Claim No. 129; Western Roper River (Bed and Banks) Land Claim No. 141; Roper Valley Area Land Claim No. 164 and Elsey Region Land Claim No. 245

Australian Border Force

Australian Communications and Media Authority

Australian Fisheries Management Authority

Commonwealth Department of Agriculture

Australian Institute of Marine Science

Australian Maritime Safety Authority Bureau of Meteorology

Commonwealth Scientific and Industrial Research Organisation

Commonwealth Department of Defence

Director of National Parks, Commonwealth Department of Environment

Commonwealth Department of Finance

Geoscience Australia

Commonwealth Department of Infrastructure

Solicitor for the Northern Territory, Northern Territory Government

Northern Territory Seafood Council

Amateur Fishermen's Association of the Northern Territory

Northern Territory Cattlemen's Association

Northern Territory Guided Fishing Industry Association

Association of Mining and Exploration Companies

Minerals Council of the Northern Territory
Roper Gulf Regional Council
The Australian Petroleum Production & Exploration Association
Mr Paul Reed
Roper Bar Store
Northern Territory Iron Ore Pty Ltd
Kaylan Resources Pty Ltd
Australian Mining and Exploration Title Services
Australian Ilmenite Resources Pty Ltd
Macmines Austasia Pty Ltd
Big River Station
MS Contracting (Flying Fox Station)
Mr Simon Hoar (Goondooloo and Moroak Stations)
DK Grazing (Lonesome Dove Station)
Red Metal Ltd Sandfire Resources NL

Grouping 6: Finnis River Land Claim No. 39 and Mataranka Land Claim No. 69

Australian Border Force
Australian Communications and Media Authority
Australian Fisheries Management Authority Commonwealth
Department of Agriculture
Australian Institute of Marine Science
Australian Maritime Safety Authority
Bureau of Meteorology
Commonwealth Scientific and Industrial Research Organisation
Commonwealth Department of Defence
Director of National Parks, Commonwealth
Department of Environment Commonwealth
Department of Finance
Geoscience Australia
Commonwealth Department of Infrastructure
Solicitor for the Northern Territory, Northern Territory
Government Northern Territory Cattlemen's Association

Association of Mining and Exploration Companies

Minerals Council of the Northern Territory

Roper Gulf Regional Council

Coomalie Community Government Council

Rio Tinto Exploration Ltd

Rio Tinto Services Ltd

Ward Keller

Northern Australia and Major Projects Division, Department of Industry, Innovation and Science

Namul-Namul Aboriginal Corporation

Mount McMinn Station

DK Grazing (Lonesome Dove Station)

Mr Simon Hoar (Goondooloo and Moroak Stations)

Big River Station

MS Contracting (Flying Fox Station)

Further entities that were provided letters indirectly in respect of Grouping 6:

Northern Territory Iron Ore Pty Ltd

Northern Territory Resources Pty Ltd

Australian Mining and Exploration Title Services

Doe Run Company

Annexure 2

Newspaper notice published in the NT News, Centralian Advocate, Katherine Times and Tennant & District Times between the dates of 18 May 2018 to 23 May 2018.



Australian Government
Office of the Aboriginal Land Commissioner

ABORIGINAL LAND RIGHTS (NORTHERN TERRITORY) ACT 1976

**LAND CLAIMS DETRIMENT REVIEW -
INVITATION TO PROVIDE SUBMISSIONS ON DETRIMENT MATTERS**

At the request of the Commonwealth Minister for Indigenous Affairs, Senator the Hon Nigel Scullion (Minister), I have commenced a review of detriment issues relating to 16 land claims previously recommended for grant by the Aboriginal Land Commissioner (Commissioner) but not yet finalised (Detriment Review), pursuant to section 50(1)(d) of the *Aboriginal Land Rights (Northern Territory) Act 1976*.

The following land claims are subject to the Detriment Review:

- Finniss River Land Claim No. 39 (Report No. 9)
- Mataranka Area Land Claim No. 69 (Report No. 29)
- Lower Daly Land Claim No. 68 (Report No. 57)
- Lower Roper River Land Claim No. 70 (Report No. 65)
- Maria Island and Limmen Bight River Land Claim No. 71 (Report No. 61)
- Maria Island Region Land Claim No. 198 (Report Nos. 61 and 63)
- McArthur River Region Land Claim No. 184 (Report No. 62)
- Manangorra Region Land Claim No. 185 (Report Nos. 62 and 66)
- Lorella Region Land Claim No. 199 (Report No. 63)
- Garrwa (Wearyan & Robinsons River beds and banks) Land Claim No. 178 (Report No. 64)
- Seven Emu Region Land Claim No. 186 (Report No. 66)
- Wollogorang Area II Land Claim No. 187 (Report No. 66)
- Western Roper River (beds and banks) Land Claim No. 141 (Report No. 66)
- Roper Valley Area Land Claim No. 164 (Report No. 68)
- Mataranka Area (NT Portion 916) Land Claim No. 129 (Report No. 68)
- Elsey Region Land Claim No. 245 (Report No. 66)

The Terms of Reference for the Detriment Review and the relevant land claim reports by the Commissioner, which include maps of the areas under claim, can be accessed at:
<https://www.pmc.gov.au/news-centre/indigenous-affairs/detriment-review-2017-2018>

The completion date for the Detriment Review has been revised by the Minister to 31 December 2018.

I have written to detriment parties who participated in the land claim inquiries and new stakeholders who may have an interest in the areas recommended for grant, asking for updated detriment information. This Notice is directed to other persons who have not been so notified and who consider that they would be adversely affected by a grant of Aboriginal title to any part of the areas the subject of any of the reports referred to. Such persons should, on or before **Wednesday 04 July 2018**, provide my Office with detailed information about their detriment concerns, including documentary material substantiating those concerns. Where relevant, submissions should include information described in the Schedule, which can also be accessed on the website link provided above.

Wednesday 04 July 2018 is the final date for providing any detriment submissions and documentary material in respect of the Detriment Review. Only information provided by this date will be considered in the writing of my Report and Recommendations to the Minister.

Detriment submissions should be provided by email to AboriginalLandCommissioner@network.pmc.gov.au Or by mail addressed to the Aboriginal Land Commissioner, 4th Floor, 39-41 Woods Street, DARWIN, NT 0800 or GPO BOX 9322, DARWIN NT 0801.

Dated this 18th day of May 2018
The Hon John Mansfield AM QC
Aboriginal Land Commissioner

016328

Annexure 3

Schedule of persons and entities that have provided detriment submissions to date in respect of groupings 1 to 5

Grouping 1: Garrwa (Wearyan and Robinson Rivers Beds and Banks) Land Claim No. 178; McArthur River Land Claim No. 184 and Manangoora Land Claim No. 185

Solicitor of the Northern Territory, Northern Territory Government

Northern Territory Seafood Council

Amateur Fishermen's Association of the Northern Territory

Northern Territory Cattlemen's Association

NT Coastal Fishing Charters together with King Ash Bay Lodge

Carpentaria Shipping Services, P&O Maritime

Britmar (Aust) Pty Ltd

Glencore/Mount Isa Mines Ltd

Mr Frank Shadforth, Seven Emu Station

King Ash Bay Fishing Club

King Ash Bay Service Station & Supermarket (as part of King Ash Bay Fishing Club's submission)

Alice Springs Outback Anglers (as part of King Ash Bay Fishing Club's submissions) Tennant Creek Fishing Club (as part of King Ash Bay Fishing Club's submissions) Mabunji Association (as part of Northern Territory Seafood Council's submissions)

Armour Energy Ltd

Gulf Mini Mart Borroloola

Grouping 2: Lower Daly Land Claim No. 68

Amateur Fishermen's Association of the Northern Territory

Daly River Barra Resort

Mousie's Barra

Litchfield Station

Solicitor for the Northern Territory, Northern Territory Government

Northern Territory Cattlemen's Association

Grouping 3: Maria Island & Limmen Bight River Land Claim No. 71; Maria Island Region Land Claim No. 198 and Lorella Region Land Claim No. 199

Solicitor for the Northern Territory, Northern Territory Government

Northern Territory Cattlemen's Association

Amateur Fishermen's Association of the Northern Territory

Limmen Bight Fishing Camp

Maximus No. 82 (Lorella Springs Station)

Four Wheel Drive Australia Inc. (as part of Maximus No. 82's submissions)

Tourism Top End Inc. (as part of Maximus No. 82's submissions)

Northern Territory Seafood Council

Northern Territory Iron Ore Pty Ltd Britmar (Aust) Pty Ltd

Grouping 4: Seven Emu Region Land Claim No. 186 and part of Wollogorang Area II Land Claim 187

Pardoo Beef Company Pty Ltd (Wollogorang Station)

Mr Frank Shadforth, Seven Emu Station

Armour Energy Ltd

Northern Territory Seafood Council

Amateur Fishermen's Association of the Northern Territory

Solicitor for the Northern Territory, Northern Territory Government

Northern Territory Cattlemen's Association

Grouping 5: Lower Roper River Land Claim No. 70 and the Upper Roper River Land Claims comprising: Mataranka Area (NT Portion 916) Land Claim No. 129; Western Roper River (Bed and Banks) Land Claim No. 141; Roper Valley Area Land Claim No. 164 and Elsey Region Land Claim No. 245

Northern Territory Cattlemen's Association

MS Contracting (Flying Fox Station)

Moroak Pastoral Company Pty Ltd (Goondooloo and Moroak Stations)

DK Pastoral Company Pty Ltd (Lonesome Dove Station)

Northern Territory Seafood Council

Amateur Fishermen's Association of the Northern Territory

Northern Territory Iron Ore Pty Ltd

To receive Friday 15 June 2018:

Solicitor for the Northern Territory, Northern Territory Government

Roper Bar Store

Schedule of persons and entities that have provided an intention to participate in respect of Grouping 6 to date:

Grouping 6: Finnis River Land Claim No. 39 and Mataranka Land Claim No. 69

Northern Territory Iron Ore Pty Ltd

Northern Territory Resources Ptd Ltd

Doe Run Company

Northern Australia and Major Projects Division, Department of Industry, Innovation and Science

Northern Territory Cattlemen's Association

DK Pastoral Company Pty Ltd (Lonesome Dove Station)

MS Contracting (Flying Fox Station)

Solicitor for the Northern Territory, Northern Territory Government



Australian Government
Office of the Aboriginal Land Commissioner

Phone: (08) 8928 6458
Email: AboriginalLandCommissioner@network.pmc.gov.au

Level 4, Jacana House, 39-41 Woods Street, DARWIN NT 0800
GPO Box 9932 DARWIN NT 0801

20 April 2018

Dear Stakeholders,

Memorandum: Detriment Review – Claims of detriment by stakeholders to be supported by particulars and documentary material

As you are aware, I am currently conducting a review at the request of the Commonwealth Minister for Indigenous Affairs, the Hon Nigel Scullion MP (Minister), into current detriment issues associated with 16 land claims recommended for grant by the Aboriginal Land Commissioner (Commissioner) but not yet finalised (Detriment Review). The Minister has recently extended my reporting date to 31 December 2018. I do not anticipate that any further extension will be granted. By that date I am to provide a report to the Minister which reviews the relevant information received from stakeholders relating to detriment issues associated with the land claims and where appropriate make recommendations to the Minister with respect to such issues.

It is important that detriment submissions include sufficient detail of the claimed detriment, and the documentary material and statements which support it. The Minister's time frame does not allow for supplementary requests for information and the later supply of confirmatory material.

A number of the detriment submissions I have received so far from stakeholders have lacked sufficient specificity in relation to the detriment claimed. I have sought further details from a number of stakeholders which in some cases have not been responded to. Claims of detriment that are merely speculative or general in nature may not be able to be given much weight for the purposes of my report to the Minister.

The Schedule to this memorandum (memo) on page 5 sets out some matters which in relevant cases should be addressed, and gives some examples of how this might be done. I emphasise that the Schedule below provides examples only, and all claims of detriment should be supported by particulars and documentary material applicable to the particular claim of detriment.

Where submissions have already been received by my Office, any further particulars you wish to provide in response to this memo are to be provided by 30 April 2018.

I expect that submissions provided after the date of this memo will address the issues identified herein.

Where stakeholders do not provide appropriate particulars or material in support of their claims of detriment, including in response to a specific request for further information, I will proceed on the basis of what is provided.

Beyond the provision of submissions on the above terms, the time frame dictates that there will be no further opportunities to provide additional details and evidence prior to the Northern Land Council's (NLC) consultations and responses in respect of the claimed detriment issues. There may however be matters arising from the NLC's responses which do require further comment.

If you have queries about this letter, please contact my Associate, Elena Zola (e: elena.zola@network.pmc.gov.au | p: 08 8208 0331).

Yours sincerely,

A handwritten signature in black ink, appearing to read 'John Mansfield', is enclosed within a thin black rectangular border.

The Hon John Mansfield AM QC Aboriginal Land Commissioner

David Avery
Lawyer
Northern Land Council
David.Avery@nlc.org.au

Matilda Hunt
Lawyer
Northern Land Council
Huntma@nlc.org.au

Poppi Gatis
Senior Lawyer
Solicitor for the Northern Territory
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Amateur Fishermen Association of the NT
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Partner in Charge – Darwin
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Sarah Pringle
Associate
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David Kerr
General Manager – Legal
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Katherine Winchester
Chief Executive Officer
Northern Territory Seafood Council
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Ashley Garner
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King Ash Bay Lodge
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Roger Cressey
Chief Executive Officer

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John Connor
Chairman
CSS P&O Maritime
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Bradly Torgan
Senior Lawyer
Ward Keller
bradlytorgan@wardkeller.com.au

Stephen Barrett
Limmen River Fishing Camp
limmenriver@gmail.com

Simon Peat
Director
Britmar (Aust) Pty Ltd
Simon.peat@britmargroup.net

David Connolly
General Manager
Tipperary Group of Stations
Branir and Booloomani Partnership
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Stuart and Marnie Brisbane
Daly River Barra Resort
dalyriverbarra@gmail.com

Paul Burke
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Paul.burke@ntca.org.au

Ruth Cairns
Legal Counsel
Australian Wildlife Conservancy
ruth.cairns@australianwildlife.org

Shannon Latham
Mousie's Barra
Mousiesbarra@yahoo.com.au

Graeme Williams
Executive Officer
NT Guided Fishing Industry Association
info@ntgfia.com.au

Brain Hevey President
Australian National Four Wheel Drive Council
– 4WD Australia president@4wda.org.au

Cristel Woelfel-Donovoan
Senior Tenement Consultant
AMETS
Cristel@amets.com.au

The Australian Petroleum Production &
Exploration Association
Darwin@appea.com.au

Minerals Council of Australia
Info.nt@minerals.org.au

Michael Berto
Roper Gulf Regional Council
info@ropergulf.nt.gov.au

Mark Sullivan Flying Fox Station
Mark@mscontracting.com.au

Donald and Kelly White
Lonesome Dove Station
dkgrazing@bigpond.com

Neil Vandrunen
Association of Mining and Exploration
Companies
Neil.vandrunen@amec.org.au
info@amec.org.au

Australian Ilmenite Resources Pty Ltd
rphillips@macmines.com
Jiaof@ilmenite.com.au

Red Metal Limited
info@redmetal.com.au

Daniel Tapp
Big River Station
bigriverstation@reachnet.com.au

Simon Hoar Goondooloo Station
Hoarla9@hotmail.com

Donna Boyce
Australian Government Solicitor
Donna.Boyce@ags.gov.au

SCHEDULE

1. Timing Issues

Claims for detriment might be assessed differently depending on whether the interest holder had the opportunity to know of the claim made under the *Aboriginal Land Rights (Northern Territory) Act 1976* (Land Rights Act), or the Report on that claim by the Commissioner.

It is important, therefore, to indicate if:

- i. The person or entity claiming the detriment was in possession /occupation of the relevant interest at the time of the claim/ Report or became the possessor/ occupier of the relevant interest after that date, and;
- ii. If the latter, then what date the relevant interest was acquired, and whether it should be assumed that at that date the person or entity knew or should have known of the claim/Report or in the alternative, did not know or should not have known of the claim/Report and why that is.
- iii. In any event, where the interest gives rise to a relevant transaction (e.g. starting a business or leasing an interest), topic (ii) may also be relevant.

2. Financial detriment

Claims of financial detriment should be accompanied with particulars quantifying the loss that would be incurred in the event a grant of title is made. Claims of financial detriment would be assisted by supporting material such as annual reports and financial statements, contracts or exchanges of correspondence.

3. Physical / access detriment

Claims of detriment in relation to access or use of beds and banks of rivers and intertidal zones should be accompanied with particulars defining which part and/or portion of the claim areas you access, the purpose for which you access the area, your means of accessing it and how often. Such claims should also be accompanied with details substantiating how you or your operation will be impacted both geographically and financially if your access is restricted **and** how you or your operation will be affected if a permit for access is required to be purchased in the event of a grant of title being made.

4. Benefits to local community

Claims that you or your business contribute to the local Aboriginal community should be accompanied with particulars of what those contributions are, who they go to, under what informal or formal agreement (and with whom), and when/how often they have been made. It is desirable that such claims are also supported by documentary material such as monetary figures or estimations and an explanation of how such was calculated.

5. Wider detriment

Claims that you or your business contribute to the local or Northern Territory economy should be accompanied with particulars of such contributions and

documentary material such as annual reports or financial statements which provide a breakdown of expenditure to illustrate how that money can be considered to contribute to the local or wider economy.

Where there is a claim of detriment to the wider local community, including to any local Aboriginal community, the basis of the claim should also be fully explained and to the extent possible quantified and the anticipated loss justified by appropriate material.

6. Cumulative detriment

This topic is likely to be asserted only by the Northern Territory and representative bodies.

In addition to the sort of material referred to above, such submissions and documentary material are invited to comment on the extent to which the detriment referred to has been experienced as a result of past grants under the Land Rights Act.

7. General

In all instances, where there is an existing contracted or practical arrangement (e.g. a section 19 lease agreement under the Land Rights Act or a permit under the Aboriginal Land Act or a verbal agreement) with a local Aboriginal community/Aboriginal Land Trust, which might diminish the claimed detriment, details of this arrangement should be provided.

SATURDAY MAY 19 2018

CLASSIFIEDS 63

General Notices


Australian Government
Office of the Aboriginal Land Commissioner

ABORIGINAL LAND RIGHTS (NORTHERN TERRITORY) ACT 1976
LAND CLAIMS DETRIMENT REVIEW -
INVITATION TO PROVIDE SUBMISSIONS ON DETRIMENT MATTERS

At the request of the Commonwealth Minister for Indigenous Affairs, Senator the Hon Nigel Scullion (Minister), I have commenced a review of detriment issues relating to 16 land claims previously recommended for grant by the Aboriginal Land Commissioner (Commissioner) but not yet finalised (Detriment Review), pursuant to section 50(1)(b) of the Aboriginal Land Rights (Northern Territory) Act 1976.

