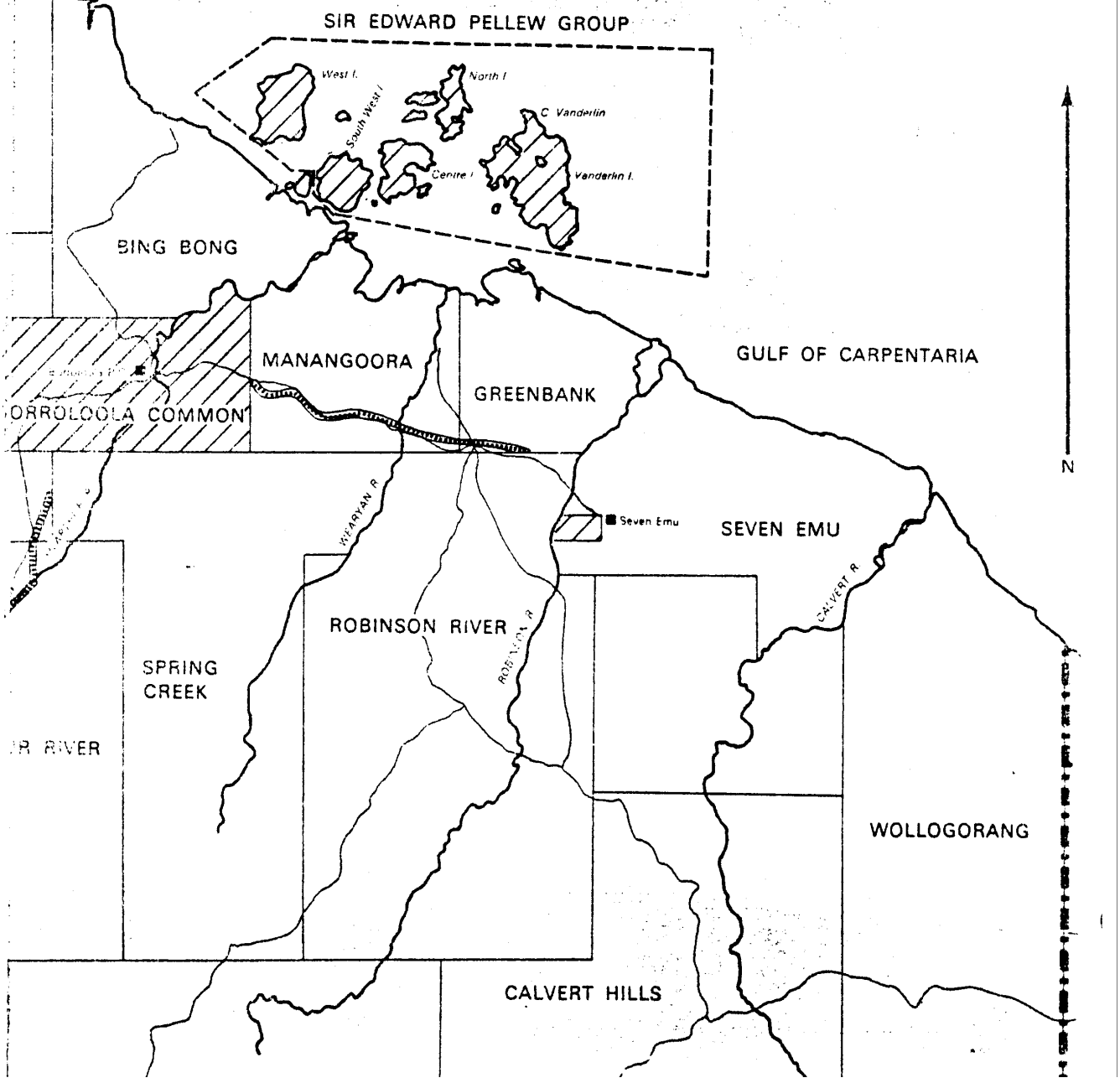
Borroloola land claim

Report by the Aboriginal Land Commissioner to the Minister for Aboriginal Affairs and to the Minister for the Northern Territory



Aboriginal Land Rights (Northern Territory) Act 1976

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

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Office of the
ABORIGINAL LAND COMMISSIONER
Supreme Court
Darwin.
CONFIDENTIAL
Telephone 819326.
3rd March 1978.
The Honourable R.I. Viner M.P.
Minister for Aboriginal Affairs,
Parliament House,
Canberra,
A.C. T. 2600.

Dear Minister,

BORROLOOLA LAND CLAIM

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John Toohey
Aboriginal Land Commissioner.

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Aboriginal Land Rights (Northern Territory) Act 1976

BORROLOOLA LAND CLAIM
REPORT TO THE MINISTER FOR ABORIGINAL AFFAIRS
and to
THE MINISTER FOR THE NORTHERN TERRITORY

This is the first report on an application made to the Aboriginal Land Commissioner under the Aboriginal Land Rights (Northern Territory) Act 1976. A number of questions have arisen concerning the meaning and operation of the Act. The answers to those questions will prove material to other applications still to come. I have sought to confine the report to matters relating directly to the application, but inevitably some discussion of the object of the legislation and the nature of the proceedings involved has emerged.

History of the Application

1. On 27 July 1977 the Northern Land Council applied on behalf of Aboriginals claiming to have a traditional land claim in the Borroloola area. All told there were some seventy claimants. On 4 August I issued directions for the service of notice of the application on various individuals, organisations and government departments and at the same time indicated the steps that I would take to advertise the application. It is unnecessary to detail what was done; an affidavit filed on behalf of the claimants and a statement by my associate, Mr Mark Nicholson, (Exhibit 77) show this.

2. The hearing of the application began in Darwin on Tuesday, 27 September, with sittings on 28, 29 and 30 September and again on 5, 6, 7, 10, 11, 12 and 13 October. Evidence was taken at Borroloola from 17 October until 20 October. The hearing recommenced in Darwin on I November and continued thereafter on 2, 3, 4, 7, 8 and 9 of that month. By then the taking of evidence had been largely completed and the hearing was adjourned until 12 December so that counsel and others appearing might have an opportunity to consider the whole of the transcript and prepare final addresses.

3. Earlier at Borroloola I had mentioned my intention to seek the services of Dr Marie Reay, an anthropologist from the Australian National University, and to ask her to report on the existence or otherwise of traditional land claims to the areas in question. When the hearing resumed on 12 December Dr Reay gave evidence, her report having already been circulated. Final addresses then began and were concluded on 15 December.

The Claim

4. The land claimed comprises three separate areas within the Borroloola region, described in the application as:

(1) Vacant Crown Land known as the 'Borroloola Town Common'
(2) Vacant Crown Land known as the 'Sir Edward Pellew Group of Islands'
(3) Vacant Crown Land on Robinson River Pastoral Lease, known as 'Proposed Aboriginal Reserve, Robinson River'

In each case the land was more precisely defined in the application.

5. The town common is an area of 1366 square kilometres surrounding the Borroloola townsite and itself surrounded by a number of pastoral leases, Tawallah to the west, Bing Bong to the north, Manangoora to the east and Spring Creek to the South. This can be seen most readily in Exhibit 36, a copy of which is part of this report.

6. The scope of the claim to the Sir Edward Pellew Group is not so easy to determine. According to the application it includes the major islands, Vanderlin Island, North Island, Centre Island, South West Island and West Island, but as well 'all minor islands and islets that may or may not appear on the 1:250 000 topographic map presented with this application but which would be present in the area outlined on the accompanying map'. Exhibit 36 is itself to the scale 1:250 000 and by reason of its size shows more easily what is involved in the claim to the islands. A somewhat arbitrary line has been drawn to take in all the islands, islets and reefs within.

7. The proposed Aboriginal reserve is shown on the map accompanying the application and also on Exhibit 36. It consists of 38.8 square kilometres of land excised some time ago from the Seven Emu pastoral lease. Its northern, southern and eastern boundaries adjoin that lease; its western boundary appears to follow the course of the Robinson River.

Those Involved in the Hearing

8. During the course of the hearing a number of persons gave evidence on their own behalf. Others had a continuing part to play; they were:

Northern Land Council representing the claimants
Commonwealth of Australia
Department of the Chief Secretary of the Northern Territory
Mt Isa Mines Limited
Northern Territory Cattle Producers Council
Northern Territory Commercial Fishermen's Association
Northern Territory Fishing Industry Council
At a late stage M.G. Kailis Gulf Fisheries Pty Ltd appeared through counsel.

To refer to these various interests as 'parties' is not particularly apt but sometimes it is convenient to do so. The hearing did not take the form of conventional litigation with parties necessarily opposed to each other although the Northern Land Council accepted the onus of making good traditional land claims.

Nature of the Proceedings

9. Not only is the Act a unique piece of legislation in terms of what it seeks to do and in the recognition that it gives to traditional land claims but as well the functions entrusted to the Commissioner are somewhat unusual. Faced with a claim to unalienated Crown Land the Commissioner is required to ascertain whether the claimants or any other Aboriginals are the traditional Aboriginal owners of the land and to report his findings (s.50(1)(a)). There may be occasions when the Commissioner will need to initiate his own inquiries. At other times the evidence presented on behalf of claimants may show sufficiently that there are no likely traditional Aboriginal owners other than the claimants themselves. Again it may be that as a hearing

draws to an end the Commissioner has serious doubts about the sufficiency of the evidence presented in support of the claim, but has good reason to believe that other material is available to support it. He will then have to consider whether to call for further evidence or indeed seek it himself. Those problems will have to be met as and when they arise. Here there is nothing to suggest the existence of persons other than the claimants who assert a traditional land claim to any of the areas in question.

10. As well as ascertaining whether the claimants or any other Aboriginals are the traditional owners of the land, s.50(3) requires the Commissioner to 'comment' on a number of matters about which I heard a great deal of evidence. A question that arises is the relationship between s.50(1)(a) and s.50(3), in particular whether any recommendation made by the Commissioner for the granting of land should take into account the matters referred to in sub-s. (3) or whether the Act envisages the Commissioner making a recommendation based essentially upon the existence of a traditional land claim, reporting on the matters upon which he is required to comment and then leaving for ministerial decision the weight to be attached to the matters referred to in sub-s. (3).

11. This is something I shall explore further under the next heading, 'Commissioner's Functions'. I mention it here to emphasise that proceedings under the Act are not truly analogous to those of conventional court proceedings nor to those of Royal Commissions. With the latter there are no parties in the sense in which that term is ordinarily understood and often no one upon whom any onus of proof lies. A Royal Commissioner is entrusted with the task of inquiring into a particular matter and ordinarily he is assisted by counsel as the only or at any rate the most appropriate way of ensuring that the necessary facts are brought to his attention. Under the Land Rights Act there are applicants who presumably prefer to present their case in the way that they think best with the witnesses whom they decide to call and with such counsel as they engage.