The following land claims are subject to the Detriment Review:

- Finnis River Land Claim No. 39 (Report No. 39)
- Mataranka Area Land Claim No. 69 (Report No. 29)
- Lower Daly Land Claim No. 68 (Report No. 67)
- Lower Roper River Land Claim No. 70 (Report No. 65)
- Maria Island and Limmen Bight River Land Claim No. 71 (Report No. 61)
- Maria Island Region Land Claim No. 198 (Report Nos. 61 and 63)
- McArthur River Region Land Claim No. 164 (Report No. 62)
- Maningarra Region Land Claim No. 135 (Report Nos. 62 and 66)
- Lamela Region Land Claim No. 189 (Report No. 63)
- Garwa (Warran) & Robinsons River beds and banks Land Claim No. 178 (Report No. 64)
- Seven Emu Region Land Claim No. 186 (Report No. 66)
- Wollongaring Area II Land Claim No. 187 (Report No. 66)
- Western Roper River beds and banks Land Claim No. 141 (Report No. 68)
- Roper Valley Area Land Claim No. 164 (Report No. 68)
- Mataranka Area (NT Portion 916) Land Claim No. 129 (Report No. 68)
- Elsey Region Land Claim No. 246 (Report No. 68)

The Terms of Reference for the Detriment Review and the relevant land claim reports by the Commissioner, which include maps of the areas under claim, can be accessed at: <https://www.pmc.gov.au/news-central/indigenous-affairs/detriment-review-2017-2018>

The completion date for the Detriment Review has been revised by the Minister to 31 December 2018.

I have written to detriment parties who participated in the land claim inquiries and new stakeholders who may have an interest in the areas recommended for grant, asking for updated detriment information. This notice is directed to other persons who have not been so notified and who consider that they would be adversely affected by a grant of Aboriginal title to any part of the areas the subject of any of the reports referred to. Such persons should, on or before **Wednesday 04 July 2018**, provide my Office with detailed information about their detriment concerns, including documentary material substantiating those concerns. Where relevant, submissions should include information described in the Schedule, which can also be accessed on the website link provided above.

Wednesday 04 July 2018 is the final date for providing any detriment submissions and documentary material in respect of the Detriment Review. Only information provided by this date will be considered in the writing of my Report and Recommendations to the Minister.

Detriment submissions should be provided by email to Aboriginal.Land.Commissioner@nt.gov.au Or by mail addressed to the Aboriginal Land Commissioner, 4th Floor, 39-41 Woods Street, DARWIN, NT 0800 or GPO BOX 8322, DARWIN NT 0801.

Dated this 18th day of May 2018
The Hon John Mansfield AM QC
Aboriginal Land Commissioner

PARAQUAD NT BRIGHTSKY AUSTRALIA

Come to our FREE INFORMATION SESSIONS
on effective NDIS transition in preparation for the Darwin roll out scheduled for July 1 2018.

Two sessions will be held on the 29th May 2018 at the Holsbee (C2), 100 The Esplanade Darwin.

FIRST SESSION: 10AM-12NOON Light refreshments will be served

SECOND SESSION: 2PM-4PM

All are welcome!

Sessions will be relevant for NDIS Participants, people and organisations providing care and Coordination of Support. The sessions will cover a brief overview of the NDIS and supports available, how they can be worked into your plan to achieve your goals and how to maximise your choice and control.

For more information and for catering purposes please RSVP by 23rd May 2018 to gail.black@brightsky.com.au or call (08) 8914 8940

ParaQuad NT BrightSky

In the Removalist backloading or transport industry...
Load up today with an ad in the bizINDEX...
Let us get you on the map to success!

NT4News Call Rachel on 8944 9902

 **CITY OF DARWIN**

Irrigation System Installation

Wulagi Greenbelt (Brolga)
Council will be conducting irrigation system installation works at the Wulagi Greenbelt from Monday 21 May to Monday 4 June. Works are expected to be completed by Monday 4 June 2018, weather permitting.

Heavy machinery will be on-site and noise disruption is anticipated. Please adhere to all signage and traffic management directions.

Irrigation System Installation

Twil - Kapaiga Park
Council will be conducting irrigation system installation works at Kapaiga Park, Twil from Monday 21 May to Monday 4 June. Works are expected to be completed by Monday 4 June 2018, weather permitting.

Heavy machinery will be on-site and noise disruption is anticipated.

Abandoned Vehicles

The following vehicles have been removed from public places.

Any person with an interest in these vehicles should phone Council on 8930 0602.

- Blue Holden Hatchback NT 904553**
from Shevak Street, Nightcliff
- Yellow Ford Sedan NT 645886**
from Marina Boulevard, Larrakeyah
- White Holden Sedan No Plates**
from Delatour Street, Coconut Grove
- White Holden Van NT 625185**
from Alawa Shops, Alawa
- Black Scooter No Plates**
from Armstrong Street, Leanyer
- White Ford Hatchback NT 496492**
from Darwin Model Aircraft Road, Leanyer
- White Suzuki Hatchback NT 6A65EQ**
from Anne Street, Stuart Park
- White Great Wall Utility NT CA76BE**
from Dick Ward Drive, Coconut Grove
- White Holden Station Wagon NT CB47SM**
from Nightcliff Road, Nightcliff
- White Mazda Hatchback NT CC09XV**
from Shadforth Lane, Darwin
- White Mitsubishi Utility NT CC940V**
from Eden Street, Stuart Park
- White Caravan NSW M39252**
from Duke Street, Stuart Park
- White Nissan Sedan NT CC46KD**
from Shadforth Lane, Darwin
- Silver Boat and Trailer WA 1TDL155**
from Duke Street, Stuart Park
- White Mazda Van VIC 1H18HE**
from Harvey Street, Darwin
- Blue Holden Utility VIC YJ813**
from Hinkler Crescent, Fannie Bay

Please note these vehicles are not for sale.

Diana Leeder
Chief Executive Officerdarwin.nt.gov.au

 **menzies**

Menzies 2018 Annual General Meeting

You are invited to attend our AGM on Monday 29 May, 4.30pm-5.30pm at the Menzies Auditorium, Building 38, Royal Darwin Hospital campus.

Light refreshments will be provided.

For details and to RSVP: www.menzies.edu.au/AGM2018 or email corporateaffairs@menzies.edu.au

Planned works

Power supply may be interrupted for maintenance work in the following areas:

Gillies
Thursday 24 May, 8.30am to 1.30pm**Katherine**
Saturday 19 May, 1am to 5am,
Sunday 20 May, 12am to 4am,
Monday 21 May, 1am to 5am
Wednesday 23 May, 10pm to 12am**Woodroffe**
Thursday 24 May, 8am to 2pm**This week, Active Tree Services will be performing tree:**In the Darwin region around Winnellie & Yarrawonga
In the rural area around Herbert & Lake Bennett
In the Katherine area around Boroloola, Timber Creek & Daly WatersFor detailed outage information visit: powerwater.com.au/works or follow @PowerWaterCorp on Twitter and Facebook**PowerWater** **Perfection Pool and Spa Restorations**

Our company has been in the pool industry for over 30 years.

We won't be beaten on price or workmanship, only quality materials used.
Make your pool or spa new again!
Ring John for free quote.**FUN POOLS - 0408 168 265****CLEARANCE SALE****Shoal Bay Recycle Shop.**

Everything must go.

STARTS TODAY!

Automotive, Camping, Furniture & more...

Shoal Bay Access Rd Karama.**RSPCA**
Darwin Regional Branch
Name: Dooz
Age: 1yr 7mths
Days in shelter: 32 days
Desexed, microchipped, up to date with vaccinations, worming, flea treatment & council Rego
Name: Lizzie
Age: 3yr 10mths
Days in shelter: 157 days
Desexed, microchipped, up to date with vaccinations, worming, flea treatment & council Rego**To adopt: 08 8984 3795**
www.adoptapet.com.au**ANAPURA ROOFING**
repairs, metal, gables, downpipes, white, black, flashings, fascias, gutters, roof maintenance. 9488 103 860**CLASSIFIEDS**
PHONE 8944 9909



Australian Government
Office of the Aboriginal Land Commissioner

Phone: (08) 8928 6458
Email: AboriginalLandCommissioner@network.pmc.gov.au

Level 4, Jacana House, 39-41 Woods Street, DARWIN NT 0800
GPO Box 9932 DARWIN NT 0801

13 April 2018

Dear Stakeholders,

Extension requests for the Aboriginal Land Commissioner's Detriment Review

As you are aware, I am currently conducting a review at the request of the Commonwealth Minister for Indigenous Affairs, the Hon Nigel Scullion MP ('the Minister'), into current detriment issues associated with 16 land claims recommended for grant by the Aboriginal Land Commissioner but not yet finalised.

I have recently invited participation from stakeholders to assist in identifying relevant detriment issues for the Review and my Office has received a number of requests from stakeholders seeking extensions to the timelines for the provision of submissions. The timelines were set with a view to completing my final report on the Detriment Review by 6 July 2018, as the Minister originally requested.

Today, I received notice from the Minister that I have been granted an extension of time until 31 December 2018 for completion of the Detriment Review.

For the Review to be completed by December 2018 and ahead of the wet season, the Northern Land Council ('NLC') will need to complete traditional owner consultations and provide a response to detriment submissions by 31 August 2018.

NLC will require all detriment statements and supporting material prior to conducting consultations.

To ensure the completion of the Review by 31 December 2018, I can only consider requests from stakeholders seeking extensions to the original timelines fixed for provision of their submissions within the timeframes set out at points (1), (2) and (3) below.

1. No extension requests for submissions in relation to Grouping 1, 2 and 3 can be considered beyond **30 April 2018**. These groupings include the following land claims:
 - McArthur River Land Claim No. 184 and part of Manangoora Land Claim No. 185
 - Garrwa Land Claim No. 178
 - Lower Daly Land Claim No. 68
 - Maria Island and Limmen Bight River Land Claim No. 71 and part of Maria Island Region Land Claim No. 198
 - Lorella Region Land Claim No. 199 and part of Maria Island Region Land Claim No. 198

8.1.6.

2. No extension requests for submissions in relation to Grouping 4 and 5 can be considered beyond **04 June 2018**. These groupings include the following land claims:
 - Seven Emu Region Land Claim No. 186
 - Wollogorang Area II Land Claim No. 187 and part of Manangoora Region Land Claim No. 185
 - Lower Roper River Land Claim No. 70
 - Upper Roper River Land Claims, which comprise Mataranka Area (NT Portion 916) Land Claim No. 129; Western Roper River (Beds and Banks) Land Claim No. 141; Roper Valley Area Land Claim No. 164 and Elsey Region Land Claim No. 245

8.1.7.

3. No extension requests for submissions in relation to Grouping 6 can be considered beyond **04 July 2018**. This grouping includes the following land claims:
 - Finnis Land Claim No. 39
 - Mataranka Area Land Claim No. 69

Please note that any requests to provide submissions by the above extended dates will be considered on a case-by-case basis. Unless granted an extension, stakeholders are expected to provide submissions by the original date set in the letter inviting participation in the Review.

Yours sincerely,

A handwritten signature in black ink, appearing to read 'John Mansfield', is written over a light blue rectangular background.

The Hon John Mansfield AM QC
Aboriginal Land Commissioner

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Level 4, Jacana House, 39-41 Woods Street, DARWIN NT 0800
GPO Box 9932 DARWIN NT 0801

22 October 2018

Dear Stakeholders,

Detriment Review: Submissions to the Office of the Aboriginal Land Commissioner – Concluded

I thank you for taking the time to make submissions on the matters contained in the Detriment Review's Terms of Reference.

Over the last 11 months my Office has received a considerable number of submissions updating me on the status of detriment issues associated with the 16 land claims recommended for grant by previous Aboriginal Land Commissioners under the *Aboriginal Land Rights (Northern Territory) Act 1976* (Land Rights Act), but not yet granted.

I will, of course, take all the submissions into account. I am grateful that the submissions, by and large, were provided consistent with the set procedure and when provided in response or reply, were directed to the submission and land claim or land claim grouping to which they were referring.

I am confident that on the information before me, I can provide the Minister for Indigenous Affairs, the Hon Nigel Scullion MP (the Minister), a written report consistent with my terms of reference, as per s 50(1)(d) of the Land Rights Act. The report is to be provided to the Minister by 31 December 2018.

Yours sincerely,

A handwritten signature in black ink, appearing to read 'John Mansfield', written over a light blue horizontal line.

The Hon John Mansfield AM QC
Aboriginal Land Commissioner

Index of Submissions to the Detriment Review

Group 1 – Land Claim Nos. 178, 184, 185

Date of Submission	Organisation	Title
19/01/2018	Fulham Pty Ltd	Detriment Submissions
25/01/2018	Glencore/Mount Isa Mines Ltd	Outline of Detriment
06/02/2018	NT Coastal Fishing & King Ash Bay Lodge	Detriment Submissions
15/03/2018	Northern Territory Seafood Council	Detriment Submissions
16/03/2018	King Ash Bay Fishing Club Inc	Detriment Submissions
16/03/2018	Amateur Fishing Association of the Northern Territory	Detriment Submissions
16/03/2018	Glencore/Mount Isa Mines Ltd	Detriment Submissions
16/03/2018	Armour Energy Ltd	Detriment Submissions
16/03/2018	Northern Territory	Detriment Submissions
05/04/2018	Carpentaria Shipping Services Pty Ltd	Detriment Submissions
16/04/2018	Britmar (Aust) Pty Ltd	Detriment Submissions
28/04/2018	Seven Emu Station	Detriment Submissions
30/04/2018	Glencore/Mount Isa Mines Ltd	Response to ALC Memorandum – Further Particulars
30/04/2018	Carpentaria Shipping Services Pty Ltd	Response to ALC Memorandum – Further Particulars
18/07/2018	Northern Land Council	Submissions on behalf of Claimants
7/08/2018	Amateur Fishing Association of the Northern Territory	Submissions in reply to the NLC
09/08/2018	Northern Territory	Submissions in reply to the NLC
16/08/2018	Northern Territory	(Supplementary) Submissions in reply to the NLC

Group 2 – Land Claim No. 68

Date of Submission	Organisation	Title
31/01/2018	Northern Territory Cattlemen's Association	Detriment Submissions
5/02/2018	Tipperary Group of Stations	Outline of Detriment
13/02/2018	Daly River Barra Resort	Detriment Submissions
14/02/2018	Mousie's Barra and Bluewater Fishing Charters	Detriment Submissions
8/03/2018	Amateur Fishermen's Association of the Northern Territory	Detriment Submissions
8/03/2018	Northern Territory	Detriment Submissions
8/03/2018	Tipperary Group of Stations	Detriment Submissions
8/06/2018	Northern Land Council	Submissions on behalf of Claimants
19/07/2018	Amateur Fishermen's Association of the Northern Territory	Submissions in reply to the NLC
23/07/2018	Tipperary Group of Stations	Submissions in reply to the NLC
26/07/2018	Northern Territory	Submissions in reply to the NLC

Group 3 – Land Claim Nos. 71, 198, 199

Date of Submission	Organisation	Title
06/03/2018	Amateur Fishermen's Association of the Northern Territory	Outline of Detriment
06/03/2018	Maximus No. 82 Pty Ltd	Outline of Detriment
08/03/2018	Britmar (Aust) Pty Ltd	Outline of Detriment
05/04/2018	Maximus No. 82 Pty Ltd	Detriment Submissions
05/04/2018	Limmen Bight Fishing Camp	Detriment Submissions
06/04/2018	Northern Territory Seafood Council	Detriment Submissions
10/04/2018	Limmen Bight Fishing Camp	Detriment Submissions
16/04/2018	Britmar (Aust) Pty Ltd	Detriment Submissions

Annexure 9

Date of Submission	Organisation	Title
24/04/2018	Amateur Fishermen's Association of the Northern Territory	Detriment Submissions
30/04/2018	Northern Territory Iron Ore Pty Ltd	Detriment Submissions
11/05/2018	Northern Territory Iron Ore Pty Ltd	Detriment Submissions with attachments
04/06/2018	Northern Territory	Detriment Submissions
01/08/2018	Limmen Bight Fishing Camp	Detriment Submissions
18/08/2018	Northern Land Council	Submissions on behalf of the Claimants
11/09/2018	Maximus No. 82 Pty Ltd	Submissions in reply to the NLC
11/09/2018	Amateur Fishermen's Association of the Northern Territory	Submissions in reply to the NLC
11/09/2018	Northern Territory Iron Ore Pty Ltd	Submissions in reply to the NLC
27/09/2018	Northern Land Council	Submissions in reply to Northern Territory Iron Ore Pty Ltd
27/09/2018	Northern Territory	Submissions in reply to the NLC

Group 4 – Land Claim Nos. 185, 186, 187

Date of Submission	Organisation	Title
28/03/2018	Northern Territory Cattlemen's Association	Outline of Detriment
4/04/2018	Armour Energy Ltd	Detriment Submissions
4/04/2018	Pardoo Beef Company Pty Ltd	Outline of Detriment
28/04/2018	Seven Emu Station	Detriment Submissions
1/05/2018	Pardoo Beef Company Pty Ltd	Detriment Submissions
2/05/2018	Northern Territory Cattlemen's Association	Detriment Submissions
4/06/2018	Australian Wildlife Conservancy	Detriment Submissions
4/06/2018	Northern Territory	Detriment Submissions
4/06/2018	Northern Territory Seafood Council	Detriment Submissions

Annexure 9

Date of Submission	Organisation	Title
4/06/2018	Amateur Fishermen's Association of the Northern Territory	Detriment Submissions
16/07/2018	Northern Land Council	Submissions on behalf of the Claimants
2/08/2018	Pardoo Beef Company Pty Ltd	Submissions in reply to the NLC
7/08/2018	Amateur Fishermen's Association of the Northern Territory	Submissions in reply to the NLC
7/08/2018	Australian Wildlife Conservancy	Submissions in reply to the NLC
09/08/2018	Northern Territory	Submissions in reply to the NLC
16/08/2018	Northern Territory	(Supplementary) Submissions in reply to the NLC

Group 5 – Land Claim Nos. 70, 141, 129, 245

Date of Submission	Organisation	Title
19/04/2018	Northern Territory Cattlemen's Association	Outline of Detriment
20/04/2018	DK Pastoral Company Pty Ltd	Outline of Detriment
11/05/2018	Northern Territory Iron Ore Pty Ltd	Detriment Submissions
28/05/2018	Northern Territory Cattlemen's Association	Detriment Submissions
29/05/2018	Moroak Pastoral Company Pty Ltd	Detriment Submissions (attachments withdrawn)
29/05/2018	DK Pastoral Company Pty Ltd	Detriment Submissions
29/05/2018	Fly Fox Pty Ltd	Detriment Submissions
1/06/2018	DK Pastoral Company Pty Ltd	Errata to Detriment Submissions
4/06/2018	Northern Territory Seafood Council	Detriment Submissions
4/06/2018	Amateur Fishermen's Association of the Northern Territory	Detriment Submissions
15/06/2018	Estate of Veronica Januschka (Deceased)	Detriment Submissions
22/06/2018	Northern Territory	Detriment Submissions

Annexure 9

Date of Submission	Organisation	Title
29/06/2018	Northern Territory	Addendum to Detriment Submissions
1/09/2018	Northern Land Council	Submissions in reply to the NLC
26/09/2018	Northern Territory Cattlemen's Association	Submissions in reply to the NLC
26/09/2018	DK Pastoral Company Pty Ltd	Submissions in reply to the NLC
27/09/2018	Moroak Pastoral Company Pty Ltd	Submissions in reply to the NLC
27/09/2018	Amateur Fishermen's Association of the Northern Territory	Submissions in reply to the NLC
1/10/2018	Northern Territory	Submissions in reply to the NLC
13/11/2018	Northern Land Council	Letter re: sale of Fly Fox Pty Ltd

Group 6 – Land Claim Nos. 39, 69

Date of Submission	Organisation	Title
30/05/2018	Doe Run Company	Outline of Detriment
30/05/2018	Northern Territory Iron Ore Pty Ltd	Outline of Detriment
30/05/2018	DK Pastoral Company Pty Ltd	Outline of Detriment
31/05/2018	Northern Territory Cattlemen's Association	Detriment Submissions
31/05/2018	Northern Territories Resources Pty Ltd	Outline of Detriment
21/06/2018	Department of Industry, Innovation and Science (Cth)	Detriment Submissions
2/07/2018	DK Pastoral Company Pty Ltd	Detriment Submissions with attachments
4/07/2018	Northern Territories Resources Pty Ltd	Detriment Submissions
4/07/2018	Northern Territory Iron Ore	Detriment Submissions with attachments
4/07/2018	Northern Territory Cattlemen's Association	Detriment Submissions

Annexure 9

Date of Submission	Organisation	Title
4/07/2018	Northern Territory	Detriment Submissions
25/07/2018	Fly Fox Pty Ltd	Detriment Submissions
17/08/2018	Northern Land Council	Submissions on behalf of the Claimants (LC 69)
17/08/2018	Northern Territory	Submissions in reply to the NLC (LC 69)
31/08/2018	Northern Land Council	Submissions on behalf of the Claimants (LC 39)
11/09/2018	Northern Territory Iron Ore Pty Ltd	Submissions in reply to the NLC (LC 69)
11/09/2018	DK Pastoral Company Pty Ltd	Submissions in reply to the NLC (LC 69)
11/09/2018	Fly Fox Pty Ltd	Submissions in reply to the NLC (LC 69)
20/09/2018	Northern Territories Resources Pty Ltd	Submissions in reply to the NLC
26/09/2018	Northern Territory	Submissions in reply to the NLC (LC 39)
27/09/2018	Department of Industry, Innovation and Science (Cth)	Submissions in reply to the NLC
13/11/2018	Northern Land Council	Letter re: sale of Fly Fox Pty Ltd

BEFORE THE ABORIGINAL LAND COMMISSIONER

IN THE MATTER OF THE DETRIMENT REVIEW INQUIRY REGARDING
LAND CLAIMS RECOMMENDED FOR GRANT BUT NOT YET FINALISED

SUBMISSIONS OF NORTHERN TERRITORY OF AUSTRALIA AS TO
PROPER APPROACH OF ABORIGINAL LAND COMMISSIONER TO
DETRIMENT MATTERS ARISING AFTER A LAND CLAIM

A. Introduction

1. On 20 July 2017, the Aboriginal Land Commissioner (**Commissioner**) informed the Chief Minister of the Northern Territory that on 6 July 2017 the Commonwealth Minister for Indigenous Affairs (**Minister**) had requested him to undertake a review (**Review**) of detriment issues pursuant to s50(1)(d) of the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) (**ALRA**) relating to 16 land claims previously recommended for grant by previous Commissioners but not finalised. The Commissioner advised that the main objective of the Review is to identify updated detriment issues in relation to the land claims, to assist the Minister to exercise his powers under s11 of the ALRA to proceed with the recommendation for the grant of land, where the Minister is satisfied that the land should be granted.
2. The Terms of Reference for the Review record the following:
 - (a) In practice, the Minister is most likely to exercise power under s11 of the ALRA to recommend the grant of claimed land, upon agreement between parties to settle detriment matters.
 - (b) There is an intention to focus in some detail on the group of 12 claims that relate only to land which comprises the beds and banks of rivers and/or the intertidal zone (**ITZ**), as these constitute the majority of the 16 outstanding claims and present "particular issues" in relation to addressing matters of detriment.
 - (c) Prior to the decision of the High Court in *Northern Territory v Arnhem Land Aboriginal Land Trust* (2008) 236 CLR 24, detriment identified in past land claim reports largely reflected the widely held understanding that members of the public could enter waters overlying Aboriginal land without authorisation under the ALRA.
 - (d) The Commissioner is asked (relevantly) to:
 - (i) review relevant land claim reports and related documents;
 - (ii) ascertain the views of stakeholders and seek relevant information relating to detriment issues associated with the land claims;

- (iii) identify, review and where appropriate make recommendations with respect to relevant land claims in relation to:
 - (1) areas of progress and causes of delay to addressing/settling detriment matters;
 - (2) current opportunities and challenges to addressing/settling detriment matters;
 - (3) new or updated detriment issues arising since the publication of land claim reports; and
 - (4) such other matters as may be pertinent to the Review.
- 3. Between 15 December 2017 and 22 March 2018, the Commissioner informed the Solicitor for the Northern Territory that he had commenced the Review. The Commissioner advised that the 16 land claims had been grouped on a geographical basis and invited the provision of comments on identified detriment issues and further or additional material relevant to the assessment of the existence or extent of detriment issues. The Commissioner indicated (by letter dated 25 January 2018) that, as part of the Review, he would have regard to matters within both s50(3)(b) and (c) of the ALRA.
- 4. On 22 March 2018, the Commissioner's invitation to provide further or additional detriment material included a request for information explaining:
 - (a) when the new detriment concerns were acquired;
 - (b) the extent to which the then Commissioner's recommendation that the land be granted to a Land Trust was considered in making any decisions that may have resulted in new detriment concerns; and
 - (c) whether professional advice was sought or received regarding any such decisions and from whom.
- 5. On 27 March 2018, the Commissioner invited detailed legal submissions outlining the approach he should take in considering and commenting on detriment matters and patterns of land usage pursuant to s50(3)(b) and (c) of the ALRA, where those matters arose after the land claim was lodged, the inquiry commenced, or the land claim report was published. The Commissioner particularly asked whether such detriment should be treated differently depending on the stage at which it arose.
- 6. These submissions respond to this invitation.

B. Summary of position

- 7. The Commissioner should consider and comment on all detriment matters and patterns of land usage recorded in the land claim reports and currently existing as understood on the basis of further material obtained as part of the Review. There is no warrant in the terms of the ALRA (particularly ss11

and 50), the context or its purpose for treating such detriment differently depending on the stage at which exposure to it arose, or for inquiring into a person's state of knowledge about a land claim and the bearing, if any, which that knowledge had, or should have had, on their exposure. There are, in addition, a number of matters which point against doing so.

C. Detriment and patterns of land usage under the ALRA

The Commissioner's functions

8. Section 50(1)(a) of the ALRA requires the Commissioner to ascertain whether the Aboriginals who lodged a land claim, or any other Aboriginals, are the traditional Aboriginal owners of the claimed land and to report those findings to the Minister and the Administrator. Where the Commissioner finds there are traditional Aboriginal owners, s50(1)(a)(ii) requires the Commissioner to make recommendations to the Minister for the granting of the claimed land or any part of it in accordance with ss11 and 12.
9. Section 50(3)(b) requires the Commissioner in making a report under s50(1)(a) to comment on the detriment to persons or communities, including other Aboriginal groups, that might result if the claim were acceded to either in whole or in part. Section 50(3)(c) requires the Commissioner to also comment on the effect which acceding to the claim either in whole or in part would have on the existing or proposed patterns of land usage in the region.
10. In carrying out his or her functions, the Commissioner is to have regard to the principles set out in s50(4)(a) and (b), which are essentially that Aboriginals who are living, or desire to live, at a place on their traditional country ought, where practicable, to be able to acquire secure occupancy of that place.

The Minister's functions

11. Section 11(1) of the ALRA requires the Minister to make a determination specifying the Land Trust/s that is/are to hold land recommended by the Commissioner for grant in a report under s50(1) and to recommend that a grant be made to that Land Trust, if the Minister is satisfied that the land or a part of the land should be granted to one or more Land Trusts so that they hold the land so granted for the benefit of Aboriginals who are the relevant Aboriginals¹ in relation to the land.
12. A recommendation that a grant of an estate in fee simple be made to a Land Trust may include a recommendation that the deed of grant not be delivered to the grantee until a condition specified in the recommendation has been complied with (s11(5)).

¹ The term "relevant Aboriginals" is defined to mean Aboriginals entitled by Aboriginal tradition to the use or occupation of the area of land (s11(4)).

The nature and purpose of the Commissioner's comment function

13. The Commissioner's comment function under s50(3) is directed to informing the Minister about the consequences which "might" flow from granting the claimed land (or part of it) to one or more Land Trusts so the Minister can take those consequences into account when deciding whether the land or a part of the land should be granted. The matters the subject of s50(3)(b) and (c) are relevant considerations in the Minister's decision making process.
14. The High Court has construed the Commissioner's comment functions in s50(3), and the Minister's functions in s11(1), as follows:
 - (a) Section 50 draws a clear distinction between the matters to which the Commissioner "shall have regard" and those upon which he "shall comment".²
 - (b) The former (ie the strength or otherwise of the traditional attachment in s50(3) and the principles in s50(4)) are required to be taken into account and given weight as a fundamental element in making the Commissioner's recommendation.³
 - (c) As to the latter (ie the matters in s50(3)(a) to (d)), the Commissioner:⁴
 - (i) is required to remark upon those matters and to express his views about them; and
 - (ii) is bound not to have regard to them in making his recommendation.
 - (d) If the Commissioner recommends that an area be granted to a Land Trust it then becomes a matter for the Minister, acting under s11, to decide whether or not he is satisfied that the land or any part of it should be so granted.⁵ The Minister is in no sense bound by the recommendation of the Commissioner.⁶ But, in making his decision, the Minister is bound to consider the matters mentioned in s50(3)(a) to (d).⁷
 - (e) In making his decision, the Minister needs to have knowledge of the several matters referred to in s50(3)(a) to (d). The Commissioner can, usefully and appropriately, be asked to ascertain the facts relating to these matters and to comment upon them in the light of the knowledge

² *The Queen v Toohey; Ex parte Meneling Station Pty Ltd* (1982) 158 CLR 327 (*Meneling Station*) at 333 per Gibbs CJ, at 348 per Wilson J (Murphy J agreeing), at 362 per Brennan J (upholding Toohey J's view as Commissioner).

³ *Meneling Station* at 333 per Gibbs CJ.

⁴ *Meneling Station* at 333, 345 per Gibbs CJ, at 349 per Wilson J (Murphy J agreeing), at 360-362, 363 per Brennan J (upholding Toohey J's views as Commissioner).

⁵ *Meneling Station* at 334 per Gibbs CJ, at 361-362 per Brennan J.

⁶ *Ibid.*

⁷ *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1985-86) 162 CLR 24 (*Peko-Wallsend*) at 30 per Gibbs CJ, at 44 per Mason J (Dawson J agreeing).

he has necessarily acquired and the sensitivities he has necessarily developed in the course of his duties.⁸

- (f) To enable the Minister to give proper consideration to those matters, it is to be expected that the Commissioner will comment in a way that will enable the Minister to understand the issues involved and the judgment which the Commissioner has formed with regard to the matters upon which the comment is made.⁹
- (g) The ALRA recognises the political character of a decision, under s11(1) of the ALRA, to grant traditional Aboriginal land in the Northern Territory for the benefit of Aboriginals, a decision which has regard to all circumstances relevant to the question whether a grant should be made.¹⁰ The weighing of the considerations in s50(3) and all other relevant considerations in deciding whether a grant should be made is for the Minister (not a judge) to decide – particularly when the question for decision is pregnant with political controversy.¹¹
- (h) 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 the other matters set out in s50(3) and to leave the resolution of competing interests to the Minister, by such criteria as are thought to be relevant in the light of that evaluation.¹²
- (i) If there is in the possession of the Minister, at the time when he considers the matter, material which shows that the position has changed since the Commissioner made his report, or that *for any reason* the Commissioner's comments were based on an erroneous view of the facts, the Minister is bound to take that material into account. The duty of the Minister is to consider the matters in s50(3) in light of the actual facts as disclosed by the material in his possession at the time when he considers whether or not he is satisfied for the purposes of s11(1)(b), and not on a false assumption (whether the falsity is due to a change of circumstances or to an error on the part of the Commissioner – even an error due to the manner in which a person presented their detriment evidence before the Commissioner) concerning the matters in s50(3).¹³

⁸ *Meneling Station* at 361 per Brennan J.

⁹ *Meneling Station* at 334 per Gibbs CJ.

¹⁰ *Meneling Station* at 349 per Wilson J (Murphy J agreeing), at 360-361 per Brennan J.

¹¹ *Meneling Station* at 361-362 per Brennan J; *Peko-Wallsend* at 46 per Mason J (Gibbs CJ and Dawson J agreeing), at 68 per Deane J.

¹² *Meneling Station* at 363 per Brennan J (upholding Toohey J's views as Commissioner).

¹³ *Peko-Wallsend* at 30 per Gibbs CJ (also agreeing with Mason J), at 44-46 per Mason J, at 71 per Dawson J (also agreeing with Mason J).

15. It follows that it is not part of the Commissioner's function to guide or direct the exercise of the Minister's function, particularly as to when and if the Minister should exercise the power to make a grant.¹⁴
16. The argument of the applicants in *Meneling Station* was that the Minister should have the benefit of the exercise of a judicial discretion to guide him in the final decision as to whether a grant should be made, and so the Commissioner should have taken into account the detriment which a grant of the claimed land would cause to the applicant and, had he done so, he could have harmonised the competing interests by recommending the grant of only part of the land.¹⁵ This argument was rejected by the High Court, and the above principles were laid down, recognising that the Minister's function is a political (not a judicial) one; while the Commissioner's is otherwise: to determine judicially the existence of traditional owners and the strength of their attachment, and then applying the principles in s50(4) to make recommendations for the granting of the land claimed or any part of it, without the exercise of a judicial discretion which has regard to the matters in s50(3)(a) to (d).¹⁶ Wilson J held (at 349):

If the Commissioner's recommendation was to be made in the exercise of a judicial discretion which had regard to the matters listed in pars (a) to (d) of s50(3), it might sometimes be the case that notwithstanding the satisfactory proof of a strong traditional claim, the Commissioner would be led by considerations extraneous to that claim to refrain from making a recommendation. IN that case, whatever the Minister's wishes might be, he would be precluded from even considering the making of a grant. The policy of the [ALRA] being to facilitate the grant of land for the benefit of Aboriginals who have a strong traditional claim to it, that construction of s50 should be adopted which will secure to the Minister the widest possible discretion as to whether, given such a claim, a grant should be made. The matters which are listed in s50(3) as the subject of comment in the report are matters which expose for the consideration of the Minister the implications of a decision by him to make a grant.

17. Similarly, in *Peko-Wallsend*, Deane J held (at 68):

It is for the Minister, and not for the Commissioner, to weigh against the claims in justice and morality of those traditional owners any competing claims or considerations, including specific and identified detriment to others, which might militate against a grant: the Commissioner's function, in relation to detriment to others, is to "make an evaluation of the evidence"; "the resolution of competing interests" is left to "government"...

18. So, the Commissioner's comment function is wholly separate and different from his s50(1) function and it is the latter under which judicial discretion yields a recommendation. Once a recommendation for grant is made, the Commissioner has no discretion as to, and must cease to guide or direct, an outcome and must simply provide the Minister with information based on

¹⁴ Cf Legune Area Land Claim No 188 and Gregory National Park / Victoria River Land Claim No 167, Transcript, 10 August 2017, P-207, lines 15-20; P-212, lines 9-45.

¹⁵ At 347-348 per Wilson J referring to the argument of Mr Conti.

¹⁶ At 349 per Wilson J (Murphy J agreeing).

his assessment of the evidence. At this point, the Commissioner's function is confined to "comment", ie describe, assess and evaluate the factual evidence, remarking upon and describing his views of its effect as to the nature and degree of the detriment, the potential for it to be experienced (bearing in mind that s50(3)(b) and (c) do not pose the usual civil standard of proof), and the factors bearing on the fulfilment or alleviation of that potential. The comments must enable the Minister to give proper consideration to the detriment and patterns of land usage matters by enabling the Minister to understand the issues involved, but must not guide or direct any particular outcome from the exercise of the Minister's function.

19. The Commissioner would usurp or encroach upon the Minister's function if he reached and expressed a view about whether and/or how any particular detriment or pattern of land usage matter tipped the balance of competing interests in favour or against a grant, including by reference to a starting point that says the claimed land is unalienated Crown land in which no-one has an interest or right.¹⁷ While commenting on the nature of any asserted detriment will require identification of what it is and how it arises, including whether because of vested or contingent statutory or common law rights or interests or otherwise, the posited starting point erroneously imports a value judgment about the fairness, justice or policy of granting or not granting. It is solely for the Minister (not the Commissioner) to determine the weight to be attached to the relevant considerations, to determine the criteria relevant to their resolution, and to resolve them and reach a position of satisfaction in favour of or against a grant.

"Detriment" and "patterns of land usage" and timing

20. Section 50(3)(b) and (c) of the ALRA are general in their terms. Section 50(3)(b) speaks of the detriment to "persons or communities" "that might result" and s50(3)(c) speaks of the effect of a grant on "existing or proposed patterns of land usage in the region". The words "detriment" and "patterns of land usage" are not defined, and so have their ordinary meaning. In the first land claim report, Toohey J held:¹⁸

...Detriment is not defined but must bear its ordinary meaning of harm or damage which need not be confined to economic considerations any more than the reference to 'advantaged' in s50(3)(a) need be so confined. And by speaking of detriment 'that might result' the [ALRA] invites the Commissioner to paint with a pretty broad brush rather than apply conventional methods of proof to the material before him.