12. The same is true I think of persons, organisations and departments wishing to be heard on the basis that they are likely to be affected by the application. What may happen is that persons likely to be affected will wish to do no more than assert their own interests, not seeking to contest evidence called on behalf of the applicants as to the existence of a traditional land claim. That was not the case here as counsel for Mt Isa Mines Limited, counsel for the Cattle Producers' Council and Fishing Industry Council and Mr G. McMahon representing the Commercial Fishermen's Association questioned quite extensively most of the witnesses called in support of the claim. Having heard evidence from an anthropologist, from individual Aboriginals and indirectly from a large number of Aboriginals through videotapes, it seemed to me that the most appropriate method of checking the claim was to submit the evidentiary material to an anthropologist, preferably someone familiar with the area. With this in mind I asked Dr Reay to read the material and to report. This she did. It may be that in the case of other applications some different approach will be more appropriate.

13. In practice directions issued on 8 June 1977 I had said: 'There will be no strict adherence to the ordinary rules of evidence. In particular as a general proposition hearsay evidence may be admitted, the weight to be attached to it to be a matter for submission and determination'. I had also said: 'Witnesses will be asked to take an oath or make an affirmation before giving evidence and ordinarily will be subject to cross-examination'.

14. For the most part evidence was given orally and on oath or by affirmation. At times it was convenient to receive letters and other records without requiring the author to be present. About a month before the hearing began the Northern Land Council had called a meeting at Borroloola of Aboriginal people, most from around Borroloola itself but others from Doomadgee in Queensland, from the Barkly Tableland and from Rose River in Arnhem Land. About 200 people were present. A videotape record was taken of the meeting on 6 and 7 September at which the proposed land claims were discussed and people expressed views either individually or as part of a group. To receive such a record of what took place would offend strict rules of evidence, not being the subject of oath or affirmation and no opportunity being presented for cross-examination. Nevertheless in proceedings such as these the use of videotapes may be a valuable way of hearing from a large number of people who might otherwise find it difficult to give evidence and in any event whose evidence if taken in the usual way would prolong the hearing of claims unduly. I found it helpful. There is precedent in the Ranger Uranium Environmental Inquiry.

Commissioner's Functions

15. This report is made in accordance with the requirements of s.50 of the Act. That section presents some questions of construction when read on its own and when read in conjunction with other sections of the Act, in particular s.11. The difficulties are not just peripheral nor do they bear merely upon the form a report should take.

16. By reason of s.50(1)(a) the Commissioner is required to ascertain whether the claimants or any other Aboriginals are the traditional Aboriginal owners of the land claimed and to report his findings. And where he finds that there are Aboriginals who are the traditional owners (whether or not they are the claimants) he is required to make recommendations to the Minister for Aboriginal Affairs for the granting of the land or part of it in accordance with ss.11 and 12. I shall deal later with the bearing those two sections have upon the nature and form of the recommendations to be made. At this stage I wish to consider the implications of sub-s.(3) of s.50.

17. That sub-section obliges the Commissioner to do certain things 'in making a report in connexion with a traditional land claim . . .' It requires that the Commissioner 'shall have regard to the strength or otherwise of the traditional attachment by the claimants to the land claimed . . .' Leaving aside for the moment the meaning of the words 'shall have regard to', it is the strength of the traditional attachment of the claimants that is involved. Yet it would be unsatisfactory to find that Aboriginals other than or as well as the claimants are the traditional owners and to say nothing about the strength of their traditional attachment. That situation does not arise here and any further comment is best left until it does.

18. The expression 'shall have regard to' recurs in sub-s.(4) of s.50, which is expressed somewhat differently to sub-s.(3) in that it begins with the words 'In carrying out his functions . . .' The intention no doubt is that sub-s.(4) will apply not only to the making of a report in connection with a traditional land claim, but to any other duties performed by the Commissioner, for instance an inquiry into the likely

extent of traditional claims to alienated Crown land. With the words 'shall have regard to' must be contrasted the words 'shall comment upon' that control paragraphs (a) to (d) of sub-s.(3).

19. Broadly speaking there are two ways of viewing the steps the Commissioner should take when dealing with an application under s.50(1)(a). One is to see any recommendation for the granting of land as dependent upon and following from a finding that there are traditional Aboriginal owners, qualified only by the need to have regard to the strength or otherwise of their traditional attachment to the land claimed and the need to have regard to the principles expressed in sub-s.(4). Seen that way the matters mentioned in the paragraphs of sub-s.(3) will be truly the subject of comment only, the weight to be attached to them being a matter for the Minister when considering whether he is satisfied that land should be granted to a Land Trust in accordance with s.11 of the Act. The claimants submitted that I should take this approach and with some reservation so did the Commonwealth.

20. The other way is to see everything mentioned in sub-ss.(3) and (4) of s.50 as playing a part in the recommendations to be made by the Commissioner. In other words they represent factors to be taken into account and weighed along with the evidence going to the existence of a traditional land claim. It is a corollary of this approach that there will be occasions when notwithstanding that a traditional land claim has been made out the Commissioner will not recommend the granting of the land claimed or at any rate some part of it because other considerations outweigh such a recommendation. This way of viewing the Commissioner's functions recognises as it must that some importance must be attached to the choice of the expression 'shall have regard to' in one place and to the expression 'shall comment on' in another, but the submission is that s.50(1)(a) involves a composite exercise requiring fact finding as to the existence of traditional Aboriginal owners and the exercise of a discretion in making a recommendation. It follows, so the submission runs, that in order to make a recommendation the Commissioner must first engage in balancing competing claims and interests. Merely to comment, it is said, will be of little help to the Minister who inevitably must be left to make his own evaluation.

21. This alternative approach was taken by Mt Isa Mines, and by the Cattle Producers' Council and the other interests represented by Mr Withnall. The legislation being new and novel, no guidance can be found in other statutes. However, although this is the first report made directly pursuant to s.50(1)(a) of the Act the Ranger Inquiry was a Commission under s.11 of the Environment Protection (Impact of Proposals) Act 1974 and by reason of s.11(2) of the Land Rights Act a finding by it that a group or groups of Aboriginals were entitled by Aboriginal tradition to the use or occupation of an area of land had effect as if the Commissioner had recommended to the Minister in a report made under s.50(1)(a) that an area should be granted to a Land Trust for the benefit of that group or those groups of Aboriginals.

22. The Ranger Inquiry took the view that as far as possible it should assume the role of Commissioner and act in accordance with all those provisions of the Land Rights Act relating to his functions. A reading of Chapter 15 of the Inquiry's Second Report suggests that it saw its functions rather as those of balancing competing interests and

then arriving at a recommendation. I say that because the Report involves an examination of the matters referred to in sub-ss.(3) and (4) before any recommendation is made in regard to the land claimed. Put another way, having made recommendations the Commissioners do not then go on to add comments on the matters mentioned in paragraphs (a) to (c) of sub-s.(3) as one might expect if these are truly matters of comment only.

23. Of course the view I take between these competing submissions is of considerable importance not only for this report, but for any others I may make under s.50(1)(a). And it is something that not only conditions the form of the report but also bears directly upon the scope of the matters to be taken into account when considering whether to make a recommendation. In my view it is not possible to ignore the shift in language from 'shall have regard to' to 'shall comment on'. Parliament must have seen the difference in those expressions as involving a difference in function especially when both appear in the same sub-section. Furthermore the structure of s.50(1)(a) is to gear the making of recommendations to findings concerning the existence of traditional Aboriginal owners rather than to the range of matters canvassed by the paragraphs of sub-s.(3).

24. At the same time it seems unlikely that the legislature would have left for comment of a mechanical nature only such important matters as the detriment to persons or communities that might result from acceding to a claim and the effect that would have on existing or proposed patterns of land usage. I think that what is required of me is this:

1. I am to ascertain who are the traditional Aboriginal owners of the land claimed, if there be such.
2. I am to have regard to the strength or otherwise of their traditional attachment to that land.
3. I am to have regard to the principles spelled out in sub-s.(4).
4. That done, I am to make recommendations to the Minister for the granting of land, if it be appropriate.
5. I am then to comment on the matters mentioned in paragraphs (a) to (c) of sub-s.(3), but in doing so I should make some evaluation of those matters in such a way as to assist the Minister in deciding whether to act on my recommendations.

Identification of Traditional Aboriginal Owners

25. I have spoken of the shift in language that takes place in s.50 of the Act. There is another such shift from s.11 to s.50 and again it is one that gives rise to a matter of some importance. Section 50 speaks of Aboriginals claiming to have a traditional land claim, of the Commissioner ascertaining whether those or any other Aboriginals are the traditional owners and of recommendations made 'in accordance with sections 11 and 12'. The fact finding required by s.50(1)(a) must I think look to individual Aboriginals even if in some cases they are identified simply by their relationship to some named person, for example the children of a particular man. In my view this follows from a reading of s.50(1)(a), in particular the need to mention whether 'those Aboriginals' or 'any other Aboriginals' are the traditional owners. It follows too from sub-ss.(3) and (4) of s.50 which seems to require the identification of individuals in order to assess the strength of traditional attachment and also to determine

whether or not Aboriginals are living at a place on the traditional country of the tribe or linguistic group to which they belong. A somewhat different view was taken by the Ranger Inquiry. See Second Report at p. 262.

26. However, s.11(1)(a), which presupposes that the Commissioner has made a recommendation in a report made pursuant to s.50(1)(a), speaks of a recommendation that an area of Crown land be granted to a Land Trust 'for the benefit of a group or groups of Aboriginals entitled by Aboriginal tradition to the use or occupation of that area of land, whether or not the traditional entitlement is qualified as to place, time, circumstance, purpose or permission'.

27. Three matters need to be looked at in regard to s.11(1)(a). The first is to ask why the use of the words 'a group or groups'? Is it merely a convenient way of saying the same thing as is said in s.50(1)(a)? Groups are mentioned in s.4(1) and (2) and also in s.71. I do not think the reference to a group or groups relieves the Commissioner of the obligation to identify traditional owners by name or at any rate by some relationship that leaves the identity of the person in little doubt. It is those persons who constitute the group in respect of which the Commissioner makes a recommendation. There may be occasions when it is not possible to identify by name or perhaps even by precise relationship some individuals whose existence is known and whose relationship to the land can be established but the identification of some traditional owners at least is necessary before a recommendation is made.

28. The second feature of s.11(1)(a) calling for comment is the reference to a recommendation that an area of land be granted to a Land Trust 'for the benefit of a group or groups of Aboriginals entitled by Aboriginal tradition to the use or occupation of that area of land . . .' In the words of the Ranger Inquiry: 'This may require that the entitlement of each group be in relation to the whole of that land, particularly in a case to which ss.11 and 50 apply. It may not be sufficient for entitlement by a group or groups to extend to part only of the land the subject of a Land Trust. If so, it would not be possible to group together under one Land Trust a number of areas in respect of which there are different groups entitled to use or occupation of part but not the whole of the land' (Second Report, p. 277). That problem presented no particular difficulty to the Ranger Inquiry because 'the evidence shows that each clan is entitled by tradition to the use or occupation of the whole area' (p. 277).