Nevertheless there must be some limit to the matters that may properly be the subject of comment. In practical terms it would be impossible to have regard to every consideration no matter how tentative. Furthermore where there is some proposal in relation to land...it is important to look at the practicality of a project and the length of time that may elapse before it gets

¹⁷ Cf Legume Area Land Claim No 188 and Gregory National Park / Victoria River Land Claim No 167, Transcript, 10 August 2017, P-212, lines 9-36, P-213, lines 45-47, P-217, lines 40-42.

¹⁸ *Borroloola Land Claim Report*, 3 March 1978, Toohey J, [174]-[175].

off the ground. Failure to do this may lead to providing the Minister with a range of information so broad and tentative as to be of little use to him.

21. As to the words "that might result", they refer to possibilities, not probabilities, and do not admit of the easy drawing of distinctions based on the degree of possibility. If a person makes an assertion of detriment, and calls evidence about it, a Commissioner should not exclude reference to it in the report on the basis that it is speculative, fanciful or not a real possibility.¹⁹ Past Commissioners have routinely included in their reports reference to asserted detriment, notwithstanding their assessment that the asserted detriment is no more than a bare possibility. As indicated by Toohey J, the proper course is to include reference to assertions about detriment and to assess the evidence about, and if possible on the evidence express a view on, the degree of possibility of it occurring.²⁰
22. As to what is contemplated by "detriment" and "patterns of land usage" in s50(3), no finer characterisation or distinction is drawn in the ALRA as to the nature, degree or timing of detriment or patterns of land usage. Writing in 1989, Graeme Neate identified the following as having been recorded in land claim reports as detriment:²¹
 - (a) the possible loss by Aboriginals of their legal interest in land successfully claimed by other Aboriginals
 - (b) the possible loss by some Aboriginals of permission to use land (eg for hunting) where it is successfully claimed by other Aboriginals;
 - (c) possible restrictions on additional land required by miners (eg for facilities, access roads, pipelines, powerlines, a railway, or a port) or access to necessary water supplies;
 - (d) the need of miners to have access to existing mining interests, including access by an economical route to mineral deposits;
 - (e) the need to use a stock route;
 - (f) the need of graziers for additional land to run stock, or their need to retain either rights to use land over which they currently holding a grazing licence, or the right of access to bores to supply water to stock;

¹⁹ Cf Legune Area Land Claim No 188 and Gregory National Park / Victoria River Land Claim No 167, Transcript, 10 August 2017, P-209, lines 11-46, P-210, lines 1-20.

²⁰ See, for example, Borroloola Land Claim Report, Toohey J, [187]-[195], regarding the needs of McArthur River Mining for roads and other infrastructure if the mine were to develop in the future; Warlpiri and Kartangarurru-Kurintji Land Claim Report, Toohey J, [337], concluding that the evidence as to the likelihood of a mineral find on claimed land was very vague, and so he was unable to conclude there was any real likelihood of the person finding minerals enabling him to negotiate for the sale of any interest he held.

²¹ G Neate, *Aboriginal Land Rights Law in the Northern Territory*, Vol 1, Alternative Publishing Co-op Ltd, 1989, pp315-317.

- (g) the need to retain rights to occupy land for a specific purpose where an occupation licence currently exists in respect of the land;
- (h) the need of fishermen to have access to land between the high and low water marks for fishing;
- (i) the need of fishermen for land bases to process their catch and to service boats, and for access to rivers and the coast for commercial or amateur fishing purposes;
- (j) the capacity to recover straying stock, repair boundary fences and fight fires;
- (k) the need for additional land for business purposes;
- (l) the possibility that Aboriginals occupying their land will require access roads across adjacent pastoral properties;
- (m) the need for access across land to a river to obtain water for domestic and irrigation purposes and the use of the river for transport;
- (n) the need to preserve a grave and access to it;
- (o) the need for land for a private airstrip;
- (p) the need to retain access to an airstrip used in emergencies;
- (q) the need to continue to use land for leisure and recreation, or to cross land to retain access to a recreation area, and the loss of business if the level of tourism is reduced;
- (r) the need for a right of access across land to privately owned land or leased land;
- (s) the need for access to places of historical significance;
- (t) the possible need for land for a new railway;
- (u) the possible need for land for an airport;
- (v) the possible need for land as an ammunition storage depot;
- (w) the possible need for land for a solar energy project;
- (x) the possible need for land on which to build power lines or to use for a dam as an additional source of hydro-electricity;
- (y) the possible need for land for a dam, catchment area, access roads, pipelines, powerlines and monitoring stations, or for investigative drilling and possible drawing of water for a town water supply;
- (z) public access to and use of historic sites;

- (aa) the possible need for land for expansion of a town and for additional facilities, or for a new town;
 - (bb) the possible agricultural development of an area; and
 - (cc) the right to clear land around an airstrip to comply with licence conditions.
23. This absence of finer characterisation or distinction suggests that the ALRA is not concerned with when the detriment and patterns of land usage arose (relative to the land claim and its process), or the state of knowledge of the persons who might suffer the detriment or the Northern Territory Government, about the land claim, or any recommendation made for grant, and the impact of that state of knowledge on their decision making. In particular, as the detriment is detriment "that might result" if claimed land is granted, there is no warrant to identify *when* the exposure to the detriment arose. All that matters is *whether* the detriment "might result" *if* the claimed land is granted.
24. This proposition is supported by an inherent (and variable) difficulty with identifying when exposure to a matter of detriment first arose. Some "new" (ie post land claim report) detriment may be a variation or extension of prior (ie pre-land claim report) detriment (eg additional operational or capital expenditure in a business venture which will be affected if a claim is acceded to). It may be the same detriment, but now faced by other persons (eg in the case of a transfer of an interest). It may be what has been termed "cumulative detriment". It may be detriment, the exposure to which has arisen because of numerous factors, some of which preceded the land claim or its hearing or report. It may be detriment the possibility of which occurring has slowly emerged over time. The concept of "detriment which might result" does not necessarily permit of a clear or easy identification of when exposure to it first arose.
25. The submission in paragraph 23 above is confirmed by the decisions referred to in paragraph 14 above, which emphasise the Minister's duty to approach the question in s11(1) with knowledge of the actual facts about the s50(3) matters existing at the time the decision in s11(1) is made, notwithstanding a change of circumstances between the time of the Commissioner's comments and the time of the Minister's decision, and that it is the Minister who weighs these matters and resolves the competing interests as part of the political exercise in deciding whether or not to make a grant.
26. For the reasons set out in paragraphs 14 to 19 above, it is no part of that function to hear evidence and ascertain facts relating to:
- (a) the state of knowledge held by a person who asserts they will suffer detriment if claimed land is granted about the existence of the claim, the hearing of the Commissioner's inquiry into it, and/or the Commissioner's recommendation in relation to the claim; or

- (b) the bearing which that state of knowledge had, if any, or should reasonably have had, upon the person's exposure to the asserted detriment.
27. The intricacies and complexities in such an inquiry could include:
- (a) identifying the potential sources of knowledge of the land claim, hearing or report to the person, or persons generally;
 - (b) characterising the state of knowledge of the person by reference to the five categories of knowledge identified in *Baden v Societe Generale pur Favoriser le Developpement du Commerce et de l'Industrie en France SA* (1992] 4 All ER 161, namely:
 - (i) actual knowledge;
 - (ii) wilfully shutting one's eyes to the obvious;
 - (iii) wilfully and recklessly failing to make such inquiries as an honest and reasonable man would make;
 - (iv) knowledge of circumstances which would indicate the facts to an honest and reasonable man; and
 - (v) knowledge of circumstances which would put an honest and reasonable man on inquiry;
 - (c) assessing the content, adequacy and/or appropriateness of any professional advice sought and/or obtained by the person about their exposure to the asserted detriment;
 - (d) considering whether the exposure to the asserted detriment was caused by the person's conduct, or was caused or contributed to by other factors, and the degree to which those factors contributed; and
 - (e) determining whether the person's conduct was reasonable or unreasonable in all the circumstances, by reference to what a reasonable person would do in those circumstances.
28. There is nothing in the terms, context or purpose of the ALRA which would compel or even suggest that the Parliament intended the Commissioner to undertake such inquiries, and the Minister to consider such matters when deciding under s11(1)(b) whether to grant claimed land.
29. No such inquiry required or suggested by the Terms of Reference of the Review.
30. Nor have Commissioners generally done so. By way of example, the Kenbi Land Claim was lodged on 20 March 1979, it was part heard in 1989 and 1990, further heard between 1995-1999 and the report provided to the Minister in December 2000. In the detriment comment section of the report, Gray J records a large number of detriment matters. In some instances,

Gray J refers only to the current facts asserted to expose a person to detriment, without reference to when those facts arose.²² In other instances, Gray J refers to changes in the prevailing circumstances which occurred after the land claim was lodged and/or after hearings occurred, but without any comment or suggestion that the detriment is of a different character or should be differently treated from matters existing at the time the claim was lodged.²³

31. There were many instances of lengthy periods between the lodgement of a land claim, the hearing of the claim and the provision of the report to the Minister, but no Commissioner has seen fit to comment (adversely to the person asserting detriment, eg that they are the maker of their own misfortune) on the time at which a person's exposure to the particular detriment arose across that period, their knowledge as to the land claim, and the cause of the person's exposure.²⁴
32. Indeed, in the McArthur River Region Land Claim and part of Manangoora Region Land Claim Report, Olney J recorded (at [123]) that a person asserting detriment was cross-examined by counsel for the claimants concerning his knowledge of when the land claim was made. His Honour expressed satisfaction that the person did not know about the claim or its potential to have a detrimental effect on his business operations until about a year before the hearing. His Honour added:

In any event, it should be pointed out that the claim was not made until a matter of days before s50(2A) (the sunset clause) took effect²⁵ more than 20 years after the [ALRA] came into operation and some 8 years after the development of King Ash Bay commenced.

33. Given the general failure of former Commissioners to differentiate between detriment exposure arising before the claim was lodged, after the claim was lodged and prior to hearing, or after the hearing and before the report, and to undertake any inquiry into the matters referred to in paragraphs 26 to 27 above, it would now be very difficult, if not impossible, for the Commissioner to make such differentiation and comment on such matters as part of the Review. The only real scope for such differentiation and comment would be in relation to detriment exposure arising after the report was provided to the Minister.

²² See, for example, [11.3], [11.5.3], [11.8.5], [11.8.6], [11.9], [11.11], [11.13], [11.14], [11.18].

²³ See, for example, [11.4.2] (solar power to the lighthouse since 1994), [11.4.3] (the occupying body established in 1990), [11.5.2] (construction of automatic weather station in 1994 and use since then), [11.6.1] (research facility established in 1992), [11.6.3] (research facility installed and accessed under licence agreement in 1994), [11.7.1] (declaration of use of land as bombing area and weapons firing in 1987), [11.8.1] (rebuilding and recommissioning of radio transmission station in 1984, "moth-balled" in 1997), [11.10.2] (grant of occupation licences in 1986, 1992, 1997), [11.12.1] (transfers of mineral leases registered in 1991).

²⁴ See, for example, Lower Roper River Land Claim Report, where Olney J makes reference to changes in relation to adjoining land since the lodgement of the claim and considers matters of detriment related to that land (at [66]-[75], [92]-[95], [107]-[111]).

²⁵ Section 50(2A) commenced on 5 June 1987 and became effective on 5 June 1997.

34. In that respect, almost all the land claim reports for the 16 outstanding land claims the subject of the Review were provided to the Minister between 2002 and 2004 (some 14-16 years ago), and the others are considerably older than that. Given such long delays, any expectation that a grant of the claimed land would not be made at all, or would not be made for a further considerable period, was not unreasonable. If that is accepted, any differentiation between detriment arising before and after the land claim report, and any inquiry as to the matters referred to in paragraphs 26 to 27 above, is of little moment.
35. For these reasons, the position set out in paragraph 21 above suggested by the natural reading of the terms of s50(3)(b) and (c) is confirmed. It follows that the Commissioner should consider and comment on all detriment matters and patterns of land usage recorded in the land claim reports and currently existing as understood on the basis of further material obtained as part of the Review. There is no warrant for treating such detriment differently depending on the stage at which exposure to it arose, or for inquiring into a person's state of knowledge about a land claim and the bearing, if any, which that knowledge had, or should have had, on their exposure.

Date: 16 May 2018



**SONIA BROWNHILL SC
SOLICITOR-GENERAL
FOR THE NORTHERN TERRITORY**

Annexure 11

BEFORE THE ABORIGINAL LAND COMMISSIONER

THE HONOURABLE JUSTICE MANSFIELD

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

IN THE MATTER of the Detriment Review
by the Aboriginal Land Commissioner

Document:	Submissions on behalf of the Northern Land Council concerning legal principles in respect of detriment interests acquired post land claim
Date:	25 May 2018

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Summary of main points

1. The main points made in these submissions are as follows:
 - (a) The express statutory foundation for the Review is s 50(1)(d) of the Act. The Commissioner's functions in the Review are broad on their face and are constrained only by the Terms of Reference and any implied constraints arising from the subject-matter, scope and purpose of the Act.
 - (b) The Commissioner's functions under the Terms of Reference are substantially broader than his function to comment on detriment issues under s 50(3)(b) of the Act in the course of a land claim inquiry. However, both functions require or enable him to give guidance to the Minister.
 - (c) Paragraph (b) of s 50(3) of the Act should be given its literal and grammatical meaning and, if this is done, there is no difficulty in inquiring under s 50(3)(b) into the time at which the asserted detriment arose and the actual or constructive state of knowledge about the relevant land claim of the persons said to have suffered the detriment.
 - (d) There is nothing about the context in which s 50(3)(b) appears, the consequences of a literal or grammatical construction, the purpose of the Act

or the canons of statutory construction that requires any different interpretation to be given to s 50(3)(b).

- (e) There were (and are) a range of different ways in which members of the public, particularly those with interests in a particular area, would come to know, or at least should come to know, of any claim to that area or of any recommendation in relation to it by a Commissioner.
- (f) It may reasonably be inferred that there is a widespread consciousness among members of the public in the Northern Territory of land claims, land grants to Land Trusts and the real possibility that particular areas of unalienated Crown land are either under claim or the subject of a recommendation by a Commissioner.
- (g) The prospects that a person is unaware that a particular piece of unalienated Crown land is under claim will be greatest prior to the notification of the claim shortly prior to hearing. After the notification of the claim (by advertisements in multiple newspapers and by notices directed to individuals, organisations and officials), it is most unlikely that any significant number of adults living in the surrounding region would be unaware of the claim.
- (h) A claim by a person asserting detriment that, at a particular point in time, he or she had no knowledge that a particular area was subject to a land claim or subject to a recommendation for grant by a Commissioner is easy to make and may be difficult to disprove. Such claims should not be accepted at face value and should be interrogated.
- (i) Where a person asserting detriment in a particular claim has actual or constructive knowledge of the claim prior the event(s) said to give rise to the asserted detriment, that person cannot be heard later to complain that he or she would suffer detriment if the relevant land is granted. Any harm or damage to the person in these circumstances would not be the result of the grant of land; rather, they would be the result of decisions or choices made by the person and would therefore not be detriment within the meaning of s 50(3)(b).
- (j) It should not be expected that detriment issues can always be settled by agreement. In some cases, this will not be possible. There are a number of circumstances where it is appropriate for the Minister to recommend that a grant be made to a Land Trust, notwithstanding that agreement has not been reached with persons asserting detriment. The Commissioner should provide advice to this effect in his written report and recommendations to the Minister in the Review.

- (k) In relation to the 16 claims that are the focus of the Review, the Commissioners overwhelmingly made strong findings about the strength of attachment of the traditional owners to their lands, including the particular areas claimed. Delay in granting land to a Land Trust constitutes an obvious prejudice to the traditional owners. The Commissioner should provide advice to this effect in his written report and recommendations to the Minister in the Review.

Introduction

2. These submissions are provided by the Northern Land Council (**NLC**) pursuant to a request by the Aboriginal Land Commissioner (**Commissioner**) made by letter dated 27 March 2018. This request arises in the context of the Commissioner undertaking a Review of Detriment (**Review**) for the Minister for Indigenous Affairs.
3. The Review is being undertaken by the Commissioner under s 50(1)(d) of the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) (**Land Rights Act** or **Act**) and pursuant to terms of reference provided to the Commissioner on 6 July 2017 (**Terms of Reference**).
4. The Terms of Reference draw attention to 16 land claims (**16 claims**)¹ in respect of which three different Commissioners published their reports between 1981 to 2004. In each case:
 - (a) land was recommended by the relevant Commissioner for grant, but has not been granted;
 - (b) one or more detriment issues were identified by the Commissioner; and
 - (c) it is said that those issues are not currently the subject of settlement negotiations.
5. In none of the 16 claims did any Commissioner find that there was little or no traditional attachment by the claimants (or the persons found to be the traditional Aboriginal owners (**traditional owners**)) to the lands claimed. If such a finding had been made in any claim, it would have been open to the Commissioner not to make a recommendation to the Minister for the granting of the land claimed or any part of it (see [12] below).

¹ The 16 claims are listed in the Terms of Reference. It is noted that these claims were the subject of only 10 reports by Commissioners, being Report Nos. 9, 29, 61, 62, 63, 64, 65, 66, 67 and 68. The reason for this is that, in some instances, more than one land claim (or parts of more than one land claim) were heard together and the subject of a single report.