29. Whether the evidence does so in the present case depends upon the third matter to be considered and it is the use in s.11(1)(a) of the words 'whether or not the traditional entitlement is qualified as to place, time, circumstance, purpose or permission'. In my view those words are descriptive of the traditional entitlement; they are not looking to events that may have happened and that may have limited in some way the exercise of this entitlement. In other words a Land Trust may not be created for the benefit of a group or groups of Aboriginals unless that group or those groups are entitled by Aboriginal tradition to the use or occupation of the whole of the land the subject of that Land Trust. But the entitlement of the group or groups to that use or occupation need not be the same in all cases. It may be that for some the entitlement is qualified as to places on the land or times when the entitlement may be

exercised or the purpose for which it may be exercised. The object is to avoid a situation in which one Land Trust is created for the benefit of Aboriginals some of whom may have no traditional entitlement at all to the use or occupation of part of the land. Separate Land Trusts are then required.

30. The Borroloola claim illustrates what I mean. With each of the areas involved, the town common, the islands and the proposed reserve, there is a claim to part by one group and a claim to another part by another group. In the case of the common, for instance, unless the three claimant groups can show an entitlement to the use or occupation of the whole of that land any recommendation must be confined to that area to which each group can show entitlement. In the case of the common the result might be the creation of three Land Trusts, in the case of the islands four and in the case of the proposed reserve two. Of course this is on the assumption that in other respects a recommendation is justified.

Traditional Land Claim

31. Section 50 of the Act provides for applications to be made by or on behalf of Aboriginals claiming to have 'a traditional land claim to an area of land, being unalienated Crown land or alienated Crown land in which all estates and interests not held by the Crown are held by, or on behalf of, Aboriginals'. The present claim is expressed to be one to unalienated Crown land but it includes Vanderlin Island, part of which is the subject of a special purposes lease. By chance that lease is held by a family who are part Aboriginal. I shall discuss the implications of this later.

32. The expression 'traditional land claim' is defined by s.3(1) as 'a claim by or on behalf of the traditional Aboriginal owners of the land arising out of their traditional ownership'. But it is necessary to look again at s.3(1) for the meaning of 'traditional Aboriginal owners'. That expression is defined as 'a local descent group of Aboriginals who:

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

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

33. The applicants made their claim by virtue of their membership of groups identified by Mr John Avery, an anthropologist called on their behalf, as clans. The Ranger Inquiry was faced with a claim made by several clans or gunmugugur, each of which had its own name. That is not the case here. Neither in the Aboriginal nor the English tongue are there named clans for the Mara, Yanyula (Anyula), Binbingka, Kurdanji (Kutanji) and Karawa (Garawa) people of the McArthur River area and in Mr Avery's words there is 'no generic term for a clan' (Exhibit 1, p. 26). The alternative spellings mentioned in the last sentence simply reflect the fact that there is no universal agreement among anthropologists, linguists and others on the spelling of Aboriginal names. In the absence of any named clans Mr Avery gave to each claimant group and its country a letter running from A to I. These letters are nothing more than a means of identification. The real question of course is whether particular claimants constitute in respect of each area of land claimed a local descent group meeting the requirements of the definition of traditional Aboriginal owners in s.3(1).

34. Mr Avery saw the clan as a group of persons of both sexes, membership of the group being determined by patrilineal descent whereby a person belongs to the clan of his or her father. That descent may be actual or it may be putative. A clan is not necessarily confined to one lineage; there may be more than one but in that case all claim to be descended from a remote common ancestor, human or mythological. In Mr Avery's opinion the semi-moiety system while not irrelevant 'provides only the most general terms in which land ownership can be described and adds little that is essential to understanding the relation between clans and territories' (Exhibit 1, p. 35). Nevertheless he found it useful to identify each claimant group by reference to its semi-moiety, there being four types-Rhumburriya (Rumburia), Wawukariya/Mambaliya, Wurdaliya (Wudalia) and Wuyaliya (Wialia). Again I list alternative spellings.

35. Dr Reay was somewhat critical of the way in which Mr Avery approached the concept of land owning groups. She regarded the semi-moiety as of greater significance and to quote her: 'it seems evident that on anthropological criteria the Anyula semi-moiety is as much a clan as the unnamed, less inclusive group Mr Avery identifies as such' (Exhibit 80, p. 10). In the end, however, there was not much in issue between the two anthropologists in this regard. Dr Reay accepted that 'even within the Anyula semi-moiety there is a smaller group of people who are more closely associated with particular parts of the territory attributed to their semi-moiety than other members are' (Exhibit 80, p. 10).

36. Dr Reay offered this definition which I accept: 'A Borroloola clan is a group of one or more patrilineages of the same semi-moiety who acknowledge a common relationship with a particular territory through Dreamings that are not shared in the same way by other groups' (Exhibit 80, p. 12). It was in regard to Area H only that Dr Reay saw difficulty in viewing combined lineages as a single descent group, but I shall have something more to say about this when dealing with that area.

37. Accepting Dr Reay's definition it becomes necessary to look at each claimant group, see whether it is possible to identify particular patrilineages within a particular semi-moiety within that group and then to determine what relationship if any there is between the group and the area of land claimed, keeping in mind the two limbs of the definition of 'traditional Aboriginal owners 'in s.3(1) of the Act.

38. The applicants claimed that the members of each group were nimaringki to the area claimed. The word nimaringki comes somewhere near to the English phrase 'owner of land'; at any rate it seems to be the closest equivalent. In Aboriginal tradition land is not a transactable item although some of the incidents of land 'are in a sense transactable' (Exhibit 1, p. 29). To use Dr Reay's words, there may be 'different degrees of nimaringki-ship' (Exhibit 80, p. 1). The closest and most direct association with a territory is that of clan members.

39. It was the applicants' case that there may be other Aboriginals with some interest by way of ownership but who do not possess the primary spiritual responsibility for sites and land spoken of by the Act. An example given was that of conception filiation stemming from the belief that as part of the process of birth a spirit child (Ardiri)

has entered the mother. The place of this conception may be outside the father's own clan territory but in an area to which he is nimaringki. Such an event may form the basis upon which the child is later recognised as an owner of the land where he was so conceived. Conception filiation is not enough of itself to constitute membership of a clan. More is required but it is not necessary to explore this matter. It is enough to recognise a tie with land which is not dependent upon the rules ordinarily controlling clan membership.

40. The term djungkai includes not only the children and sons' children of the women of the clan but also all people of the opposite moiety to the nimaringki. The djungkai have rights and duties some of which fall within English concepts of ownership and management but they do not have primary spiritual responsibility for land.

41. As already mentioned the definition of traditional Aboriginal owners speaks of those who are entitled by Aboriginal tradition to forage as of right over land. The evidence satisfied me that this right to forage is not the exclusive prerogative of the land-owning group; it is a right exercised by others as well, all those entitled to forage constituting what anthropologists call a band.

The Evidence

42. The evidence in support of a traditional land claim came from several sources. There was the evidence of Mr Avery and Mr Dehne McLaughlin, the former an anthropologist at Sydney University, and the latter a site survey officer with the Museums and Art Galleries of the Northern Territory. Mr Avery's first contact with the Borroloola area was in December 1974 and since then he has spent considerable time there engaged in field work. His evidence went to general principles of anthropology, the nature of the land-owning group at Borroloola and more particularly the identification of those claiming to be the traditional owners of land in that region. That identification was based upon information given to him by Aboriginal people in and around Borroloola during the time he spent there together with assertions of ownership made during the public meeting held on 6 and 7 September 1977. That meeting at which Mr Avery was present and in which he participated was recorded on ten videotapes shown during the hearing. Mr Avery also played some part in delineating the boundaries of the areas claimed, although most of that work was done by Mr McLaughlin.

43. The land available to be claimed is of course controlled by s.50(1) of the Act. The result is that in most cases an area claimed is only a part of that said to be in traditional ownership. At the same time this may make easier the task of delineating boundaries. For instance while three groups make claim to land within the town common, the overall area is necessarily confined to the unalienated Crown land surrounding the town and itself bounded by pastoral leases.

44. Mr Avery's method was to ask people to name places and to say whose country they were in. Sometimes he was in a position to do this in the field, for instance on some of the islands. At other times it was in discussion with the aid of aerial photographs, or with maps as at the September meeting. The identification of places by Aboriginals was not merely an exercise in conventional geography. Very often it included pointing out dreaming tracks, that is paths taken by mythological characters involving songs and stories with which particular groups are especially linked.

45. Mr McLaughlin made his first field trip to the Borroloola region in October 1974 and thereafter spent considerable time carrying out his duties as a site survey officer. His work was part of a national survey being conducted by and funded by the Australian Institute of Aboriginal Studies to identify places of significance to Aboriginal people. In the course of that work he mapped sites of significance. Although not an anthropologist (he is a geologist by qualification) Mr McLaughlin has acquired a general knowledge of Borroloola and of the Aboriginal people there.
46. Mr McLaughlin described in evidence visits to Areas B, C and H on the common, to the islands and in the area of the proposed reserve although not actually in it. His sources of information were Aboriginals some of whom visited the areas with him and others who, particularly when access was difficult, described their country by reference to places known by them and by Mr McLaughlin. A map tendered in evidence (Exhibit 5) showed some 930 Aboriginal place names along with dreaming paths and these in turn were related to the areas claimed by means of transparencies used over maps. A detailed description of the way Mr McLaughlin went about his work appears in the transcript of proceedings at pp. 387 to 395 and in Exhibit 1, pp. 86 to 89.
47. There are one or two comments of a general nature I wish to make about the evidence of Mr Avery and Mr McLaughlin. Mr Withnall categorised Mr Avery's as hearsay. Mr Laurie, Q.C., senior counsel for the claimants, argued that this was not so and relied upon some remarks made by Blackburn J. in Milirrpum v. Nabalco Pty Ltd (1971) 17 FLR 141 at pp. 161-2. In my view both counsel were half right. When Mr Avery described the nature of the land-owning group, the concept of clans and territories, the attributes of ownership of land and the nature of semi-moieties and subsections, he was speaking as an expert dealing with general anthropological propositions. The fact that his opinions were to some, perhaps to a large, extent based upon what he had been told by Aboriginals did not make that evidence hearsay any more than it would be right to describe as such the opinion of a physician based in part upon what he had been told by patients over a number of years.
48. At the same time, when Mr Avery and Mr McLaughlin recounted what Aboriginals had said regarding the whereabouts of their own country, they were in my opinion giving evidence of a hearsay nature. But as I indicated in the practice directions I do not adhere strictly to the rules of evidence; indeed there would be serious difficulties for all concerned if I did. In my opinion the issue is more one of the weight to be attached to that sort of evidence. This depends to some extent upon the degree to which it is corroborated. What Mr Avery and Mr McLaughlin were told was substantially supported by the testimony of Aboriginals given at Borroloola.
49. I list those who gave evidence and the area to which it related.

Leo Finlay	Area A
Gordon Lansen	Area B
Dinny McDinny	Area C
Old Davy	Area D
Don Rory	Area E

Don Miller	Area F
Tom Simon	Area G
Musso Harvey	Area G
Barney Pluto	Area H
Piro	Area I
Old Echo	Area I

50. And there was substantial corroboration too in what was said at the meeting at Borroloola on 6 and 7 September 1977. Mr Bishaw, the assistant manager of the Northern Land Council, described the way in which it was organised. Field officers told the Aboriginal people at Borroloola of the proposed meeting and others were informed, I take it by letter. As mentioned earlier there were about 200 people at the meeting. Some of what was said took place in English, some in Yanyula, some in Karawa with possibly other Aboriginal languages used at times. A transcript of the proceedings, verified both as to the accuracy of the reproduction in the English language and the translations, was provided.

51. No doubt there are defects in this sort of material. It was suggested for instance that some of the questions put by Mr Avery at the meeting were leading in nature but I accept that for the most part leading questions were only used for confirmation or clarification of basic information already offered spontaneously. It is possible too that some persons may dominate a meeting to the exclusion of others. With all that in mind the important thing is that people spoke in front of the community of matters relating to their own country such as the location of places and dreaming paths about which others would have a general knowledge. There were instances where people spoke and later corrected themselves or were corrected by others but it is fair to say that out of that meeting a general consensus arose regarding the identity of owners of land and the territory to which their ownership related.

52. Some criticism was made of both Mr Avery and Mr McLaughlin on the grounds of lack of experience, the way they went about their work and particularly in the case of Mr McLaughlin what was said to be bias towards Aboriginals. No doubt both men were sympathetic to the interests of Aboriginal people and Mr McLaughlin was inclined to wear his heart on his sleeve. Nevertheless on matters going to traditional ownership I have no reason to doubt the truth of what they told me and it is important to keep in mind a comment made by Dr Reay when she said: 'I hope that the great difficulty and complexity of the work undertaken by Mr Avery and also by Mr McLaughlin can be taken into account when evaluating the claim' (Exhibit 80, p. 1). Their work was difficult and it was complex and in my view it was done painstakingly and well.

53. At the same time it is true that too close an involvement of an expert witness with the party calling him is likely to lead to misunderstanding. Perhaps this would have been avoided had Mr Avery and Mr McLaughlin each confined his role to that of witness and not been responsible for the compilation of the claim book (Exhibit 1) which was in essence the applicants' written case.

The Areas Claimed

54. I propose now to look at the various areas claimed and in doing so to follow the order in Exhibit 1. Although this leads to a somewhat fragmented approach geographically, it is better to take this course since it was the one followed in most of the evidence, written and oral. The easiest way to identify the areas is to look at the transparency and the map at the end of this report.

Area A - Rhumburriya Country in the Sir Edward Pellew Group

55. This area comprises Vanderlin Island save for a very small section in the north-east and another in the south-east, North Island except for its most northerly part, Skull Island, Black Islet, Centre Island, the north-eastern tip of South West Island and a small section on the western and eastern sides of West Island. It also includes any minor islands and islets within the area outlined.

56. Some forty-one persons, adults and children, appear as claimants. Their relationship through patrilineal descent was sufficiently established by the evidence of Mr Finlay, one of their members, and also by the evidence of Mr Avery.

57. There are in fact two lineages involved. Old Banjo, Old Tim and Old Leo and their descendants are most closely associated with Vanderlin Island. Darby, Arthur and their descendants belong to North Island, Centre Island and to the small section of South West Island. Dr Reay saw the matter a little differently from Mr Avery. To her the two lineages constituted not so much a clan as 'a split clan'. Referring to the claimants as a group she said: 'Their spiritual affiliations to the sites and tracks of the area and the fact that some of the older members have in the past foraged over the land as of right establishes that they have a traditional land claim' (Exhibit 80, p. 15).

58. The evidence of Mr Finlay and Mr Avery and the statements of those attending the meeting in September, especially Old Tim and Old Leo, produced a detailed description of many sites on and near the named islands and of several dreaming paths on and between those islands. They sufficiently established that these particular claimants are the traditional owners in the terms of the Act of the named islands except for the small areas on West Island as to which the evidence was inconclusive.

59. The small islands, islets and rocks within the area claimed present a problem. In the course of his final address Mr Laurie said: 'I do not place any reliance upon the areas shown where the lines are out to sea, as denoting what is the claim. The claim clearly can only be claim to land, and where there are islands other than the main designated islands, it would seem that there are various islands which have been identified by Aboriginal names and we cannot identify them by any other name, but it would be our submission that they are sufficiently identified to be able to be included as part of Aboriginal land' (transcript of proceedings, p. 1566-7). It is possible to extract from the evidence a list of place names the main significance of which is that they lie on dreaming tracks such as the path of the dugong killers. But there would still remain serious problems of identification and the evidence does not justify recognising traditional ownership by reference to some general outline in the sea. I shall return to this matter when considering the recommendations to be made to the Minister.

60. I shall identify the traditional owners in the formal findings made later in this report. In its final address, which was in writing and involved an analysis of the evidence, Mt Isa Mines accepted that the named claimants 'are indeed the traditional owners' (Exhibit 82, p. 4).

Area B - Rhumburriya Country on the Borroloola Common

61. This country is more or less the northern half of the common running from its western edge and stopping short some distance from its eastern boundary with a small area further south.

62. There are some twenty-four claimants although there is doubt about the names and number of a few of the children involved. A few of the people, Napper Jilbili, Wilo McKinnon, Johnson Timothy and John Timothy, are also claimants to Area A. It is unnecessary to detail why this is so; a sufficient explanation appears in Exhibit 1 at pages 43 to 44.

63. The principal witness was Mr Gordon Lansen, one of the claimants. He described in some detail the relationship between the claimants to this area, identifying places of significance such as Mabunji Malandari and Gunminyini, together with the dreaming paths of the kangaroos, and generally supporting the claim to traditional ownership of the territory involved. Again there was confirmation in the evidence of Mr Avery and in what was said by Mr Lansen and by Borroloola Willy at the September meeting. In the words of Mt. Isa Mines' address, 'Once again, the best test of the claimants' traditional ownership is community acceptance; there is no evidence of any dissent or dispute' (Exhibit 82, p. 42). By way of illustration Area B includes a small piece of land within Area H which is Wurdaliya country on the common. There was evidence that Mr Lansen had doubts that this was truly Rhumburriya country and was not disposed to lay claim to it until he was persuaded by a senior man, Johnson Rivets, that in fact it was.

64. Dr Reay was concerned that Mr Avery had not sufficiently pieced together the lines of descent. She carried out such an exercise herself, concluding: 'Immediately it looks more like a local descent group than Mr Avery's set of genealogical fragments does' (Exhibit 80, p. 15). She then went on to inquire whether it was truly such a group and after quite a lengthy analysis concluded that there was no reason to doubt that it was. The evidence sufficiently established these claimants as the traditional owners of this country.

Area C - Mambaliya Country on the Borroloola Common

65. This land can be loosely described as the north-eastern section of the common.

66. There are thirty-six claimants, adults and children. Mr Dinny McDinny gave evidence on this part of the claim and spoke of the relationship between the claimants.

67. He identified his country as being part within the common and part extending eastwards about half-way to the sea. He then described the path of the crow dreaming and identified places on the common of significance such as Milibundurra, Dabarrangga and Yamurri. He had already at the meeting in September pointed to a map

identifying broadly the area within and without the common belonging to his group. There was also evidence from Mr Avery and Mr McLaughlin regarding sites and the dreaming path.

68. In the Mt Isa Mines' address appears this statement: 'Although there was some difficulty in establishing the relationship of the claimants one to another, there again seems little doubt that, in an Aboriginal sense, the claimants are entitled to make this claim' (Exhibit 82, p. 61).

69. Dr Reay prepared her own genealogy combining the three patrilines shown by Mr Avery in Exhibit 1 at pages 55 to 55B. While mildly criticising Mr Avery for not being more explicit about the relationship between the group and the land, Dr Reay saw no reason to doubt that the claimants did in fact constitute in truth a land-owning group in relation to Area C. I see no reason to doubt it either and am satisfied that the evidence warrants such a conclusion.

Area D - Mambaliya - Robinson River Proposed Reserve

70. This land is the western half of the proposed reserve. The entire area is quite small, 38.8 square kilometres or thereabouts. Its availability to be claimed is largely fortuitous since it was once part of the Seven Emu pastoral lease. In the later 1950s the possibility of a settlement away from Borroloola was considered because of a lack of permanent water there. An area within the Seven Emu lease was chosen and withheld from leasing when in 1961 that property was converted under s.48 of the Crown Lands Ordinance 1931. The land is said to be part of a much wider area of Mamibaliya country, but the boundaries are now fixed to the north, south and west by pastoral leases and the river, so that the only delineation of a boundary required is to the east.

71. There are thirty-two claimants, some of whom were identified only as the children of other claimants.

72. Evidence as to this area was lacking in detail mainly because the country is fairly inaccessible. Neither Mr Avery nor Mr McLaughlin had been there, nor I gather had anyone else who was at Borroloola at the time of the hearing other than Old Davey who gave evidence. Even he had not been there since he was young and I do not think he purported to speak from personal recollection but rather in terms of what he had been told.

73. When the hearing resumed in Darwin after Borroloola the applicants recalled Mr McLaughlin to give evidence of a flight he had made on 23 October, that is a few days earlier. Mr McLaughlin told how he and some Aboriginal men from Borroloola flew over the proposed reserve and how between them, with reference to features of the area and some places of significance, it was possible to prepare a map or rather plot on to a map the eastern boundary of Area D. None of the men was a claimant to Area D although it was said by Mr McLaughlin that they had authority to speak on behalf of those claimants.

74. However the problem is not just one of identifying places and delineating the eastern boundary of Area D, but rather of establishing a sufficient connection between the claimants and that country to constitute them a local descent group with the attributes required by the definition of traditional Aboriginal owners, in particular the primary responsibility for the land. The same point was made by Dr Reay in her report although she thought that some evidence was available in the videotape records of the meeting and concluded: 'The claimants would seem to have a strong traditional land claim to this estate' (Exhibit 80, p. 2 1). There was some evidence in what was said by Blue Bob at the meeting but it was not enough and I am unable to make a finding that there are traditional Aboriginal owners of Area D.