6. On the contrary, the Commissioners overwhelmingly made strong findings about the strength of attachment of the traditional owners to their lands, including the particular areas claimed.²
7. Of the 16 claims, 12 relate only to land which comprises the beds and banks of rivers and/or the inter-tidal zone (ITZ). The Terms of Reference provide that it is appropriate for the Commissioner in preparing the Review to focus in some detail these 12 claims.
8. The Commissioner's request to the NLC seeks comment or submissions on three inter-related matters:
 - (a) How should he consider detriment interests that were acquired after either the land claim was lodged, the land claim inquiry was commenced or the land claim report was published? (**Issue (a)**)

² *Finniss River Land Claim Report* (Report No. 9, Toohey J, 22 May 1981), where Areas 1 to 5 were under claim, at [262] ("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"); *Mataranka Area Land Claim Report* (Report No. 29, Maurice J, 14 December 1988) at [9.1.1] ("The Aboriginal witnesses and their anthropologists amply demonstrated the great spiritual and practical significance of the claimants' attachments to their land, including the claim area"); *Maria Island and Limmen Bight River and Maria Island Region Land Claims Report* (Report No. 61, Olney J, March 2002) at [59] ("There are many aspects of the evidence which demonstrate the strength of the claimants' traditional attachment to the claim area") and at [62] ("the claimants have maintained over a long period a traditional attachment to all parts of their traditional country"); *McArthur River and Manangoora Regions Land Claims Report* (Report No. 62, Olney J, March 2002) at [74] ("The traditional attachment of many of the claimants to the claim area is demonstrably strong"); *Lorella and Maria Island Regions Land Claims Report* (Report No. 63, Olney J, June 2002) at [60] ("the claimants have demonstrated a strong traditional attachment to their countries, including the claimed land"); *Garrwa (Wearyan and Robinson Rivers Beds and Banks) Land Claim Report* (Report No. 64, Olney J, July 2002) at [50] ("the present claimants continue to have strong traditional attachments to the claimed land"); *Lower Roper Land Claim Report* (Report No. 65, Olney J, 7 March 2003) at [53] ("It is beyond question that the Roper River, including its bed and banks is regarded by the claimants as being as much part of their country as the land which abuts its banks. ... There can be few areas in Australia where the traditional attachment of the Indigenous people to their lands exceeds that of the present claimant groups"); *Seven Emu Region, Wollagorang Area II and Manangoora Land Claims Report* (Report No. 66, Olney J, April 2003) at [67]-[68] (two senior claimants played "dominant roles ... in the process of transmitting knowledge", a matter that "is itself a demonstration of the traditional process whereby spiritual and physical attachment to country is preserved" and at [83] (the evidence of those men "demonstrated a strong traditional attachment to their respective countries and of their commitment to the preservation of traditional values throughout the region"); *Lower Daly Land Claim Report* (Report No. 67, Olney J, 30 April 2003, at [73] ("The traditional attachment of the Banagula claimants [i.e. those claimants found to be the traditional Aboriginal owners] is beyond question"); *Upper Roper River Land Claims Report* (Report No. 68, Olney J, March 2004) at [41] ("there can be few areas in Australia where the traditional attachment of the Indigenous people to their lands exceeds that of the present claimant groups").

- (b) Should such detriment be treated differently depending on what stage it was acquired? For example, should a detriment interest acquired post land claim report be treated differently to an interest acquired between the lodgement of a land claim and publication of the relevant report? (**Issue (b)**)
 - (c) What approach should be taken by the Commissioner in considering and commenting on detriment matters pursuant to s 50(3)(b) and s 50(3)(c) of the Land Rights Act? (**Issue (c)**)
9. These submissions address Issues (a) and (b) together, and then briefly address Issue (c). Before doing so, however, a number of preliminary matters are addressed. After Issues (a) – (c) are addressed, brief consideration is given to a number of additional matters.
 10. On 16 May 2018, the NLC was provided, ahead of time, with a copy of *Submissions of Northern Territory of Australia as to Proper Approach of Aboriginal Land Commissioner to Detriment Matters Arising after a Land Claim (Territory Submissions)*. These present submissions include responses to the Territory Submissions.

Relevant functions of the Commissioner and the Minister

11. Where a land claim is made, it is a function of the Commissioner under s 50(1) of the Land Rights Act to ascertain whether there are traditional owners of the relevant land and to report his or her findings to the Minister and the Administrator of the Northern Territory.
12. Where the Commissioner finds that there are traditional owners of the land, he or she will generally make a recommendation to the Minister for the granting of the land, or any part of it, in accordance with ss 11 and 12 of the Act. Where a finding that there are traditional owners has been made, but that such persons have little or no traditional attachment to the land claimed, it is open to a Commissioner not to make such a recommendation to the Minister. Alternatively, in these circumstances, the Minister may not be satisfied under s 11(1)(b) of the Act that the land should be granted to a Land Trust, even though a favourable recommendation has been made by the Commissioner.³
13. Sub-section 50(3) of the Land Rights Act provides as follows:

In making a report in connexion with a traditional land claim a Commissioner shall have regard to the strength or otherwise of the traditional attachment by the claimants to the land claimed, and shall comment on each of the following matters:

³ *Jungarrayi v Olney* (1992) 34 FCR 496 at 501-502 (Northrop, Hill and O'Loughlin JJ)

- (a) the number of Aboriginals with traditional attachments to the land claimed who would be advantaged, and the nature and extent of the advantage that would accrue to those Aboriginals, if the claim were acceded to either in whole or in part;
- (b) the detriment to persons or communities including other Aboriginal groups that might result if the claim were acceded to either in whole or in part;
- (c) the effect which acceding to the claim either in whole or in part would have on the existing or proposed patterns of land usage in the region; and
- (d) where the claim relates to alienated Crown land—the cost of acquiring the interests of persons (other than the Crown) in the land concerned.

The matters referred to at (a) to (d) above are hereafter described as the **s 50(3) matters**.

14. It was held in *R v Toohey; Ex parte Meneling Station Pty Ltd* (1983) 158 CLR 327 (**Meneling Station**) that the Commissioner must not consider the s 50(3) matters in determining whether or not to make a recommendation to the Minister for the granting of the claimed land, or any part of it, to a Land Trust.⁴ This approach has subsequently been accepted in other cases.⁵
15. Sub-section 50(4) of the Land Rights Act provides as follows:

In carrying out his or her functions a Commissioner shall have regard to the following principles:

 - (a) Aboriginals who by choice are living at a place on the traditional country of the tribe or linguistic group to which they belong but do not have a right or entitlement to live at that place ought, where practicable, to be able to acquire secure occupancy of that place;
 - (b) Aboriginals who are not living at a place on the traditional country of the tribe or linguistic group to which they belong but desire to live at such a place ought, where practicable, to be able to acquire secure occupancy of such a place.
16. In *Northern Territory v Olney*, the Territory sought judicial review of recommendations by Olney J for the grant of land in three coastal regions, including land comprising ITZ and land comprising the beds and banks of, and islands in, certain

⁴ *Meneling Station* at 348-9 (Wilson J, with Murphy J agreeing generally) and at 361-362 (Brennan J). The view taken by Wilson, Murphy and Brennan JJ was also the view taken by Toohey J whose approach as Aboriginal Land Commissioner was under challenge in *Meneling Station*. Toohey J's approach was summarised by Wilson J at 348. Gibbs CJ (at 333) did not go as far as Wilson J, Murphy J and Brennan J; his Honour said that "the matters which form the subject of the comment are not matters to which the Commissioner is bound to have regard in making his recommendation". Mason J dissented on this point: see 339-340.

⁵ See, for example, *Northern Territory v Olney* (2002) 123 FCR 580 where Black CJ, French and R D Nicholson JJ said at 591 that the Commissioner's comments under s 50(3) "do not inform the Commissioner's recommendation".

rivers.⁶ Olney J's recommendations were made in three of the 16 claims presently under consideration (see Report Nos. 61, 62 and 63). In dismissing the applications, the Full Court (Black CJ, French and R D Nicholson JJ) held that the principles referred to in s 50(4) had no relevance where no Aboriginal person was actually living or intending to live on the relevant land.⁷

17. In relation to land other than Schedule 1 land, s 11 of the Land Rights Act provides that the Minister may, in certain circumstances, recommend to the Governor-General that a grant of an estate in fee simple be made to a Land Trust. Among other things, such a recommendation can only be made by the Minister where:
 - (a) a Commissioner has made a recommendation in a report to the Minister that the land should be granted to a Land Trust; and
 - (b) the Minister is satisfied that the land should be granted to a Land Trust.
18. The decision of the High Court in *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24 (***Peko-Wallsend***) made clear that, in making a decision about whether to recommend to the Governor-General that a grant of an estate in fee simple be made to a Land Trust, the Minister is not only entitled to have regard to the s 50(3) matters and the Commissioner's comments on them, he or she is bound to do so.⁸
19. Where, as here, there is an absence of any statutory indication of the weight to be given to various considerations, it is generally for the decision-maker (in this case the Minister) and not the courts to determine the appropriate weight to be given to the matters which are required to be taken into account in exercising the statutory power.⁹ In making such a decision, the Minister therefore has a wide discretion. He or she may or may not act on the recommendation of the Commissioner. The political character of the Minister's decision has been recognised.¹⁰
20. The Minister's discretion under s 11(1)(b) of the Land Rights Act is nevertheless not unconfined. As Brennan J said in *Meneling Station* at 362:

⁶ [2002] FCAFC 280, (2002) 123 FCR 580 at [1]-[2]

⁷ [2002] FCAFC 280, (2002) 123 FCR 580 at [31], [34], [37]. Special leave to appeal to the High Court from the Full Court's decision was refused on 20 June 2003.

⁸ *Peko-Wallsend* at 44-45 (Mason J, with Gibbs CJ agreeing generally and Dawson J agreeing), at 56-57 & 63 per Brennan J and 69 per Deane J. See also the reasons of Brennan J in *Meneling Station* at 362.

⁹ See, for example, *Peko-Wallsend* at 41 (Mason J, with Gibbs CJ agreeing generally and Dawson J agreeing)

¹⁰ See, for example, *Meneling Station* at 334 (Gibbs CJ), at 348-349 (Wilson J, with Murphy J agreeing generally) and at 360-362 (Brennan J) and *Peko-Wallsend* at 63, 64 (Brennan J).

The Minister's recommendation is not a mere affirmation or rejection of the recommendation made by the Commissioner. The Minister, having regard to the Commissioner's recommendation that it would be right for the Crown to grant the land in satisfaction of the traditional owners' needs and entitlement, must decide whether other factors warrant refusing the grant recommended, and in reaching his decision the Minister is bound to have regard also to the Commissioner's comments upon the matters referred to in pars. (a) to (d) of s. 50(3).

21. The factors that the Minister may take into account in the exercise of his or her discretion under s 11(1)(b) of the Land Rights Act may impliedly be confined by the subject-matter, scope and purpose of the Act.¹¹ In analogous circumstances (in relation to the Minister's discretion whether or not to provide consent under s 19(4A) of the Land Rights Act to the grant by a Land Trust of an estate or interest in Aboriginal land), Kenny J readily implied an obligation on the part of the Minister to consider whether the proposed grant is for the benefit of Aboriginals.¹²
22. In relation to the discretion under s 11(1)(b) of the Act, it is submitted that the Minister is obliged to consider the beneficial purpose of Land Rights Act, in particular its often-referred to long title ("An Act providing for the granting of Traditional Aboriginal Land in the Northern Territory for the benefit of Aboriginals, and for other purposes").¹³
23. The Commissioner's role in the evaluation of detriment is further considered at [35] to [40] below.

¹¹ See, for example, *Peko-Wallsend* at 40 (Mason J, with Gibbs CJ agreeing generally and Dawson J agreeing) and the cases there cited.

¹² *Gondarra v Minister for Families, Housing, Community Services and Indigenous Affairs* (2014) 220 FCR 202 at [73] (Kenny J)

¹³ See, for example: *R v Kearney; Ex parte Jurlama* (1984) 158 CLR 426 at 433 (Gibbs CJ, with Brennan, Deane and Dawson JJ agreeing); *Attorney-General for the Northern Territory v Hand* (1989) 25 FCR 345 at 357 (Lockhart J), at 373, 378 (Beaumont J) and at 394, 395 (von Doussa J); *Attorney-General for the Northern Territory v Hand* (1991) 172 CLR 185 at 188 per curiam; *Jungarrayi v Olney* (1992) 34 FCR 496 at 506 (Northrop, Hill and O'Loughlin JJ); *Northern Territory v Olney* [2002] FCAFC 280, (2002) 123 FCR 580 at [4], [25], [29] (Black CJ, French and R D Nicholson JJ); *Raymond v Northern Territory* [2004] FCAFC 258; (2004) 139 FCR 493 at [1] (Black CJ, Moore and Hely JJ); *Gumana v Northern Territory* (2007) 158 CLR 349 at [94], [99] (French, Finn and Sundberg JJ); *Gondarra v Minister for Families, Housing, Community Services and Indigenous Affairs* (2014) 220 FCR 202 at [69], [73] (Kenny J).

Detriment**The meaning of detriment**

24. Paragraph (b) of s 50(3) of the Land Rights Act contains the Act's one and only usage of the word "detriment". This word is not defined in the Act.
25. The NLC accepts the word "detriment" bears its ordinary meaning and that, in s 50(3)(b) of the Act, it can reasonably be taken to mean "harm or damage which need not be confined to economic considerations any more than the reference to 'advantaged' in s50(3)(a) need be so confined".¹⁴
26. The NLC also accepts that detriment does not need to be established as a matter of probability in order for it to warrant comment from the Commissioner.

Not all potential harm or damage is detriment within the meaning of s 50(3)(b)

27. As Kearney J said:¹⁵

A broad view of what is involved in detriment under the Act should be taken and reasonable possibilities of resulting detriment should be considered, not merely probabilities.
28. Implicit in this statement is the proposition that not all potential harm or damage is detriment for the purposes of s 50(3)(b) of the Act. Harm or damage that might properly be described as speculative, far-fetched, fanciful or too remote is not a "reasonable possibility" and is therefore not detriment of the relevant kind. It is necessary that the particular detriment asserted must be at least a reasonable possibility. In a relatively recent land claim hearing, the Northern Territory accepted that the evidence must establish "[r]eal possibilities, not speculative possibilities".¹⁶
29. Some assertions of detriment may be too tentative to warrant comment from the Commissioner. Thus, Toohey J said:¹⁷

Nevertheless there must be some limit to the matters that may properly be the subject of comment. In practical terms it would be impossible to have regard to every consideration no matter how tentative. Furthermore where there is some proposal in relation to land as there is with Mt Isa Mines it is important to look at the practicality of a project and the length of time that may elapse before it

¹⁴ *Borrooloola Land Claim Report*, 3 March 1978, at [174]

¹⁵ *Jawoyn (Katherine Area) Land Claim Report*, 6 October 1987, at [190]

¹⁶ Legune Area Land Claim No 188 and Gregory National Park / Victoria River Land Claim No 167, Transcript, 10 August 2017, P-209.12-14 and see also P-210.05-08.

¹⁷ *Borrooloola Land Claim Report*, 3 March 1978, at [174]

gets off the ground. Failure to do this may lead to providing the Minister with a range of information so broad and tentative as to be of little use to him.

30. Commissioners have sometimes commented about asserted detriment to the effect that it is speculative or very tenuous. For example, in the Borroloola Land Claim, Toohey J described detriment asserted by reason of a proposal for a future prawning and fishing business on part of the land claimed as “very tenuous indeed” and “a matter of speculation”.¹⁸
31. The Territory Submissions at [21] argue that, if a person asserts detriment and calls evidence about it, “a Commissioner should not exclude reference to it in a report on the basis that it is speculative, fanciful or not a real possibility”. It is no doubt open to a Commissioner to refer to such matters in the report. However, if he or she takes the view that the asserted detriment is speculative, fanciful or not a real possibility, this should be stated in the report, as should the conclusion that such matters do not constitute detriment within the meaning of s 50(3)(b) of the Act.
32. On other occasions, Commissioners have commented that particular fact situations simply do not give rise to detriment. For example, Gray J commented that, where squatters have established dwellings and other improvements, without entitlement to do so, and where those dwellings or other improvements are fixtures, the ownership of them has already passed to the Crown, the current owner of the land. Therefore, the squatters would not suffer detriment if the land claimed becomes Aboriginal land because they have no present entitlements.¹⁹
33. Further, detriment that is simply a consequence of the operation of the Land Rights Act is not detriment of the relevant kind. As was said by a Full Court (Lockhart, Wilcox and Gummow JJ) in *Attorney-General (Northern Territory) v Minister for Aboriginal Affairs*, a case arising out of Olney J’s *Kidman Springs/Jasper Gorge Report*:²⁰

The Commissioner noted that, in one sense, the Northern Territory Government suffers a detriment whenever a land claim is granted. The only land which may be made the subject of a grant is unalienated Crown land or alienated Crown land in which all estates and interests not held by the Crown are held by, or on behalf of, Aboriginals: see s 50(1)(a) and ss 11 and 12 of the Land Rights Act. Ex hypothesi, therefore, any grant will diminish the stock of land vested in the Northern Territory Government. If that be a detriment, it is one inherent in the

¹⁸ *Borroloola Land Claim Report*, 3 March 1978, at [210]-[211]

¹⁹ *Kenbi (Cox Peninsula) Land Claim Report*, December 2000, at (36) of the Summary and at [11.17.6]-[11.17.7] and see also [11.10.13]

²⁰ (1989) 23 FCR 442 at 444. As one would expect, this decision was subsequently followed by Commissioners: see, for example, Gray J’s *Kenbi (Cox Peninsula) Land Claim Report*, December 2000, at [11.1.2], [11.8.12].

system established by the Act. We agree with the Commissioner's comment that this is not the type of detriment contemplated by s 50(3)(b).

34. Commissioners had previously come to the same conclusion:

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. ... 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.²¹

I do not consider that detriment can result from a grant simply because the legal regime instituted by the Act would then apply to the land; to argue in those terms is really to quarrel with the existence of the Act.²²

Commissioner's role in the evaluation of detriment further considered

35. As noted at [19] above, the Minister is not bound by the comments of the Commissioner in relation to the s 50(3) matters and has a wide discretion in determining whether or not to recommend to the Governor-General that a grant of an estate in fee simple be made to a Land Trust.

36. This is not to say, however, that the Commissioner does not perform a central function in relation to the evaluation of detriment and of the other s 50(3) matters. It is clear that the Commissioner does perform such a function. He or she is thus required to comment:

(a) "to express his views" on those matters, "[t]o enable the Minister to give proper consideration to those matters" and to "do so in a way that will enable the Minister to understand the issues involved and the judgment which the Commissioner has formed";²³

(b) "so that the Minister, in making his decision, may have regard to them";²⁴

²¹ *Finniss River Land Claim Report*, 22 May 1981, at [283] per Toohey J. See also *Warlpiri and Kartangaruru-Kurintji Land Claim Report*, at [337] per Toohey J.

²² *Jawoyyn (Katherine Area) Land Claim Report*, 6 October 1987, at [190] per Kearney J

²³ *Meneling Station* at 333-334 (Gibbs CJ)

²⁴ *Meneling Station* at 345 (Murphy J)

- (c) to “expose for the consideration of the Minister the implications of a decision by him to make a grant”;²⁵
- (d) to make an evaluation of the evidence concerning the matters set out in s 50(3).²⁶

37. In order that the Commissioner be able to perform this central function, it is necessary for evidence of asserted detriment to be adduced before him or her. Thus, Kearney J said:²⁷

It is necessary that facts be established from which it can fairly be concluded that some particular detriment might result, either from the grant or from the combined effect of the grant and the Act.