Area E - Wuyaliya Country on Robinson River Reserve

75. This country is roughly the eastern half of the proposed reserve.

76. There are twenty-four claimants, most of whom are adults but some of whom are children, and of the latter five were identified simply by reference to their fathers. One of the claimants, Mr Don Rory, gave evidence that established sufficiently the relationship to each other of the claimants and the fact that they constituted a single lineage.

77. But the comments made in regard to Area D apply equally to this part of the claim. Again the difficulty is not just one of identification of boundaries or even of places, but rather the lack of evidence showing a sufficient connection between the claimants and this country to satisfy the requirements of the Act. I am unable to make a finding that there are traditional Aboriginal owners of this land.

Area F - Wuyaliya Country in the Sir Edward Pellew Group

78. This claim is to South West Island, save for two sections, one at the north-eastern corner being part of Area A, and the other about half-way down the eastern side, being part of Area G.

79. There are thirty-nine claimants, all of whom are mentioned by name. Mr Don Miller identified as the traditional owners a number of people describing their relationship to each other and in Dr Reay's words: 'The claimants to this area form a single compact lineage . . .' (Exhibit 80, p. 22). The claimants were sufficiently identified as a local descent group.

80. Dr Reay commented that Mr Avery had presented no evidence that these claimants had a traditional land claim and that although he described in a general way the dreaming tracks on South West Island, he did not expressly relate sites to people. That is true as far as Exhibit 1 is concerned. Is it so of the totality of the evidence? Mr Miller identified by name and by position on a map places on South West Island including some referred to as sacred areas. He also traced the path of two dreamings, the groper and the jabiru, pointing to places connected with those dreamings. And he identified a small piece of country about half-way down the eastern side of the island as Anthawara (Andawarra), which he referred to as Wurdaliya country.

81. At the meeting on 7 September various men talked about South West Island but it is not easy to extract a very clear picture from what was said. This is not just because people were speaking much at the same time and in a conversational way. The problem is one of being able to infer from what was said that the particular claimants have in the terms of the Act 'common spiritual affiliations to a site on the land, being affiliations that place the group under a primary spiritual responsibility for that site and for the land'. Certainly Anthawara was identified as Wurdaliya country but when asked about the rest of the island there was a response from a number of people and in particular from Tommy Peters, a man who did not appear as a claimant to any of the areas and whose particular role was never defined, that 'we all own except one for this place'. See corrected transcript B, p. 88, and transcript C, p. 65, both part of Exhibit 78.

82. A reading of the transcript of the meeting suggests that there is some sharing of South West Island by Wuyaliya and Wurdaliya people. But I am unable to find that the listed claimants to Area F constitute a local descent group meeting the requirements of traditional Aboriginal owners in the Act or that anyone meets those requirements.

Area G - Wurdaliya Country in the Sir Edward Pellew Group

83. The land claimed is West Island save for a small area on the western side, part of Area A, and another on the eastern side, also part of Area A, Watson Island, the northernmost section of North Island and a small area on the eastern side of South West Island.

84. There are twenty-four claimants, all identified by name except two who are described as children of one of the claimants. In Dr Reay's words: 'The group is a simple patrilineage of Wudalia people' (Exhibit 80, p. 23).

85. The record of the meeting held on 7 September (the page references are those mentioned in paragraph 81 and thereabouts) coupled with the evidence of Mr Avery, Mr Tom Simon, one of the claimants, and Mr Musso Harvey, who is djungkai for the traditional owners of Wurdaliya country in the islands, established the relationship of the claimants to each other and also the existence of this group as the traditional Aboriginal owners of the land in question. Places of significance such as Mamadthamburu, Mabiyn and Aralwidji were identified, as was the path of the sea turtle dreaming and other dreamings.

86. The evidence showed a recognition by the Wuyaliya people that although they share in West Island it is truly Wurdaliya country because the sea turtle which travelled over Wurdaliya country on the mainland and then went to West Island is always Wurdaliya. Quoting from Dr Reay's report: 'When a group in a different semi-moiety agrees that a particular Dreaming is always Wudalia, it is unlikely that anyone would dispute the primary right of Wudalia people to the sites along its tracks. The group itself is undoubtedly a descent group. It has a strong traditional land claim to the estate' (Exhibit 80, p. 23).

87. Mt Isa Mines' final address accepted the strength of this claim (Exhibit 82, p. 79), and I find that the claimants are the traditional owners of this country.

Area H - Wurdaliya Country on the Borroloola Common

88. The land claimed is roughly speaking the southern half of the common with the exception of a small area identified as Rhumburriya country and part of Area B.

89. There are fifteen claimants, all identified by name. Although Exhibit 1 describes the land as Wurdaliya country there are in fact two patrilineages involved, one Kurdanji Wurdaliya and the other Karrawa Wuyaliya. Mr Avery saw the matter as one of incorporation of one group into another. Dr Reay preferred to think of it as involving two clans jointly claiming the one estate with the Wurdaliya having a stronger traditional land claim but with the Wuyaliya claim strengthened by the Wurdaliya peoples' recognition of them as co-owners.

90. Mr Barney Pluto identified the claimants and their relationship to each other, explaining how the Wuyaliya and the Wurdaliya came together through a spirit dreaming on the common. It is perhaps unnecessary to say again that the area claimed is arbitrarily determined by the existence of pastoral leases and that the traditional country extends beyond it. Mr Avery described the country as that of the Ngabiya dreaming, that is the dreaming of the disembodied spirit. He described the path of this dreaming in considerable detail, identifying a substantial number of sites within the area claimed or just outside it. I instance Bilidayi, Rawulmanja and Danmanmarinini. Mr Barney Pluto, one of the claimants, spoke of the path of the devil dreaming which I understand to be a reference to the Ngabiya or disembodied spirit.

91. The totality of this evidence, and I include as well Mr McLaughlin's identification of places, established that the two groups between them constitute a local descent group possessing the attributes required by the definition of traditional owners. I might add that Mt Isa Mines saw no reason to question this claim. See Exhibit 82, p. 90.

Area I - Wurdaliya country on the Eastern Side of Vanderlin Island

92. This area comprises the north-eastern tip of Vanderlin Island and a small strip of land along the south-eastern part of that island.

93. There are seventeen claimants, all identified by name. Piro, who is djungkai to this land, spoke of the claimants and their relationship to each other, linking them with the kudjika or song cycle for the area.

94. The evidence of Mr Avery, of Piro, of Old Echo, one of the claimants, and the record of the meeting of 6 September at which the relationship between Rhumburriya country and Wurdaliya country on Vanderlin Island was discussed by a number of people established that these two small areas are in fact Wurdaliya country and that the claimants are the traditional owners. See corrected transcript B, pp. 13 to 16, transcript C, pp. 11 to 14, both part of Exhibit 78.

95. It may be thought strange to find small Wurdaliya areas adjoining land that is predominantly Rhumburriya. Mr Avery explained this in terms of the need to have conception sites for men living away from the land of their own patri-moiety and Dr Reay accepted this. Her difficulty was that what had happened implied that at some time in the past the Rhumburriya people may have made this land available to the Wurdaliya people, giving rise to the possibility of some form of alienation. I do not think it necessary to explore this matter. The fact is that the claimants have made out a case for traditional ownership of the two small areas involved, and the Rhumburriya people make no claim so that an inference may properly be drawn that the claimants have the primary spiritual responsibility spoken of by the Act.

Summary of Findings

96. Formal findings must await a consideration of other matters but in brief:

Area A: The claimants are the traditional Aboriginal owners.
Area B: The claimants are the traditional Aboriginal owners.
Area C: The claimants are the traditional Aboriginal owners.
Area D: I am unable to find that there are traditional Aboriginal owners.
Area E: I am unable to find that there are traditional Aboriginal owners.
Area F: I am unable to find that there are traditional Aboriginal owners.
Area G: The claimants are the traditional Aboriginal owners.
Area H: The claimants are the traditional Aboriginal owners.
Area I: The claimants are the traditional Aboriginal owners.

Right to Forage

97. An essential element in the definition of traditional Aboriginal owners is that the local descent group be entitled by Aboriginal tradition to forage as of right over the land. The word 'forage' is capable of some shades of meaning, but I take it to refer here to a search for food in a roving sort of way. Two things may be said about paragraph (b) of the definition of traditional Aboriginal owners in s.3(1) of the Act. The first is that the definition looks to entitlement by Aboriginal tradition. It is not necessary that those claiming to be traditional owners show a present practice of foraging on the land, although that may well be relevant to other considerations under the Act. The second is that the words do not speak of an exclusive right and there is nothing in the legislation to suggest that a sharing of the right to forage is destructive of a claim to be traditional Aboriginal owners.

98. Mr Avery's evidence on this matter may I think be summarised along these lines. A clan has the right to hunt and gather food on its own territory. In fact those activities are carried on by a wider group, the band, comprising a number of families related in some way. Every member of a clan has a right to forage on the clan's land, as do the djungkai and others who may be related to the people in the local descent group. That evidence was not challenged and Dr Reay apparently saw no reason to comment upon it. I conclude that in Aboriginal tradition a right to forage belongs to those persons comprising the clan or land-owning group. It follows then that it is unnecessary to consider the claimant groups individually.

Traditional Attachment

99. I have already discussed at some length the way in which s.50 of the Act operates. There is a distinction between the obligation to 'comment' on the matters mentioned in the paragraphs to sub-s.(3) of that section and the obligations in making a report to 'have regard to the strength or otherwise of the traditional attachment by the claimants to the land claimed' and in carrying out functions under the Act to have regard to the principles expressed in sub-s.(4). And it seems to me that the matters to which regard must be had play no part in ascertaining the traditional owners but do play a real part in deciding whether to make recommendations to the Minister for the granting of any part of the land claimed. This makes it necessary to say something about the particular claimant groups, although there was also evidence of a more general nature.

100. It is not easy to deal with the question of traditional attachment because it looks to something that is to a large extent subjective but nevertheless must be measured before its strength can be assessed. The Ranger Inquiry was faced with a similar difficulty as to which it said: The Commission was concerned to establish the degree to which traditional spiritual affiliation to various sites was still meaningful to the Aboriginal people and to what extent the indigenous religion of the people was still considered important by them. This is a difficult enough matter to determine with white people. With Aboriginal people problems of communication make it much more difficult' (Second Report, p. 266). In this context I quote one further passage from the Second Report. 'It is not suggested that attachments to land can or should be judged on the basis of actual and substantial occupation. Clearly this was not a traditional requirement, and it is not contemplated by the legislation,' (p. 267). With this I agree, though cross examination and submissions seemed to proceed at times on a contrary basis.

101. That is not to say that visits to and occupation of land from time to time are unimportant; they may add strength to more general evidence. Again I do not wish to be taken as saying that this sort of evidence has no part to play in the hearing of an application. It may well prove very relevant when considering the number of Aboriginals with traditional attachments to land who would be advantaged by acceding to a claim (s.50(3) para. (a)) and in determining whether Aboriginals not living at a place on their traditional country in fact desire to live at such a place (s.50(4) para. (b)).