Maurice J emphasised the responsibility borne by parties asserting detriment, particularly that of the Territory:²⁸

The Northern Territory has a clear responsibility to give me every assistance it can in helping me to arrive at my recommendation, however much that may be seen as increasing the burden of preparing a case on detriment and losing control over aspects of Territory affairs to the Federal Minister.

38. Not only do Commissioners develop expertise in relation to the kinds of issues that arise in land claim hearings, they are also generally in a position to examine detriment issues in some depth and to do so with the benefit of a hearing at which various parties are invariably legally represented. In some claims the number of parties who have been legally represented has been extensive. In some claims, the detriment evidence and the range of detriment issues have been extensive.²⁹

²⁵ *Meneling Station* at 349 (Wilson J, with Murphy J agreeing generally)

²⁶ *Meneling Station* at 363 (Brennan J who in saying so expressly endorsed Toohey J’s statement as Commissioner); see also *Peko-Wallsend* at 68 (Deane J).

²⁷ *Jawoyn (Katherine Area) Land Claim Report*, 6 October 1987, at [190]

²⁸ *Warumungu Land Claim Report*, 8 July 1988, Appendix 1, p.247

²⁹ For example, in the Warumungu land claim, the detriment evidence occupied nearly four weeks of the hearing and included extensive documentary evidence. Detriment issues were extensively considered in the Maurice J’s report: see *Warumungu Land Claim Report*, 8 July 1988, at [2.4.2], [2.5.1], [2.16.1], Chapters 35-49, Appendix III (List of Exhibits) and Appendix V (Legal Representatives). Gray J’s *Kenbi (Cox Peninsula) Land Claim Report*, December 2000, does not appear to state specifically the length of the detriment hearing, but it is clear that an extensive volume of detriment evidence was adduced and that an extensive range of detriment issues were ventilated. So much is apparent from the following matters: the inquiry before Olney J extended for some 30 sitting days (at [2.15]); some 305 witnesses were called at the hearings before Olney J and Gray J (at [2.25]); a large number of parties were represented before Gray J (Appendix 4, List of Appearances); and a very extensive number of exhibits were tendered (Appendix 7, List of Exhibits); and Chapters 11 and 12 of Gray J’s report.

39. The Commissioner's jurisdiction is administrative in character. The proceedings are inquisitorial, not adversarial.³⁰ As a result, in many land claim hearings, particularly the earlier hearings, Commissioners appointed counsel assisting and a consultant anthropologist. In some hearings, counsel assisting the Commissioner tendered a substantial number of exhibits.³¹
40. The central nature of the Commissioner's function in relation to the evaluation of detriment is reinforced by the limited ability of those asserting detriment to make submissions that must be considered by the Minister *after* the land claim inquiry has been concluded. Thus, it was said in *Peko-Wallsend*:

In many, if not in most, cases the Minister, in considering those matters [i.e. the matters mentioned in s 50(3) of the Act], will not need to go beyond the report of the Commissioner. However, if there is in the possession of the Minister at the time when he considers the matter, material which shows that the position has changed since the Commissioner made his report, or that for any reason the Commissioner's comments were based on an erroneous view of the facts, the Minister is bound that take that material into account. ... It does not follow that the Minister is bound to consider every argumentative submission made to him after the Commissioner has furnished his report.³²

When the Act specifically provides for the Commissioner to comment on the manner in which persons may be adversely affected by the making of a land grant, and provides the means whereby those comments are brought to the Minister's attention, there may readily be found in the subject-matter, scope and purpose of the Act an implication that the Minister is bound to take resultant detriment into account when making his decision. There is no sound reason for confining that obligation to a consideration of the comments in the report; matters put to the Minister by interested parties correcting, updating or elucidating the Commissioner's comments can be of no less relevance.³³

A statutory scheme for inquiry and report would be undermined if a party could withhold information from the person conducting the inquiry and then communicate that information to the decisionmaker so as to compel the decision-maker to institute a further inquiry into it. The decision-maker is entitled to say to such a party: "You have had an opportunity to be heard at the inquiry; if you chose to withhold information then, I will not receive it from you now." The decision-maker is not bound to inquire into the information, though he is free to do so. It does not "thwart or run counter to the policy and objects of the Act" to allow a decision-maker a discretion to insist on adherence to a

³⁰ *Re Maurice, Aboriginal Land Commissioner; Ex parte Attorney-General for the Northern Territory* (1987) 17 FCR 422, at 424 (Bowen CJ, Lockhart and Sheppard JJ).

³¹ See, for example, *Kenbi (Cox Peninsula) Land Claim Report*, December 2000, Appendix 7 (List of Exhibits) which shows that counsel assisting tendered some 37 exhibits.

³² *Peko-Wallsend* at 30 (Gibbs CJ)

³³ *Peko-Wallsend* at 45 (per Mason J, with Gibbs CJ agreeing generally and Dawson J agreeing)

scheme of public inquiry and report prescribed by the Act when a party comes along afterwards and supplies ex parte information which that party had no adequate reason for failing to place before the inquiry. On the other hand, if there is an adequate reason why credible and significant information was not disclosed to an inquiry (e.g., if it relates to facts occurring after the inquiry closed) the decision-maker is under a *prima facie* duty to inquire into it. In this case no adequate reason was disclosed for failing to place the information as to the true location of the Ranger 68 prospect before the Minister. The Minister therefore had a discretion to exercise.³⁴

The Commissioner's function under s 50(1)(d)

41. The express statutory foundation for the Review is s 50(1)(d) (see the Terms of Reference). Under it, the function of a Commissioner is "to advise the Minister in connexion with any other matter relevant to the operation of this Act that is referred to the Commissioner by the Minister". The Minister has thus requested the *advice* of the Commissioner. Issues (a) and (b) arise directly out of the Review (see the Commissioner's letter dated 27 March 2018).
42. The particular tasks referred to the Commissioner by the Minister include:
 - (a) to commence an independent review into the status of detriment issues relating to the 16 claims;
 - (b) to identify, review and where appropriate make recommendations with respect to the 16 claims in relation to: areas of progress and causes of delay to addressing / settling detriment matters to date; current opportunities and challenges to addressing / settling detriment matters; and such other matters as may be pertinent to the Review;
 - (c) in response to the Review findings, and by reference to the Minister's powers under s 11 of the Land Rights Act, to make recommendations to expedite the resolution of land claims recommended for grant but not yet finalised addressing, among other things, procedural matters and stakeholder actions to settle detriment matters.
43. The Terms of Reference make plain that, underlying the Review, is a serious concern on the part of the Minister about the length of time that it has taken to finalise the 16 claims. This concern is entirely understandable: the most longstanding of the Commissioner's reports relating to the 16 claims was published on 22 May 1981

³⁴ *Peko-Wallsend* at 62 (Brennan J). See also Deane J at 69-70 to similar effect.

(almost exactly 37 years ago) and most recent of those reports was published in March 2004 (over 14 years ago).³⁵

44. In relation to the 16 claims, the Commissioner can have no function under s 50(1)(a), nor can he have any function under s 50(3) of the Act. His function derives solely from s 50(1)(d). The Terms of Reference make clear that the Commissioner's advice is being sought in relation to the exercise or possible exercise by the Minister of his powers under s 11 of the Act. In substance, the Commissioner's advice is being sought on how best to achieve the finalisation of these claims.
45. Accordingly, the Commissioner's functions under the Terms of Reference are substantially broader than his function to comment on detriment issues under s 50(3)(b) of the Act in the course of a land claim inquiry. The Commissioner's functions in the Review are broad on their face and are constrained only by the Terms of Reference and any implied constraints arising from the subject-matter, scope and purpose of the Act.
46. If it is the Commissioner's view that, in relation to some or all of the 16 claims, there is no any material detriment within the meaning of s 50(3)(b), he should advise the Minister accordingly.
47. The Territory Submissions make no reference to s 50(1)(d) of the Land Rights Act. In many respects they proceed on the erroneous assumption that, in undertaking the Review, the Commissioner is doing no more than commenting on detriment issues, as he would do in the course of a land claim inquiry.
48. According to the Territory Submissions:³⁶

... it is not part of the Commissioner's function to guide or direct the exercise of the Minister's function, particularly as to when and if the Minister should exercise the power to make a grant.

This is a recurring theme of the submissions.³⁷ To the extent that this submission draws upon jurisprudence, it is not jurisprudence that arises out of s 50(1)(d) of the Act. There is scant authority on the operation of s 50(1)(d) of the Land Rights Act.³⁸

³⁵ See footnote 42 below for further details.

³⁶ Territory Submissions at [15]

³⁷ Territory Submissions at [16], [18]

³⁸ The only such authority that has come to light is *Northern Territory v Olney* [2002] FCAFC 280, (2002) 123 FCR 580 where Black CJ, French and Nicholson JJ said at [34], by way of *obiter*, that the secure occupancy principles found in s 50(4) of the Act may have a bearing on the Commissioner's function under s 50(1)(d), depending upon the subject matter of the referral.

49. The ordinary meaning of the word “advise” is “to give counsel to”, to “offer an opinion to, as worthy or expedient to be followed” and “to recommend as wise, prudent, etc”.³⁹ These are the things that the Commissioner is asked to do in the Review, commissioned as it was by the Minister.
50. Whilst it may be accepted that it is not the Commissioner’s function to “direct” the Minister, it is undoubtedly his function under s 50(1)(d) to guide or provide guidance to the Minister in accordance with the terms of the referral.
51. Even under s 50(3) of the Act, the Commissioner’s function, as described at [36] above, is one that guides or provides guidance to the Minister, albeit that the Minister is ultimately free to make his or her own decision about recommending land for grant.⁴⁰

Issues (a) and (b): The time at which a person is said to suffer detriment and the person’s knowledge of the land claim

The Territory’s position in summary

52. At [7] of the Territory Submissions, it is said:

There is no warrant in the terms of the ALRA (particularly ss11 and 50), the context or its purpose for treating such detriment differently depending on the stage at which exposure to it arose, or for inquiring into a person’s state of knowledge about a land claim and the bearing, if any, which that knowledge had, or should have had, on their exposure. There are, in addition, a number of matters which point against doing so.
53. At [23], the Territory Submissions argue that the Land Rights Act:

is not concerned with when the detriment and patterns of land usage arose (relative to the land claim and its process), or the state of knowledge of the persons who might suffer the detriment or the Northern Territory Government, about the land claim, or any recommendation made for grant, and the impact of that state of knowledge on their decision making.
54. And at [26], the Territory Submissions argue:

... it is no part of that function to hear evidence and ascertain facts relating to:

 - (a) the state of knowledge held by a person who asserts they will suffer detriment if claimed land is granted about the existence of the claim, the

³⁹ *The Macquarie Dictionary Online*, accessed 23 May 2018

⁴⁰ In *Peko-Wallsend* at 45, Mason J (with Gibbs CJ agreeing generally and Dawson J agreeing) said that a post-claim change of circumstances may mean that the Commissioner’s comments “no longer prove to be an accurate *guide*” (emphasis added) i.e. guide to the Minister in determining whether or not to exercise the power to make a grant.

hearing of the Commissioner's inquiry into it, and/or the Commissioner's recommendation in relation to the claim; or

- (b) the bearing which that state of knowledge had, if any, or should reasonably have had, upon the person's exposure to the asserted detriment.

- 55. Before responding to the Territory's position, it is necessary to say something about the process by which members of the public in the Northern Territory come to know about particular land claims and to consider whether the time at which detriment arose or the state of knowledge about the relevant land claim of the persons said to have suffered the detriment are relevant issues, either in an ordinary land claim inquiry or in the Review.

Lodgement and notification of, and publicity concerning, land claims

- 56. The NLC accepts that, at the times when land claim applications were lodged at the the Aboriginal Land Commissioner's office, the fact of lodgement was not something that was publicly advertised by the Commissioner.⁴¹
- 57. There were, however, a range of different ways in which members of the public, particularly those with interests in a particular area, would come to know, or at least should come to know, of any claim to that area or of any recommendation in relation to it by a Commissioner.
- 58. First, various peak bodies were not uncommonly represented at land claim hearings.⁴² It may reasonably be inferred that these bodies would ordinarily have become aware of the lodgement of relevant land claim applications within a relatively short time of that occurring, and that they would ordinarily have advised their members, or their relevant members, accordingly.

⁴¹ See, for example, the comments of Olney J during the McArthur River and Manangoora Regions Land Claims inquiry: Transcript, 9 August 2000, P-1312.43 – 1313.01.

⁴² Using the 10 land claim reports referred to in footnote 1, it is apparent that one or both peak fishing bodies were represented at seven of the relevant hearings: see: *Maria Island and Limmen Bight River and Maria Island Region Land Claims Report* (Report No. 61, Olney J, March 2002) at Appendix 1 – the Northern Territory Seafood Council Incorporated (NTSC) and the Amateur Fishermen's Association of the Northern Territory (AFANT) were represented; *McArthur River and Manangoora Regions Land Claims Report* (Report No. 62, Olney J, March 2002) at Appendix 1 – NTSC and AFANT were represented; *Lorella and Maria Island Regions Land Claims Report* (Report No. 63, Olney J, June 2002) at Appendix 1 – NTSC was represented; *Lower Roper Land Claim Report* (Report No. 65, Olney J, 7 March 2003) at Appendix 1 – AFANT was represented; *Seven Emu Region, Wollogorang Area II and Manangoora Land Claims Report* (Report No. 66, Olney J, April 2003) at Appendix 1 – NTSC and AFANT were represented; *Lower Daly Land Claim Report* (Report No. 67, Olney J, 30 April 2003, at Appendix 1 – AFANT was represented; *Upper Roper River Land Claims Report* (Report No. 68, Olney J, March 2004) at Appendix 1 – AFANT was represented.

59. Secondly, in numerous instances, land claims and grants under the Land Rights Act have been controversial and have generated both publicity and public debate, sometimes of a very animated kind. For example, in relation to the Finniss River Land Claim, Toohey J said:⁴³

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. ... 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.

60. A number of judges have referred to the political nature of the Minister's decision to recommend land for grant. For example, Brennan J noted that such a decision may be "pregnant with political controversy".⁴⁴ Newspaper and/or other media coverage of land claim hearings has not been uncommon.⁴⁵ Publicly available maps reinforce the fact that grants of land have been made to Land Trusts by noting the requirement to obtain a permit if wishing to enter areas of Aboriginal land.
61. Thirdly, land claim inquiries were typically widely notified in the Northern Territory. For example, the Commissioner's notice of his intention to commence an inquiry in relation to the McArthur River and Manangoora Regions Land Claims was advertised in the *Northern Territory News*, the *Tennant and District Times*, the *Centralian Advocate*, the *Katherine Times* and *Land Rights News*. In addition, notice was given by direct mail to individuals, organisations and officials thought likely to have an

⁴³ *Finniss River Land Claim Report* (Report No. 9, Toohey J, 22 May 1981) at [2]

⁴⁴ *Meneling Station* at 362. See also Wilson J (with Murphy J agreeing generally) at 349 in the same case.

⁴⁵ See, for example: *Uluru (Ayers Rock) National Park and Lake Amadeus/Luritja Land Claim Report*, 31 August 1979, at [163]; *Re Maurice, Aboriginal Land Commissioner; Ex parte Attorney-General for the Northern Territory* (1987) 17 FCR 422 at 433, 434, 439, 444 (Bowen CJ, Lockhart and Sheppard JJ; Ngaliwurru/Nungali (Fitzroy Pastoral Lease) Land Claim Report, 22 December 1993, at [1.5]; *Jawoyn (Gimbat Area) Land Claim Report*, June 1995, at [1.14].

interest in the claim area or the outcome of the inquiry.⁴⁶ The situation was similar in relation to the remainder of the 16 claims.⁴⁷

62. As a result of the notification procedures described above and other sources of knowledge, there are at times a large number of persons or organisations who appear at the inquiry, provide written submissions or other material to it or register an interest in the outcome of the claim.⁴⁸
63. Fourthly, by s 50(1)(c) of the Land Rights Act, the Commissioner is required to establish and maintain a register of traditional land claims. Inquiries about land claims could be made by corresponding with the Commissioner's office or by visiting the office. For many years, the Commissioner maintained offices in Cavenagh Street, Darwin. This office included a counter at which inquiries could be made of the Commissioner's Executive Officer. Further, I am instructed that, over the years, land council lawyers have from time to time received and answered inquiries from lawyers acting on behalf of purchasers of pastoral leases in relation to the existence and status of any land claims affecting those leases or adjacent lands.
64. Fifthly, by s 61 of the Land Rights Act, the Commissioner is required to furnish an annual report to the Minister of his or her operations during the relevant year. The Minister is required to table this report in each House of Parliament within 15 sitting days of its receipt. Such reports typically include significant information about the overall list of land claims that have been made and the extent to which they have been disposed of or still await disposition. I am instructed that the Commissioner's annual reports have been available online for many years.

⁴⁶ *McArthur River and Manangoora Regions Land Claims Report* (Report No. 62, Olney J, March 2002) at [33].

⁴⁷ *Finniss River Land Claim Report* (Report No. 9, Toohey J, 22 May 1981) at [5] (where Toohey J noted that the hearing of the claim was "extensively advertised and notice given to all those departments, organisations and persons appearing to have some interest in its outcome"); *Mataranka Area Land Claim Report* (Report No. 29, Maurice J, 14 December 1988) at [1.1.2]; *Maria Island and Limmen Bight River and Maria Island Region Land Claims Report* (Report No. 61, Olney J, March 2002) at [28]; *Lorella and Maria Island Regions Land Claims Report* (Report No. 63, Olney J, June 2002) at [21]; *Garrwa (Wearyan and Robinson Rivers Beds and Banks) Land Claim Report* (Report No. 64, Olney J, July 2002) at [24]; *Lower Roper Land Claim Report* (Report No. 65, Olney J, 7 March 2003) at [17]; *Seven Emu Region, Wollogorang Area II and Manangoora Land Claims Report* (Report No. 66, Olney J, April 2003) at [22]; *Lower Daly Land Claim Report* (Report No. 67, Olney J, 30 April 2003, at [11]; *Upper Roper River Land Claims Report* (Report No. 68, Olney J, March 2004) at [23].

⁴⁸ In the *Kenbi (Cox Peninsula) Land Claim Report*, December 2000, at Appendix 3, Gray J listed: 19 persons or organisations who appeared in the inquiry (other than the claimants); 33 persons or organisations who provided written submissions or other material; and 22 persons or organisations who indicated interest in the outcome of the claim.

65. Sixthly, the Commissioner's land claim reports (or at least a large number of them) are available online.⁴⁹ The same website includes links to various of the Commissioner's annual reports. I am instructed that this has been the case for many years.
66. In light of these matters and what has now been a 40-year history of land claims and land grants to Land Trusts in the Northern Territory, it may reasonably be inferred that there is a widespread consciousness among members of the public in the Northern Territory of land claims, land grants to Land Trusts and the real possibility that particular areas of unalienated Crown land are either under claim or the subject of a recommendation by a Commissioner.
67. The prospects that a person is unaware that a particular piece of unalienated Crown land is under claim will be greatest prior to the notification of the claim shortly prior to hearing. After the notification of the claim (by advertisements in multiple newspapers and by notices directed to individuals, organisations and officials), it is most unlikely that any significant number of adults living in the surrounding region would be unaware of the claim.
68. A claim by a person asserting detriment that, at a particular point in time, he or she had no knowledge that a particular area was subject to a land claim or subject to a recommendation for grant by a Commissioner is easy to make and may be difficult to disprove. In light of the matters referred to at [55]-[65] above, such claims should not be accepted at face value and should be interrogated.

Relevance of the time at which the asserted detriment arose and the state of knowledge about the relevant land claim of the persons said to have suffered it

69. The Territory Submissions accept, with respect correctly, that it is part of the Commissioner's function under s 50(3) of the Land Rights Act:
- (a) to remark upon the s 50(3) matters and to express his views about them (at [14(c)]);
 - (b) to ascertain the facts relating to the s 50(3) matters and to comment upon them in light of the knowledge he has necessarily acquired and the sensitivities he has necessarily developed in the course of his duties (at [14(e)]);
 - (c) to comment on the s 50(3) matters in a way that will enable the Minister to understand the issues involved and the judgment that the Commissioner has formed about them (at [14(f)]); and

⁴⁹ See <https://www.pmc.gov.au/indigenous-affairs/land/aboriginal-land-commissioner>.

- (d) to make an evaluation of the evidence concerning the s 50(3) matters (at [14(h)]).
70. In relation to s 50(3)(b), the Commissioner's function is to elucidate the nature and extent of the asserted detriment. Different parties to land claim inquiries have routinely made submissions to the effect that the Commissioner should comment that the scale of the asserted detriment is anywhere on a scale between extreme and non-existent and that the degree of likelihood that it will occur is anywhere on a scale between certain and fanciful. Commissioners have routinely commented on these matters in accordance with their assessments of the evidence and have also commonly commented that the asserted detriment could be overcome, if the relevant parties are prepared to enter into an agreement or if some other action is taken. The Commissioner's function under s 50(3)(b) is a broad one and has been interpreted thus by successive Commissioners.
71. The underlying rationale of s 50(3) is to ensure that the Minister is provided with fulsome and accurate factual information and that he or she has the benefit of the Commissioner's comments on the same in order to assist and facilitate the Minister's decision on whether or not to recommend the land for grant.
72. In these circumstances, it is impossible to see how it would not be relevant for a Commissioner to inquire into and comment upon the time at which the asserted detriment arose and the state of knowledge about the relevant land claim of the persons said to have suffered it – at least where such matters are raised by a party to the inquiry or by the evidence.
73. The Territory Submissions state at [7] that "[t]here is no warrant in the ALRA ... for treating such detriment differently depending on the stage at which exposure to it arose, or for inquiring into a person's state of knowledge". Thus, as the Territory would appear to have it, there should be no relevant difference (so far as the Commissioner and, therefore, the Minister are concerned) between the differing situations described below; that is to say that the asserted detriment is the same or is equal in each case:
- (a) a person has conducted commercial fishing tours utilising the beds and banks of certain rivers and certain areas of ITZ (collectively the **relevant land**) since prior to the enactment of the Land Rights Act and a claim to those lands is subsequently lodged;
 - (b) a person commences or acquires a similar business in the 1990s, after such a claim is lodged and before it is heard, but in circumstances where the person did not know of the claim and had no reason to consider that the relevant land may be under claim;

- (c) a person commences or acquires a similar business in the 1990s, after such a claim is lodged and before it is heard; he or she does so despite believing that there is a real possibility that the relevant land is under claim, but makes no inquiries to determine whether or not this is so;
 - (d) a person commences or acquires a similar business in the 2000s, despite the knowledge that the relevant land is under claim and that a hearing of that claim will take place in the near future;
 - (e) a person commences or acquires a similar business in the 2010s, despite believing that there is a reasonable possibility that the relevant land has been claimed, that the claim has been heard and that the Commissioner has made a recommendation for grant under s 50(1)(a)(ii), but makes no inquiries to determine whether or not this is so;
 - (f) a person commences or acquires a similar business in the 2010s, despite the knowledge that the relevant land has been claimed, that the claim has been heard and that the Commissioner has made a recommendation for grant under s 50(1)(a)(ii) of the Act.
74. A rational assessment of the harm or damage that might result from a grant of land in these examples could not conclude that it is the same in each case. The detriment in examples (a) and (b) is obviously the most significant. In relation to examples (d) and (f), the person concerned has commenced or acquired the business with his or her eyes open. At that time, a future grant of the relevant land was known to be a realistic possibility, if not a probability. This person cannot be heard later to complain that he or she would suffer detriment if the relevant land is granted. Any harm or damage to the person would not be the result of a grant of the land; rather, it would be the result of the person's decision to commence or acquire the business in those circumstances. Such harm or damage would therefore not be detriment within the meaning of s 50(3)(b) of the Act. The situation is similar in relation to examples (c) and (e). In these examples, the person concerned has decided to commence or acquire the business and to take the risk that the relevant land is under claim or has been the subject of a recommendation by the Commissioner. Once again, any harm or damage would not be detriment within the meaning of s 50(3)(b) because it would not be the result of the land being granted; it would be the result of the person's decision to take the risk.
75. In many different contexts, the law requires people to act reasonably, not only in their own interests but in the interests of others. For example, in both tort and contract, a plaintiff has a duty to take all reasonable steps to minimise or mitigate

his or her loss resulting from the relevant breach.⁵⁰ In most, if not all jurisdictions in Australia, apportionment legislation enables a defendant to obtain a reduction in damages for the contributory negligence of the relevant plaintiff.

76. After the long history of land rights in the Northern Territory, persons who are considering acquiring an interest in land, commencing or acquiring a business or undertaking some other activity that requires continued access to an area of Crown land should be expected to make reasonable inquiries about the land claim status of that land. Based on the results of those inquiries, the person can make an informed decision about whether or not to proceed with whatever is under consideration. He or she should not refrain from making reasonable inquiries and simply hope for the best and, if he or she does so, that should not be a matter that operates to the detriment of the traditional owners.
77. The objectives of the Land Rights Act would not be achieved where a person fails to make such inquiries and then asserts detriment and, on the basis of the asserted detriment, the Minister does not recommend the land for grant. At the least, where persons who assert detriment have relevantly failed to act in a reasonable manner, that failure should be taken into account by the Minister in weighing up whether or not to recommend the land for grant.
78. At common law, the defence of *volenti non fit injuria*, if established, is a complete answer to an action in negligence.⁵¹ By way of analogy, though no doubt an imperfect one, the persons referred to at [73(c)] and [73(e)] above can be said to have been aware of the risk that the relevant land would one day be granted to a Land Trust (with possible resulting impact on their businesses) and to have impliedly agreed to run that risk.
79. The Territory Submissions at [32], reliance is placed on Olney J's *McArthur River and Manangoora Regions Land Claims Report* at [123]. Not only do the matters there referred to not assist the Territory's present submissions, they are inconsistent with them. In that inquiry, Mr Hallett was cross-examined about his state of knowledge about the land claim and the Commissioner made a finding about it, namely that he did not have knowledge of the claim until about a year before the hearing. According to the Territory Submissions at [26(a)], however, it was no part of the

⁵⁰ See, for example: *Hasell v Bagot, Shakes and Lewis Ltd* (1911) 13 CLR 374 at 388 (O'Connor J); *Ardlethan Options Ltd v Easdown* (1915) 20 CLR 285 at 296 (Issacs J); *Wenham v Ella* (1972) 127 CLR 454 at 463-464 (Menzies J); *Tuncel v Renown Plate Co Pty Ltd* [1976] VR 501 at 503 (Full Court); *Holmark Constructions Pty Ltd v Willis Faber Johnson & Higgins* (1990) Aust Torts Reps 81-029 (NSW CA).

⁵¹ *Letang v Ottawa Electric Railway Co* [1926] AC 725 at 731 (PC)

Commissioner's function to hear such evidence or to make any finding in relation to it.

The Territory's position further considered

80. When the Territory Submissions suggest at [23] that the Land Rights Act is not concerned with the time at which detriment arose or with the state of knowledge of the persons who may suffer the detriment, this is presumably said to be based on a limitation that is to be implied into s 50(3) of the Act. Whilst some consequences of this implied limitation are stated, the form of the suggested limitation is not stated.
81. In sharp contrast to the Territory's Submissions (at [21]) that all asserted detriment that has been the subject of evidence (whether speculative, fanciful or not a real possibility) should be addressed in the Commissioner's report, as the Territory would have it, substantive questions about the timing of the asserted detriment and the person's state of knowledge about the relevant land claim are said to be beyond the Commissioner's remit.
82. If the Territory submission is correct, it would virtually guarantee that the Minister would not take into account these substantive questions (see the matters referred to at [36] above and the statement of Gibbs CJ in *Peko-Wallsend* recited at [40] above that in many, if not in most, cases the Minister will not need to go beyond the report of the Commissioner).
83. The Territory Submissions argue at [24] and [27] that an inquiry into the time at which the asserted detriment arose or the state of knowledge about the relevant land claim of the person said to have suffered it would involve "intricacies and complexities" and that there is "an inherent (and variable) difficulty with identifying when exposure to a matter of detriment arose". In the NLC's submission, this is clearly not a statement of general application – see the illustrative examples given at [73] above where the date of the commencement or acquisition of the business would be readily ascertainable.
84. There is nothing novel about courts or tribunals determining the date on which or the period during which a person acquired particular knowledge; in fact, it is a common occurrence. Further, none of the matters presently under discussion involves any undue difficulty. In general terms, such difficulties as may arise would pale into insignificance compared to some of the intricacies and complexities that accompanied land claims to areas in the vicinity of towns or cities, for example, the Kenbi (Cox Peninsula) Land Claim and the Warumungu Land Claim (which included substantial areas of land that were contiguous with the boundaries of the town of Tennant Creek). In any event, the fact that it is necessary for a court or tribunal to undertake a difficult task has never been a justification for it not doing so.

85. The Territory Submissions at [28] approach the matter in the wrong way. It is not a question of whether the terms, context or purpose of the Land Rights Act would compel or even suggest that the Parliament intended the Commissioner to undertake such inquiries. The appropriate question is, in the first place, whether such inquiries fall within the ordinary and natural i.e. literal and grammatical meaning of the language used in s 50(3). In the NLC's submission, they do. Then, it is appropriate to ask whether there is anything about the context in which the words appear, the consequences of a literal or grammatical construction, the purpose of the Act or the canons of statutory construction that may require the words of the section to be read in a way that does not correspond with their literal or grammatical meaning.⁵² In the NLC's submission, there is not.
86. It should also be remembered that s 50(3) is not relevant to the Review, which is being undertaken pursuant to s 50(1)(d) of the Act (see [41] to [51] above).
87. The Territory Submissions at [29] state that the Terms of Reference do not require or suggest any inquiry by the Commissioner into the knowledge of a person asserting detriment about the land claim status of the relevant land or about the bearing which such knowledge had, or should reasonably have had, upon the persons exposure to the asserted detriment. The NLC accepts that the Terms of Reference do not explicitly provide for such an inquiry. However, as is explained in these submissions, such matters are relevant to the evaluation of detriment. They therefore fall comfortably within the Terms of Reference.
88. The Territory Submissions at [30] state that Commissioners have not generally made such inquiries. Three responses are made to this submission. First, the particular inquiries that are undertaken in the course of a land claim hearing will largely depend on the matters that are raised by the parties to the inquiry and by the evidence that is given to it – this is so notwithstanding the inquisitorial nature of the process (see [39] above).
89. Secondly, by definition, a land claim inquiry cannot give any consideration to events that occur after the date on which the Commissioner's report is published; in contrast, a major part of the Review relates to events since the publication of the reports relating to the 16 land claims between 1981 and 2004. Though it is submitted that the concession does not go nearly far enough, the Territory Submissions do acknowledge at [33]:

The only real scope for such differentiation and comment would be in relation to detriment exposure arising after the report was provided to the Minister.

⁵² *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at 384 (McHugh, Gummow, Kirby and Hayne JJ)

Accordingly, the Territory acknowledges that the Commissioner has some scope for investigating such matters in the Review.

90. Thirdly, there are many examples of Land Commissioners making findings about the length or approximate length of time over which persons asserting detriment have held relevant interests or undertaken relevant activities. There are also examples of Commissioners making findings about the state of knowledge about the relevant land claim of those asserting detriment. One such example is found in the *McArthur River and Manangoora Regions Land Claims Report* and is referred to at [79] above. The Frances Well Land Claim provides another example. In that claim, the proprietors of Maryvale Station asserted detriment on the basis that they had accessed the claim area from time to time when moving or mustering their cattle. Mansfield J found that they had known about the claim for many years and had dealt with the Titjikala community over many years and that there was no reason to think that appropriate access arrangements could not be made through the traditional owners in the event of a grant. In these circumstances, the Commissioner found that the detriment to the pastoralists is no more than theoretical.⁵³
91. Before leaving this topic, it may be useful to recall what was said by Gibbs CJ in *R v Kearney; Ex parte Northern Land Council* (1984) 158 CLR 365 at 374 in relation to post-claim alienations of land under claim:

It would seem to be contrary to the policy of the Land Rights Act that it should be possible to put an end to an application validly made under s. 50(1)(a), and to defeat a claim which might be meritorious, by action taken after the application had been made, and with knowledge that it was pending.

92. In the same way, where a Commissioner has found that there are traditional owners of the land and where traditional attachment has been found to be strong, it would seem to be contrary to the policy of the Act for it to be possible to defeat the ultimate grant of land to a Land Trust by reason of actions taken after the claim was made. This is particularly so where the party asserting detriment has, or if reasonable inquiries had been made would have had, knowledge that the relevant land was under claim.

Issue (c): Approach that should be taken in considering and commenting on matters pursuant to s 50(3)(b) and s 50(3)(c)

93. Issue (c) relates to the approach that should be taken by the Commissioner in the remaining land claim hearings. This is because s 50(3) of the Land Rights Act sets out certain obligations of the Commissioner “[i]n making a report in connexion with a

⁵³ *Frances Well Land Claim Report* at [171]-[172]

traditional land claim". This reference to "making a report" clearly relates to the Commissioner's function under s 50(1)(a)(ii) to report his or her findings to the Minister and the Administrator.

94. Much has already been said in these submissions about the Commissioner's comment function in relation to detriment under s 50(3)(b) of the Act and, in some cases, about his comment function in relation to the s 50(3) matters more generally.⁵⁴ It is not proposed to repeat anything that has been said in relation to these matters, nor is it proposed to add anything in relation to the comment function under s 50(3)(b).
95. Paragraph (c) of s 50(3) requires the Commissioner to comment on the effect which a grant of land would have on the existing or proposed patterns of land usage in the region. Commissioner's comments under this provision have generally been brief and have often referred back to detriment that has been asserted and how it might be resolved.

Other matters

The BMB decision

96. The Terms of Reference draw attention to the impact of the decision of the High Court in *Northern Territory v Arnhem Land Aboriginal Land Trust* (2008) 236 CLR 24 (**BMB decision**), and include the following statement:

Detriment identified in past land claim reports largely reflected the widely held understanding prior to the BMB decision, that members of the public could enter (but not 'drop anchor on') Aboriginal land in the ITZ without authorisation pursuant to sections 70 and 73 of the Land Rights Act.

If this statement is to be understood as conveying that, until the decision of the High Court in 2008, it was generally accepted that there was no right to exclude persons from the inter-tidal zone of land vested in a Land Trust, it calls for comment.

97. In the BMB decision, a 5:2 majority of the Court held that:

⁵⁴ See [12], [13], [17], [19], [23], [24], [26]-[35], [39], [44]-[46], [51], [55], [71]-[73], [76], [82], [87], [88], [95], [96], [103]

- (a) by necessary implication the *Fisheries Act* (NT) abrogated any public right to fish in tidal waters in the Northern Territory that existed before that Act was enacted;⁵⁵
 - (b) ss 10(1) and 11 of the *Fisheries Act* (NT) did not confer power to grant a licence under that Act which, without more, would authorise or permit the holder to enter and take fish or aquatic life from areas within the boundaries of an area of Aboriginal land;⁵⁶ and
 - (c) “Aboriginal land”, in s 70(1) of the Land Rights Act, extended to so much of the water or atmosphere as lay above the land surface within the boundaries of a grant of an estate in fee simple to a Land Trust and was ordinarily capable of use by an owner of land.⁵⁷
98. The BMB decision authoritatively clarified the law, but the outcome was substantially foreshadowed in earlier proceedings. Thus:
- (a) *Arnhem Land Aboriginal Land Trust v Director of Fisheries* [2000] FCA 165, (2000) 170 ALR 1, a case heard in 1999, concerned, or at least was intended by the parties to concern, the entitlement of holders of commercial fishing licences in the Northern Territory to fish in tidal waters within the designated boundaries of land granted by deed to the Arnhem Land Aboriginal Land Trust.⁵⁸
 - (b) In *Gumana v Northern Territory* [2005] FCA 50, (2005) 141 FCR 457, a case heard in 2004, Selway J said at [1] that “the essential issue raised in these proceedings is whether, and to what extent, the traditional owners of parts of Blue Mud Bay in north-east Arnhem Land can exclude fishermen and others from the “inter-tidal zone” ...”. His Honour said at [69] that, if the issue were free of authority, “I would have thought that s 70 of the Land Rights Act excluded persons from the waters to the landward of the low water mark” and “I would also have thought it reasonably clear that the land grant was a grant of a right of exclusive occupation over the area (including waters) to the landward of the low water mark” (see also [73]). The

⁵⁵ BMB decision at [27]-[28], [59] (Gleeson CJ, Gummow, Hayne and Crennan JJ, with Kirby J agreeing generally)

⁵⁶ BMB decision at [16], [37], [62] (Gleeson CJ, Gummow, Hayne and Crennan JJ, with Kirby J agreeing generally)

⁵⁷ BMB decision at [54]-[55], [58] (Gleeson CJ, Gummow, Hayne and Crennan JJ, with Kirby J agreeing generally)

⁵⁸ *Director of Fisheries v Arnhem Land Aboriginal Land Trust* [2001] FCA 98, (2001) 109 FCR 488 at [8] (Sackville J, with Spender and Merkel JJ agreeing).

authority that Selway J considered to stand in the way of these conclusions was the decision of the Full Court in *Commonwealth v Yarmirr* (1999) 101 FCR 171.⁵⁹

(c) In *Gumana v Northern Territory* [2007] FCAFC 23, (2007) 158 FCR 349, a Full Court (French, Finn and Sundberg JJ) held that:

- (i) a grant of an estate in fee simple to the low watermark under and in furtherance of the purposes of the Land Rights Act confers a right to exclude those seeking to exercise a public right to fish or to navigate;
- (ii) the *Fisheries Act 1988* (NT) must be read down under section 59 of the *Interpretation Act 1978* (NT) so as not to authorise the grant of a licence to take fish in relation to the intertidal zone. The *Fisheries Act 1988* (NT) has no application in relation to areas within the boundary lines of areas subject to the grant of fee simple under the Land Rights Act.