102. Both Mr Avery and Mr McLaughlin gave evidence on this matter. Both men spoke from a close association with the people of the Borroloola region since late 1974 and from knowing a substantial number of the claimants. Mr Avery told of the enthusiasm that the people had when speaking about their country and of the emotion shown at sites and at ceremonies. He saw the use presently made of the land claimed and the patterns of land use as indicating an aspect of traditional attachment, namely economic attachment. See transcript of proceedings, pp. 152-3. To reply upon the use made of land might be thought somewhat at variance with the approach taken by the Ranger Inquiry but this is not so. Mr Avery was referring not just to the fact that people from Borroloola went out to hunt and to camp but that when they did they tended to go in the direction of their own country if this was practicable.

103. Mr McLaughlin put it this way: 'Many situations, not necessarily verbal, indicate to you that people are very concerned with country; that people's thoughts are tied up with country; that there is a real intimate relationship between people and country. You often get expressions of - emotional expressions, tears, or people enthusiastically describing a place - in the field situation . . . People are very much concerned with country' (transcript of proceedings pp. 398-9).

104. Exhibit 1 part F prepared by Mr Avery contains a table headed 'Outcamps Maintained Oct. 1974 to June 1977' and a map was tendered in evidence (Exhibit 11) showing the location of these outcamps. Some were used with regularity, especially on weekends, others for periods ranging up to a couple of months, with two maintained permanently. None of these outcamps was in the Sir Edward Pellew Islands or in the proposed reserve, but quite a number were within the common. Clearly enough the so-called outstation movement has not developed in this region to the extent that it has in some other places within the Territory; no doubt it is easier to maintain such communities on the mainland than on the islands.

105. The strength of traditional attachment to land is bound up with the strength of traditional life generally and an aspect of this is the continuation of ceremonial life. Mr Avery noted that between December 1974 and the end of the wet season in 1976-77 there took place some fifteen initiation ceremonies, five funerary rites and one kunapipi, a ceremony of great importance lasting from April until September 1976 and involving people living not only in Borroloola but from places some distance away including Doomadgee.

106. Although in the words of the Ranger Inquiry traditional attachment should not be judged 'on the basis of actual and substantial occupation', the extent to which the claimants have had some physical connection with the land claimed does have a bearing on this aspect. In summary form the picture that emerged was:

Area A: There has been no permanent occupation of these islands by any of the claimants since the beginning of World War II. Old Tim, Old Banjo and Old Leo used to live on Vanderlin Island. Since that time there have been sporadic visits, at first of some weeks duration and later for a few days at a time. There was no evidence that the Arthur family had ever visited these islands. Leo Finlay was last there in June 1977 after an absence of thirty years or so.

Area B: These claimants are spread around the Territory. Some of them visit their country from time to time, others do not.

Area C: A similar comment can be made here as made in regard to Area B.

Area D: There was no evidence of any of these claimants visiting the land. As mentioned earlier this country is fairly inaccessible.

Area E: What I have said regarding Area D applies equally here.

Area F: Mr Don Miller gave evidence that he visited South West Island with his family often, but there was no evidence that any of the other claimants did.

Area G: A number of these claimants visit this area from time to time, particularly to fish around the islands.

Area H: Mr Barney Pluto described how he and his people went to this country a lot to hunt and fish.

Area I: There was no evidence that any of these claimants visited this country.

Traditional Attachment Summarised

107. There is no satisfactory yardstick by which such a subjective and intangible concept as traditional attachment to land can be measured. Clearly this was the experience of the Ranger Inquiry, whose conclusion was: 'Having carefully considered the evidence, we have formed the opinion that in general traditional spiritual affiliation with the land in the Region continues. It tends to be stronger with the middle-aged and elderly, but can fairly be said to be present with all the claimants, in some degree' (p. 267). I draw a similar conclusion from the evidence tendered in the present hearing, with these qualifications:

1. The strength of traditional attachment is greater to the common than it is to the islands, taking both areas as composite regions.
2. Within the islands it is greater to Vanderlin Island and West Island.
3. It is not possible to say anything in particular about the strength of traditional attachment to the proposed reserve.

Living on Traditional Country

108. Section 50 (4) of the Act expresses two principles to which the Commissioner shall have regard in carrying out his functions. For the reasons given earlier in this report I am of the opinion that this obliges me to consider these principles before determining what recommendations to make to the Minister. In the words of the subsection '(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'.

109. In the case of a claim to unalienated land the words 'at a place on the traditional country' must I think look to the land claimed and not to some wider area, otherwise the application of these principles would have no practical results.

110. The terms 'living', 'live' and 'secure occupancy' in sub-s.(4) carry with them a sense of something permanent rather than casual although there is nothing in the Act to say that when land is vested in a Land Trust the persons for whose benefit the Trust exists should remain on the land at all times any more than continuity of occupation is a requirement of ownership by Europeans.

111. The fact is that none of the claimants lives on the land claimed by him or her, most living in or around the township of Borroloola. Some live elsewhere, for instance Arthur's children (Area A) live at Doomadgee. All the claimants to Area C live at Borroloola except Amy, who is in Darwin. Of the claimants to Area D some live in Borroloola, others in Queensland and others again on stations around Borroloola. The Rory family (Area E) lives at Borroloola, as do the claimants to Area F. Most of

the claimants to Area G live in Borroloola, although again some work on surrounding stations. The claimants to Area I are scattered, with some of the Kurrababas in Queensland and a number in Borroloola. All the claimants who gave evidence (see paragraph 49) live in Borroloola.

112. It may be thought somewhat artificial not to treat some of the claimants to the common who live at Borroloola as living at a place on their traditional country. But I do not think it can be done. In any event it is clear from the definition of alienated Crown land and unalienated Crown land in s.3(1) that land in a town is outside the scope of the Act.

113. The next question to ask is whether the claimants desire to live at a place on their traditional country. It should be noted that the two paragraphs in sub-s.(4) speak of the country 'of the tribe or linguistic group to which they belong', but I do not think that introduces any additional complication.

114. The application of the principle mentioned in para.(b) of sub-s.(4) cannot be dealt with by a generalisation. It requires some consideration of each of the areas involved. I did not hear personally from all the claimants, nor did I expect to having regard to the number involved. I must therefore draw inferences as to the wishes of many of the claimants, bearing in mind what others said about them and recognising too that the wish of older people to return to their country may not always be shared by their children, especially those who have become used to town life or to a different sort of existence to that which their parents have in mind.

115. At the same time very young children who grow up in a different life-style, for instance on one of the islands, may well prefer it. There is no doubt that the Act requires the Commissioner to take into account the desire of claimants to live on the land that they claim, but it is not the only yardstick to be applied. There is an in-built difficulty here not unlike that in assessing the strength of traditional attachment. By definition the people are no longer living on their traditional land and some, particularly the young, have never lived on it.

116. A number of factors have operated to draw people to Borroloola - the establishment of a ration depot there before 1920, lack of employment opportunities on stations in recent years and the provision of educational and health facilities in the town. At the same time there was evidence in the written material tendered of what Mr W.E. Harney described as 'a systematic clearing out' of the coastal and river people to the Barkly Tableland and elsewhere (Exhibits 52, 57).

Area A

117. Mr Leo Finlay was the spokesman for these forty-one traditional owners. He spoke of the wish of his people to go back to the islands, explaining it this way: 'All of the islands we would like to visit and sit down in all those islands. We would like to live in those islands and hunt like tribe used to do and we would like to live the way that we were' (transcript of proceedings, p. 668). Mr Finlay was sufficient of a realist to appreciate that returning to the islands to live would mean a boat, a school and medical facilities, also that people would move back and forth to Borroloola.

Whether the Arthur family would move from Doomadgee is a matter of speculation although Mr Finlay thought they would. It may be too that some of the claimants, for instance Mavis Timothy and Florette Timothy, who work at the clinic in Borroloola, wish to stay where they are.

118. Some of the cross-examination of Aboriginal witnesses and some of the submissions seemed to assume that an important consideration was whether people wished or were prepared to take up residence almost immediately in the event of a claim being acceded to and land vested in a Land Trust. This is an unreal approach. All the land claimed is unalienated Crown land and by definition all is outside any town. None of the areas claimed has any facilities for immediate European style living and it should not be thought that because Aboriginal people wish to live on their own country they will necessarily do so in traditional Aboriginal style. The Act looks to the desire of people rather than prospects of immediate occupancy. It seems to me that in the case of Area A there is a desire on the part of some of the traditional owners to live on Vanderlin Island in the way suggested, but not on the other islands within Area A which are seen as places to visit.

Area B

119. Mr Gordon Lansen was the spokesman for these claimants and in answer to a question what his people would do if they got this land, he said: 'We might as well live on it all the time, you know' (transcript of proceedings, p. 724). He agreed he had no particular plans for the land. Of course Area B abuts the township of Borroloola where a number of the claimants now live. I am of the opinion that as a general proposition these traditional owners do desire to live on their country.

Area C

120. Although this country is close to Borroloola where most of the claimants now are there was no wish expressed by them to live on it. Their spokesman, Mr Dinny McDinny, put it this way: 'Have ceremony and hunting place, go hunting for kangaroo. When I finish hunting, work on the job' (transcript of proceedings, p. 736). What he was saying was that he and his people would use the land for ceremonies and for hunting but that they would continue to live in Borroloola.

Area D

121. There was no evidence of any desire on the part of these claimants to live on the proposed reserve.

Area E

122. There was no evidence that these claimants wish to live on this country.

Area F

123. Mr Don Miller was the spokesman for this group and I think it as well to set out verbatim a short passage from the transcript of his evidence at p. 751.

> Mr Withnall: What do you do in Borroloola? Do you have work to go to? . . . Yes. What work do you do? . . . Council.
>
> And if you get your land are you going to stay in Borroloola with the council or are you going to go and live on the island? . . . Yes.
>
> What are you going to do? . . . Stay there to watch the sacred area and all that.

> His Honour: Mr Withnall is asking you, if you and your people get this land, this South West Island, will you go to live there or stay here and go to the island sometimes? . . . Live there and go sometimes to the island.

There is no doubt that what Mr Miller was saying was that he intended to remain in Borroloola but from time to time go to South West Island. There was no suggestion that any of the claimants desire to live on this island.

Area G

124. Mr Tom Simon, also known as Tom Boy, spoke on behalf of these claimants. His evidence was that he would remain in Borroloola with his children but would holiday on 'the island' (transcript of proceedings, p. 776), which I take to be a reference to West Island. Again there was no suggestion that any of the other claimants wish to live on any of this country.

Area H

125. There are two groups of people involved here. Mr Barney Pluto, their spokesman, said that he was going to live out in the bush 'all the time' (transcript of proceedings, p. 760). However I think this was a statement of his personal intention and there was no evidence that any of the other members of the Wuyaliya semi-moiety or that any of the Wurdaliya people also claiming this area desire to live on the land.

Area I

126. There was no evidence that any of these claimants desire to live on the land claimed.

Summary of Evidence of Desire to Live on Land Claimed

127. Summarising the evidence bearing on paragraph (b) of s.50(4), there is a desire on the part of some of the traditional owners to live on Vanderlin Island (part of Area A), a desire to live on the northern part of the common (part of Area B), a desire to use the north-eastern section of the common (Area C) for ceremonies and hunting, no desire to live on South West Island (Area F) but a wish to go there from time to time, a similar wish in regard to West Island (Area G), no evidence of any general desire to live on the southern half of the common (Area H), no desire to live on the north-eastern tip or south-eastern section of Vanderlin Island (Area 1) and no desire to live on the proposed reserve (Areas D and E).

Unalienated Land

128. By reason of s.50 of the Act this claim is confined to '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'. The definition of 'alienated Crown land' and of 'unalienated Crown land' each includes the expression 'estate or interest'. The significance of this is that any Crown land in which a person has an estate or interest is alienated Crown land and so outside the scope of an application unless all estates and interests are held by or on behalf of Aboriginals. Within the land claimed are special purposes leases, grazing licences and occupation licences and one thing to resolve is whether any amount to an estate or interest.

Special Purposes Leases

129. Leslie Kevin James claimed an interest in Special Purposes Lease No. 207, a lease of 4.78 hectares at Ryan's Bend for the trucking of cattle and their holding before trucking. As the evidence emerged I am satisfied that Mr James has no interest in this lease nor has Alfred Burke Cant, the original lessee. The only person now with an interest in it is Mr James's son, Arthur James. He did not give evidence but the fact remains that there is a special purposes lease on the common within the areas claimed, probably lying across the boundary of Areas B and H. There is no doubt, and no one suggested otherwise, that a special purposes lease constitutes an estate or interest so that this land may not be claimed.

130. Special Purposes Lease No. 395 was granted to the Borroloola Amateur Race Club Incorporated to begin on 28 May 1975 and to run in perpetuity. It is an area of 44.36 hectares part of which falls within the Borroloola townsite and part of which is outside within Area H. None of it may be claimed.

131. Special Purposes Lease No. 108 is an area of 4.1 hectares on the south-western tip of Vanderlin Island. It is a lease for residential and boat slipway purposes for a term of twenty-one years from 28 February 1962. It is a lease to Stephen Colester Johnston, Willie Gordon Johnston, Archie Johnston, Johnie Johnston and Donald Johnston. This family has been closely associated with Vanderlin Island for many years. The lessees, who are brothers, were all born there. Mr Stephen Johnston has lived there for some forty-one years. Their mother, who is still alive, is Aboriginal and came from West Island or South West Island. She is one of the claimants to Area G. Their father was a European who came to Vanderlin Island before World War I, fished in the area and in 1923 settled on the island with his wife. A curious situation arises here. A special purposes lease is ordinarily alienated land but s.50(1)(a) permits an application to be made for alienated Crown land in which all estates and interests are held by Aboriginals. 'Aboriginal' is defined by s.3 (1) to mean 'a person who is a member of the Aboriginal race of Australia'. The Johnstons, I think, answer this description, hence their special purposes lease may be claimed. It is unlikely that Parliament had such a situation in mind when framing the terms of s.50(1)(a), nevertheless the language of the statute is clear enough.

132. Ronald John Kerr gave evidence which at one point tended to suggest he might have a lease. But it seems rather that he has rights under the Mining Ordinance 1939 and that he has been seeking a lease or grazing licence of some land on the common. This has not come to anything. If he does have a lease it is of land within the town and I need not consider his position any further in this part of the report.

Occupation Licences and Grazing Licences

133. Occupation licences and grazing licences require closer consideration because it was the applicants' submission that neither constitutes an estate or interest in land, hence both may be claimed. The matter is important not only for the present application but for others likely to follow. I shall first identify those involved.

134. Max Herbert Weise holds Occupation Licence No. 1004 current to 30 April 1978. It is an area of 2 hectares on Law Island in Barbara Cove at the north-west of

Vanderlin Island. It is a licence to occupy land 'for Industrial (Base for Fishing) and Ancillary purposes'.

135. Mr Stephen Johnston holds Grazing Licence No. 1857, an area of some 5400 hectares in the southern section of Vanderlin Island.

136. The Johnston brothers hold Grazing Licence No. 1956, an area of about 19 200 hectares taking up the balance of Vanderlin Island.

137. At one time Mr A.B. Cant held Grazing Licence No. 2012 near Ryan's Bend. There was a suggestion that Mr L.K. James or his son Arthur had an interest in this licence but the evidence indicated that in fact it no longer exists.

Estate or Interest

138. I turn now to the question whether an occupation licence or a grazing licence constitutes an estate or interest under the Act. Counsel referred to a number of decisions both in Australia and in England in which the nature of a lease and of a licence has been analysed and the two contrasted. Many of these authorities are I think of little assistance, especially those decided in the context of legislation controlling recovery of possession and rent where policy considerations existed that have no relevance to the Land Rights Act. It is more profitable to look first at the provisions of the Crown Lands Ordinance 1939 by which grazing licences and occupation licences are created, see what rights and obligations arise under that Ordinance and then to ask whether the totality of those rights and obligations constitutes an estate or interest in land as those terms are generally understood. The Land Rights Act itself does not purport to define estate or interest except perhaps indirectly in s.3(2), to which I shall refer later.

139. By s.107 of the Crown Lands Ordinance the Administrator is empowered to grant licences to persons to graze stock on any Crown lands not already held under a lease or licence. A licence may be for a period not exceeding one year. Section 107A empowers the holder of a licence to apply to the Administrator for permission to make or erect specified improvements on the land; the granting of permission gives to the licensee a right to compensation in respect of those improvements. Regulation 70 of the Crown Lands Regulations provides that a licence remains in force until 30 June next following the date of grant. Under reg. 72 a licence may at the discretion of the Administrator be renewed from time to time for a period not exceeding twelve months, the application for renewal to be made within one month before the date of the expiry of the licence and the application being deemed to be an application for a licence. Regulation 71 empowers the Administrator to forfeit a licence for failure to comply with any of its conditions and re. 71A empowers him to cancel a licence after three months notice.

140. Section 108 provides that the Administrator may grant a licence to any person to occupy Crown lands 'for such purposes as the Administrator thinks fit'. Such a licence shall not exceed five years. The position of the holder of an occupation licence is equally precarious because reg. 83 permits forfeiture for non-compliance with a condition of the licence and cancellation on three months notice.

141. In time the categories of estates in land have become well recognised and neither of the licences mentioned falls into any of the accepted categories. The Ordinance itself draws a clear distinction between leases and licences. The expression 'interest in land' is not capable of precise definition. '"Interest" is not a technical word in the sense in which " fee simple " or " estate tail " may be said to be technical words, but includes all those various limitations of real estate allowed by law, vested, contingent or executory' (Hoysted v. Federal Commissioner of Taxation (1920) 27 CLR 400 at p. 409). However broadly those words are read they do require a right to the land, at its widest perhaps a right to the proceeds of the sale of land. Whatever rights are conferred by a grazing licence and an occupation licence are given to a particular individual to make use of land for some specified purpose. They do not confer any right to the land itself and their personal nature is emphasised by the power to revoke or cancel. There is support for this view in Vaughan v. Shire of Benalla (1891) 17 VLR 129. It follows then that neither licence constitutes an estate or interest in land and each therefore is unalienated Crown land.

142. Earlier I mentioned s.3(2) of the Act. It reads: 'Unless the contrary intention appears, a reference in this Act to an estate or interest in land includes a reference to an interest by way of a right against the Crown to a grant of an estate or interest in land but does not include a reference to . . .' and then follow certain specified interests. The reference to an interest by way of a right against the Crown is apt to meet the situation that exists in the Territory by which the formal grant of an estate or interest does not always take place. It is I think designed to safeguard the position of a person who has complied with the requirements of the Crown Lands Ordinance or Special Purposes Leases Ordinance but who has not received a formal grant.

143. One of the exceptions in s.3(2) is '(d) an interest by way of the occupation or use, with the licence or permission of the Crown, of land by an Authority or a Mission'. It was suggested by Mr Withnall that the specific exclusion of such an interest must be taken to carry with it the implication that any such interest by way of occupation or use not so excluded falls within the definition of an estate or interest in land. In my view this is not so; the exclusion is by way of caution only and no other inference can be drawn.

Conditional Recommendations

144. It was suggested by Mr Withnall that I have the power to make a conditional recommendation and that in respect of an area of land that may be used as a corridor from the Mt Isa Mines site to a wharf on Centre Island I should exercise that power. The condition suggested was that a grant should be made, assuming traditional ownership to have been made out, unless within a period of say two years the company has made a firm decision to proceed with development of the mine. Two matters arise here, one of power and one of discretion. As to the first, while the Act speaks generally of making recommendations in my opinion it does not contemplate a recommendation that is conditional, at least not in the sense suggested. The reason is that matters such as the development of a mine site or port are for comment under s.50(3). For reasons already given the Commissioner's recommendations depend essentially upon the existence or otherwise of a traditional land claim, not upon the matters mentioned in the paragraphs to sub-s.(3). Those are matters going to a decision by the Minister whether or not to act upon a recommendation made.

145. Similar considerations bear upon the exercise of any discretion. A primary object of the Act is to give recognition to traditional land claims established before the Commissioner. If he is otherwise of a mind to recommend the granting of land to a Land Trust I do not think he should condition that recommendation in the way suggested thereby appearing to make recognition depend upon considerations that have nothing to do with traditional ownership.

Formal Findings

146. I find for the purposes of this hearing and in accordance with s.50(1)(a) of the Aboriginal Land Rights (Northern Territory) Act 1976 that:

(a) The land described in the application and shown on the map and transparency attached to this report is unalienated Crown land or is Crown land in which all estates and interests not held by the Crown are held by or on behalf of Aboriginals save for the land within Special Purposes Lease No. 207 (Ryan's Bend) and Special Purposes Lease No. 395 (near Borroloola townsite).