In so holding, the Full Court did not follow the Full Court decision in *Commonwealth v Yarmirr* (1999) 101 FCR 171.⁶⁰

99. The issues raised by the above cases were discussed in land claim reports well prior to the BMB decision. For example, in the *McArthur River and Manangoora Regions Land Claims Report* published on 15 March 2002, Olney J said at [82(f)]:

The legal rights of persons seeking to exercise the common law right to fish and other common law rights in relation to the waters above Aboriginal land remain the subject of debate.

Detriment issues cannot always be settled by agreement

100. As noted at [3(c)] above, the Terms of Reference note that the outstanding detriment issues are not currently the subject of any settlement negotiations. They also include the following statement:

In practice, the Minister is most likely to exercise his or her powers under s 11 upon agreement between the parties to settle detriment issues.

101. Notwithstanding the width of the Minister's discretion in determining whether or not to make a recommendation to the Governor-General, it is submitted that the Minister would fall in to error if he or she were to adopt the position of merely waiting until an agreement between the parties is struck and, if no such agreement is struck, deferring indefinitely the making of any such recommendation. It is appreciated that the above passage from the Terms of Reference does not go this

⁵⁹ *Gumana v Northern Territory* [2005] FCA 50, (2005) 141 FCR 457 at [74]

⁶⁰ *Gumana v Northern Territory* [2007] FCAFC 23, (2007) 158 FCR 349 at [90], [91], [105]

far, though it does suggest that a very substantial premium is placed on the consensual resolution of detriment issues.

102. It is, with respect, necessary for the Minister to bear in mind the following matters (in addition to the matters set out at [21]-[22] above) in determining whether to recommend to the Governor-General that a grant be made to a Land Trust:
- (a) to over-emphasise a perceived need for agreed outcomes between the traditional owners and those asserting detriment, is correspondingly to undermine the negotiating position of the traditional owners; put another way, if in reality the only way for traditional owners to get what they would like (a grant of land) is to reach agreement with those asserting detriment, they are beholden to the best terms that those persons are willing to offer;
 - (b) competing interests are sometimes irreconcilable, that is they are unable to be resolved by agreement;⁶¹
 - (c) there will undoubtedly be cases where it is appropriate for the Minister to recommend that a grant be made to a Land Trust, notwithstanding that agreement has not been reached with persons asserting detriment, for example, because:
 - (i) in truth what is asserted is not detriment within the meaning of s 50(3)(b);
 - (ii) the asserted detriment is not significant; or
 - (iii) the party asserting the detriment has failed to make reasonable efforts to reach agreement with the traditional owners on the matter;
 - (d) delay in granting land to a Land Trust constitutes an “obvious prejudice” to the traditional owners.⁶²
103. It is submitted that the Commissioner should provide advice to this effect in his written report and recommendations to the Minister in the Review.

⁶¹ See, for example, Maurice J’s comments in the *Warumungu Land Claim Report*, 8 July 1988, at 32.1.4: “The fact is that many of the competing interests are irreconcilable – at least within the framework of the *Land Rights Act*.”

⁶² In *Attorney-General for the Northern Territory v Hand, Minister for Aboriginal Affairs* [1988] FCA 83, Foster J said at [115]: “Finally, the Court must have regard to the period of time that has elapsed since the making of the Commissioner’s report. Indeed, the time required for the resolution of the “complex issues of detriment” referred to in the correspondence, approximates the time span of the Second World War. The Court cannot ignore the obvious prejudice which this delay has occasioned to the persons found by the learned Commissioner in 1981 to be the traditional owners of the land.”

A handwritten signature in black ink, appearing to read "Tom Keely". The signature is written in a cursive, slightly slanted style.

.....
Tom Keely
Counsel for the NLC

BEFORE THE ABORIGINAL LAND COMMISSIONER

**IN THE MATTER OF THE DETRIMENT REVIEW INQUIRY REGARDING
LAND CLAIMS RECOMMENDED FOR GRANT BUT NOT YET FINALISED**

**SUBMISSIONS OF NORTHERN TERRITORY OF AUSTRALIA IN REPLY TO
SUBMISSIONS ON BEHALF OF THE NORTHERN LAND COUNCIL
CONCERNING LEGAL PRINCIPLES IN RESPECT OF DETRIMENT
INTERESTS ACQUIRED POST LAND CLAIM**

A. Introduction

1. These submissions respond to the "Submissions on behalf of the Northern Land Council concerning legal principles in respect of detriment interests acquired post land claim" dated 25 May 2018 (**NLC Submissions**).
2. The terms and abbreviations adopted in the "Submissions of Northern Territory of Australia as to Proper Approach of Aboriginal Land Commissioner to Detriment Matters Arising after a Land Claim" dated 16 May 2018 (**Territory Submissions**) are adopted in these reply submissions.

B. The comment function and the review function

3. The NLC Submissions posit¹ that s50(3) of the ALRA is not relevant to the Review because it is being undertaken pursuant to s50(1)(d) of the ALRA. Despite this, the NLC Submissions deal at length with the content and scope of s50(3)(b) and the task it confers upon the Commissioner. The reason is unstated, but twofold.
4. First, in order to perform the function which the Review requires according to its Terms of Reference, the Commissioner must understand and properly apply the terms of s50(3)(b). In essence, the Review tasks the Commissioner with providing an update of the detriment information which was obtained via the performance of the comment function under s50(3)(b) (and (c)). Consequently, the Review must be undertaken consistently with the performance of that function.
5. Secondly, the Review is directed to the performance of the Minister's function under s11(1) of the ALRA, which remains unperformed in relation to the 16 land claims previously recommended for grant but not finalised. The Review cannot be a "back door" means of placing findings or other information before the Minister for the performance of that function which he or she could not validly and properly have through the performance of the Commissioner's functions under s50(1)(a), (3) and (4) in respect of any particular land claim.

¹ See paragraph 86, referring back to paragraphs 41-51.

6. The submission that s50(3), and s50(3)(b) in particular, is irrelevant to the Review is neither correct nor supported by the attention it is given in the NLC's Submissions.
7. The function in s50(1)(d) is "to advise the Minister in connexion with any other matter relevant to the operation of" the ALRA that is referred to the Commissioner by the Minister. If the Review necessarily or appropriately required the Commissioner to hear and resolve the factual intricacies and complexities referred to in paragraphs 26 and 27 of the Territory Submissions and, in particular:
 - (a) interrogate claims that a person asserting detriment was unaware of a recommendation for grant;²
 - (b) determine when exposure to claimed detriment first arose and when a person first acquired the relevant degree of knowledge about the claim or recommendation for grant;³ and
 - (c) determine whether a person has failed to act reasonably⁴ (see further below),

it would fall outside the function prescribed by s50(1)(d), to advise in connection with a matter relevant to the operation of the ALRA. Such a function (with the power to perform it conferred by s51 of the ALRA) is directed to informing the responsible Minister of anomalies or difficulties in the operation of the legislation and whether it is achieving its legislative purpose or requires legislative amendment to do so.⁵
8. The difficulty of the task *per se* is not the issue;⁶ what is raised is the absence of power in the Commissioner to undertake a complex factual inquiry into the minds, motives and personal circumstances (including any legal advice they obtained) of persons claiming detriment, pursuant to such a provision.
9. It should be noted that the proposal to inquire into whether a person obtained professional (most likely legal) advice⁷ and from whom may be characterised as a request (or demand) for a person to waive legal professional privilege and divulge the content of privileged communications, which is inappropriate in circumstances where the Commissioner's power to obtain information or documents under s54 of the ALRA does not allow

² NLC Submission, paragraph 68.

³ NLC Submission, paragraphs 80-84.

⁴ NLC Submission, paragraphs 74-78.

⁵ See, for example, the observations of the Full Court of the Federal Court in *Ralph v Repatriation Commission* [2016] FCAFC 89 at [65]-[68] of the power to advise the Minister in s180(1)(d) of the *Veterans Entitlement Act* "on matters relating to the operation of this Act".

⁶ NLC Submission, paragraph 84.

⁷ See the letter from the Commissioner to the Solicitor for the Northern Territory dated 22 March 2018.

the Commissioner to compel production of legally privileged communications.⁸

C. “Reasonableness” as an element of detriment

10. The NLC Submissions assert⁹ that harm or damage to a person's business is not “detriment” “that might result if the claim were acceded to” within the meaning of s50(3)(b) where the person acquired the business knowing that the land was claimed or possibly claimed, that a land claim was about to be or had been heard, or that a recommendation for grant had been made.
11. This submission is made, despite acceptance¹⁰ that the word “detriment” bears its ordinary meaning of “harm or damage” which is not confined to economic considerations. Contrary to the NLC Submissions¹¹, the harm or damage that might result to the person's business if the land claim is acceded to is precisely the same in each scenario, and does not vary according to what the person knew about the possibility of it being acceded to.
12. There is, of course, nothing expressed in s50(3)(b) to the effect that it is only concerned with harm or damage to persons or communities that might result if the claim were acceded to, *if* that detriment is not the result of a person's decision to take the risk that a claim will be acceded to, or of their failure to make inquiries, or of their decision to commence or acquire interests which might suffer the harm or damage.
13. To so read s50(3)(b) is to imply a complex and varying set of words into the section. Such implication of words into the provision is not justified here – this is not a simple, grammatical or drafting error which if uncorrected would defeat the object of the provision, and it would make an insertion which is too big, or too much at variance with the language in fact used by the legislature.¹²

D. “Reasonableness” as a relevant factor

14. The NLC Submissions go on to suggest¹³ that there is a requirement under the law for the persons or communities referred to in s50(3)(b) to “act reasonably” in their own interests and in the interests of others, by making, before acquiring an interest in land, commencing or acquiring a business or undertaking some other activity that requires continued access to an area of Crown land, reasonable inquiries about the land claim status of unalienated Crown land, and an implied expectation that they will suffer the

⁸ See *Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission* (2002) 213 CLR 543, which so concluded in relation to the ACCC's information gathering powers under s155 of the *Trade Practices Act 1974* (Cth).

⁹ See paragraph 74.

¹⁰ See paragraph 25.

¹¹ See paragraph 74.

¹² See *Taylor v Owners – Strata Plan No 11564* (2014) 253 CLR 531 at [37]-[38] per French CJ, Crennan and Bell JJ.

¹³ See paragraphs 75-78.

consequences if they fail to do so or if they impliedly agreed to run the risk of a claim being acceded to.

15. None of the suggested analogues found elsewhere in the law in support of this submission¹⁴ are implied within a statutory context and without a court's declaration of the law (or a Commissioner's suggestion) to say so. To imply it here would be to hold people and communities to a standard about which they could not have been aware.
16. The NLC Submissions say¹⁵ that a person's (relevant) failure to act reasonably is a factor for the Minister to take into account in exercising the discretion under s11(1). They appear to suggest¹⁶ this is a factor the Minister is bound to take into account, requiring the Commissioner to now inquire into and determine these matters.
17. In any event, the problem with that submission remains the difficulties of (and consequent time, costs and efforts for all involved in) performing an inquiry into whether a person alleging detriment has or has not acted reasonably in all the circumstances, as has already been submitted.¹⁷
18. It should not be assumed or inferred that a person claiming detriment has failed to act reasonably. The NLC Submissions yield that outcome, submitting¹⁸ that it may reasonably be inferred there is "a widespread consciousness" among the Northern Territory public of land claims and the "real possibility" that particular areas of unalienated Crown land are under claim or the subject of a recommendation by a Commissioner.
19. The submission ignores two important facts. First, 12 of the 16 claims the subject of the Review are to the beds and banks of rivers and/or the intertidal zone, commonly distinct from a parcel of Crown land as traditionally understood. Even if members of the public might be conscious of land claims made to Crown *land*, they are unlikely to reasonably anticipate that "land claims" have been made to areas covered by *water*, namely the beds and banks of rivers, or to areas of the foreshore between the low water and high water marks.
20. Secondly, and critically, none of the potential sources of information about land claims relied upon in the NLC Submissions grapple with the fact that the 16 land claims the subject of the Review have been the subject of a recommendation for grant for between 14 and 37 years. Given such lengthy delay between the making of a recommendation and the present, the public perception is plausibly to have been that, notwithstanding the recommendation, a grant was not going to be made.
21. Indeed, this fact makes the questions of whether a person made reasonable inquiries or not, or knew or did not know of the existence of a land claim or

¹⁴ See paragraphs 75, 78.

¹⁵ See paragraph 77.

¹⁶ See paragraph 72.

¹⁷ See paragraphs 26-27 of the Territory Submissions.

¹⁸ See paragraph 66.

a recommendation for grant, irrelevant to the question whether they failed to act reasonably, because it is reasonably to be inferred that persons acquiring an interest in land, commencing or acquiring a business or undertaking some other activity that requires continued access to an area of Crown land would, had they known of a recommendation for grant, have reasonably expected that a grant would not be made, or would have reasonably assessed the risks that a grant would be made after such a long time as negligible.

22. This is borne out by the way in which the 16 land claims the subject of the Review have been depicted in the Commissioner's Annual Reports, presumably based upon the register of traditional land claims maintained by the Commissioner under s50(1)(c) of the ALRA. These claims are listed in Table 1 of Appendix 1, headed "Applications in respect of which a report has been submitted pursuant to s50(1)(a)(ii)". The Annual Report states that the applications in Table 1 "have been the subject of completed inquiries and reports".¹⁹ There is nothing in the Annual Report to suggest that these land claims have not been disposed of or still await disposition.²⁰ In fact, the opposite is suggested by the fact that there is a separate Table headed "Applications which have not been finally disposed of". The Annual Reports have been in the same or a similar form since the Report for the year ended 30 June 2003.

E. "Reasonableness" as a two-way street

23. If s50(1)(d), and s50(3)(b) require a person who claims they might suffer detriment if the land claim is acceded to to show when their exposure to detriment arose, what they knew (or their lawyers advised) about the possibility of a grant of the land to a Land Trust, and that they did not fail to act reasonably in becoming exposed, fairness and equality of treatment might require the traditional Aboriginal owners to show what steps they have taken since the recommendation for grant towards resolving by agreement any detriment identified by the Commissioner in the report, what they knew (or their lawyers advised) about the possibility of a grant being delayed pending resolution of detriment by agreement, and that they did not fail to act reasonably in waiting to be granted the land as recommended.²¹
24. The inequity of demanding the former, without also insisting upon the latter, is exemplified in the NLC Submissions in paragraphs 100-103, which suggest that: (a) requiring agreement on detriment undermines the negotiation position of traditional owners, who will have to reach agreement to obtain a grant; and (b) it will be appropriate for the Minister to recommend a grant of the land despite detriment where the party asserting detriment has failed to make reasonable efforts to reach agreement with the traditional

¹⁹ See, for example, the Report for the year ended 30 June 2015, at [13].

²⁰ Contrary to the NLC Submissions, paragraph 64.

²¹ The letters from the Chief Executive Officer of the Northern Land Council to the Commissioner dated 2 February 2017 appears to indicate that, in the absence of a proposal to settle at least some of the land claims until recently, the NLC had not taken steps to address detriment concerns raised in the land claim reports.

owners on the matter. These submissions ignore that the ALRA contains the comment function regarding detriment for a reason – it recognises that detriment which might result if the claim is acceded to in whole or in part may legitimately be a barrier to the grant of all or part of the claimed land as recommended. It follows that detriment, whenever it arises, can legitimately and properly defeat a claim validly made in the exercise of the Minister's discretion in s11(1). It is utterly unlike a "post-claim alienation of land under claim",²² which the ALRA now confirms by s67A is not a legitimate barrier to a claim validly made.

25. If the proposition in paragraph 24 for traditional owners raises objection, it is an objection which should rise equally to the proposed approach to persons making current detriment claims.
26. It can equally and properly do so on the basis that, for the reasons referred to in paragraphs 7 to 9 above, such inquiries fall outside the scope of what is to be determined in performance of the comment function under s50(3)(b) and the advice function under s50(1)(d), according to the terms, context and purpose of the ALRA.

F. BMB decision

27. The point of the NLC Submissions addressing the BMB decision²³ is unclear. The need to take issue with the Minister's understanding and rationale for the Review is unexplained. In case it be directed to a view that people who assert current detriment acted unreasonably on the basis of the "widely held understanding" set out in the Terms of Reference, the following submissions are made.
28. At the time that all of the 16 land claims the subject of the Review were reported on (between 1981 and 2004), the law was as declared by the Full Court of the Federal Court of Australia in *Commonwealth v Yarmirr* (1999) 101 FCR 171, namely that the waters of the sea overlying Aboriginal land were not included in the grant, so the grant did not authorise the Land Trust to exclude persons exercising common law rights to fish or navigate from the waters overlying the intertidal zone.²⁴
29. It was not until the decision of the Full Court of the Federal Court in *Gumana v Northern Territory* (2007) 158 FCR 349 on 2 March 2007 that the law as declared in *Yarmirr* was not followed and was declared otherwise by a differently constituted Court. Up until that point in time, the observation of "the widely held understanding" that members of the public could enter waters overlying but not drop anchor on Aboriginal land in the intertidal zone without authorisation is accurate.

²² NLC Submissions, paragraphs 91-92.

²³ See paragraphs 96-99.

²⁴ *Commonwealth v Yarmirr* (1999) 101 FCR 171, as construed by Selway J in *Gumana v Northern Territory* (2005) 141 FCR 457 at [76] and [84], and as construed by Mansfield J in *Arnhemland Aboriginal Land Trust v Director of Fisheries (NT)* (2000) 170 ALR 1 at [39], [45]-[47].

30. The uncertain state of the law consequent upon two different decisions of the same Court was finally resolved by the High Court in 2008. Again, a "widely held understanding" that the decision in *Yarmirr* rather than the decision in *Gumana* would find favour with the High Court could not be said to be unreasonable.

Date: 6 June 2018



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