(b) There are Aboriginals who are the traditional Aboriginal owners of some of the land claimed being the persons whose names are set out below together with references to the land of which they are the traditional Aboriginal owners:

Area	Traditional Aboriginal Owners
A	
Vanderlin Island (excluding those parts shown on the transparency as within Area I)	Old Banjo Old Tim Old Leo Finlay
North Island (excluding that part shown on the transparency as within Area G)	Emma Napper Jilbili
Skull Island	Wilo McKinnon
Black Islet	Dennis McKinnon
Centre Island	Johnson Timothy
South West Island (that part shown on the transparency as within Area A)	Nero Timothy Mavis Timothy Florette Timothy John Timothy Leo Finlay Arthur Darby Keith Arthur Archie Arthur Nolene Arthur Robert Arthur Finlay Arthur Lincoln Arthur Children of Napper Jilbili Jennifer Julie

Area	Traditional Aboriginal Owners
	Children of Dennis McKinnon
	Terry
	Daniel
	Yvonne
	Children of Johnson Timothy
	Phillip
	Marlene
	Wilton
	Child of Nero Timothy
	Ivor
	Children of Nero Timothy's deceased brother
	Warren
	Valma
	Elaine
	Josie
	(Josephine)
	Children of Leo Finlay
	Maxie
	John
	Maxine
	Joy
	Lawrence
	Lorraine
	Child of Robert Arthur
	Name not known
B	
Those parts of the common shown on the map and identified on the transparency as Area B	Borroloola Willy Gordon Lansen Bella Jackson Lansen Queenie Willy Paddy Powder Napper Jilbili Wilo McKinnon Johnson Timothy John Timothy Son of Borroloola Willy Name not known (brother of Wendy) Children of Gordon Lansen Luke Dennis Cathy Mary Johnny

Area	Traditional Aboriginal Owners
	Children of Jackson Lansen
	Names and number not known
	Children of Paddy O'Keefe
	Barbara
	Joan
	Ding Dong
	Scotty
	Name not known
	Name not known
C	
That part of the common shown on the map and identified on the transparency as Area C	Owen Sandy
	Irene
	Ivy Parker
	Old Harry
	Jemima
	Isaac
	Dinny
	Ginger
	Piro
	Violet
	Tyson
	Bella Charlie
	Amy
	Children of Isaac
	Irene
	Johnny
	Eunice
	Michael
	David
	Louise
	Children of Dinny
	Isa
	Linda
	Mara
	Nancy
	Reggie
	Benjamin
	Rachel
	Peter
	Maria
	Children of Piro
	Ronnie
	Jimmy
	Phillip
	Debbie
	Robert

Area	Traditional Aboriginal Owners
	Granddaughter of Yakaman
	Elaine
	Children of Ginger
	Janice
	Susan
G	
West Island (excluding those parts shown on the transparency as within Area A)	Tommy McCracken
	Andrew Warikamadji
Watson Island	Rita
North Island (that part shown on the transparency as within Area G)	Harriet Johnson
	Elizabeth McCracken
South West Island (that part shown on the transparency as within Area G)	Paul McCracken
	Norma Timothy
	Tom Boy (Tom Simon)
	Gwynneth
	Larry
	Mervyn
	Carol
	Judith
	Rhonda
	Kerry
	Children of Tom Boy
Teresa	
	Thomas
	Lynette
	Jill McCracken
	Children of Larry
	Name not known (boy)
	Glenda
H	
That part of the common shown on the map and identified on the transparency as Area H	Barney Long
	Andy Wyndham
	Georgina
	Eunice Long
	Barney Pluto
	Bessie
	Rosie
	Doris
	Timothy Barney
	Ivan
	Dixie
	Patsy
	Bobby
	Children of Barney Pluto
	John
	Douglas

Area	Traditional Aboriginal Owners
I Vanderlin Island (excluding those parts shown on the transparency as within Area A)	Kurrababa Bill Kurrababa Billy Kurrababa Thelma Douglas Ted Mukerdy John Mukerdy Rosie Marikbalina Dulcie Awalmalmara Old Echo Jacob Echo Agnes Rory Eileen Rory Jim Ross Hilda Rosalin Gladys Roy Ross

(c) There are Aboriginals who are the traditional owners of some of the small islands, islets and rocks within the area of the claim to the Sir Edward Pellew Group but it is not practicable to ascertain particular owners or to identify with sufficient precision particular small islands, islets and rocks.

(d) The traditional owners of those parts of Areas A, G and I mentioned in sub-paragraph (b) of this paragraph are entitled by Aboriginal tradition to the use or occupation of all that land although that traditional entitlement may be qualified as to place, time, circumstance, purpose or permission.

(e) The traditional owners of Areas B, C and H are entitled by Aboriginal tradition to the use or occupation of all that land although that traditional entitlement may be qualified as to place, time, circumstance, purpose or permission.

Recommendations

147. Having regard to the findings made in this report as to traditional ownership, the strength of traditional attachment by the claimants to the land claimed, the desire to live at a place and the entitlement by Aboriginal tradition to the use or occupation of land, all of which considerations operate to varying degrees, I recommend that:

(a) Vanderlin Island and West Island be granted to a Land Trust for the benefit of the groups of Aboriginals listed as the traditional owners against Areas A, G and I in paragraph 146 (b);

(b) the unalienated Crown land on the Borroloola common be granted to a Land Trust for the benefit of the groups of Aboriginals listed as the traditional owners against Areas B, C and H in paragraph 146 (b).

148. It is true that no finding of traditional ownership has been made in regard to those parts of West Island within Area A but as there is a finding of entitlement to use or occupation s.4 (1) of the Act is sufficient authority for the Minister to give effect to the recommendation in paragraph 147 (a).

High Water Mark or Low Water Mark?

149. Both ss.11 and 50 speak of Crown land, which s.3(1) defines to mean 'land in the Northern Territory . . . 'Section 5 of the Crown Lands Ordinance defines 'Crown Lands' to mean 'all lands of the Crown or Commonwealth in the Northern Territory, including the bed of the sea within the territorial limits of the Northern Territory other than reserved or dedicated lands'. In view of the decision of the High Court in New South Wales v. Commonwealth (1975 8 ALR I (the Seas and Submerged Lands Act case) the definition in the Ordinance may need to be read down. But it is clear that 'land in the Northern Territory' extends at least to the low water mark and it was not suggested that a grant under s.11 of the Land Rights Act of an estate in fee simple extending to the low water mark would be beyond power. Nor is there any doubt that land in the Sir Edward Pellew Group falls within the description 'land in the Northern Territory'. See the article by Mr M.H. McClelland: 'Colonial and State Boundaries in Australia', 45 ALJ 671, especially at pp. 677-8.

150. Rather the matter was put on the basis of convenience and the interests of those involved. Mr Withnall offered four reasons why no claim should extend beyond the high water mark. The first was that it is the only convenient and easily identifiable boundary and that to grant land to the low water mark will provide problems of identification particularly if regard is had to the reciprocal legislation envisaged by s.73, sub-s.(1)(d) of which contemplates ordinances 'regulating or prohibiting the entry of persons into, or controlling fishing or other activities in, waters of the sea, including waters of the territorial sea of Australia, adjoining, and within 2 kilometres of, Aboriginal land . . . ' I do not find this argument particularly persuasive. There may well be difficulties of definition and identification whichever is taken as the boundary. The Act itself seems to contemplate no special problems because the land described in Schedule 1 and directed by s.4(1) of the Act to be the subject of Land Trusts is bounded by the low water mark of sea coasts not the high water mark.

151. The second reason offered for confining any grant to the high water mark lay in what may be described as the custom and practice of the Northern Territory. Mr V.T. O'Brien, who is First Assistant Secretary, Land and Rural Development Division of the Department of the Northern Territory, referred to the general practice of granting pastoral leases to the high water mark where they abut the coast.

152. The third reason looked again at s.73(1)(d) of the Act but this time emphasised the words 'waters of the sea, including waters of the territorial sea of Australia' within which Parliament has confirmed the power of the Legislative Assembly to make ordinances in regard to fishing and other activities. It follows, so the argument went, that the control of the fishing in those waters being a matter for the Legislative Assembly, I should abstain from making any recommendations that land should be vested in a Land Trust beyond the high water mark. I do not agree.

Any such ordinance must provide for the right of Aboriginals to enter and use the resources of those waters in accordance with Aboriginal tradition in the same way that s.73(1)(b) authorises the making of ordinances regulating or authorising the entry of persons on Aboriginal land but requires provision for the right of Aboriginals to enter in accordance with Aboriginal tradition. The power of the Legislative Assembly to make ordinances in regard to the waters of the sea within 2 kilometres of Aboriginal land is a power that may be exercised whether the land ends at the high water mark or the low water mark.

153. Fourthly it was said that a grant of land extending to the low water mark would create a serious detriment to fishermen. The evidence of Mr McMahon and Mr Weise was that barramundi fishing is often done between the high water mark and the low water mark and involves placing nets on the bed of the sea between the two.

154. In the course of dealing with these objections Mr Laurie suggested that in order to answer the question whether or not a grant should be made to the low water mark it is necessary to inquire first what rights exist in the owner of land between the high and low water marks and whether rights still remain in the public, even though that land is no longer Crown land. The answer suggested by Mr Laurie, and it is an answer supported by authority, is that at common law the public has a right to fish in tidal waters and estuaries, in tidal rivers and in the sea except where the Crown or a subject has acquired a proprietary right exclusive of that public right or where Parliament has restricted the common law right of the public. See 18 Halsbury's Laws of England (4th edn) paras 609-14. If these principles hold good for the sea around the Territory it follows that notwithstanding a grant of land to a Land Trust extending to the low water mark the public would retain the right to fish those waters. I do not think this would extend to placing nets on the bed of the sea between high water mark and low water mark so there would be little consolation for barramundi fishermen.

155. I see no reason to doubt that the principles are applicable to the Territory. The Control of Waters Ordinance 1938 vests in the Crown the property in and the right to the use of water in lakes, springs and watercourses and reserves to the Crown the bed and banks of watercourses and lakes forming the boundary or part of the boundary of land (ss.3, 4). But watercourse is defined to mean 'a river, stream, creek or natural channel along the bed of which water flows permanently, intermittently or occasionally'. The sea does not answer this description but a river does even though its waters are tidal.

156. But the Land Rights Act itself speaks on the ownership of water, if only by implication. At p. 251 of the Ranger Inquiry Second Report appears this statement: 'A grant to a Land Trust of land does not include "water" (s.12(2), s.3(1)). This remains the property of the Crown'. The reference to the two sections of the Land Rights Act arises in this way. Section 12 (2) provides in part that a deed of grant made following a recommendation by the Commissioner 'shall be expressed to be subject to the reservation that the right to all minerals existing in their natural condition, or in a deposit of waste material obtained from any underground or surface working, on or below the surface of the land, remains with the Crown'. The definition of 'minerals' in s.3(1) lists a number of minerals and metals concluding with the

words 'whether suspended in water or not, and includes water'. If water is to be excluded from a deed of grant it may be thought that some more direct form of words might have been used. And it may be argued that 'water' does not include the sea. Whether it is because it does have that wider meaning or because of the principles of common law mentioned earlier a grant of land to the low water mark would not I think preclude the public from fishing those waters.

157. Under powers conferred by the Fisheries Ordinance 1965 the Administrator may declare an area of unoccupied Crown land or of water to be a fishing reserve and in general he may prohibit the taking of fish at particular times, in particular areas and otherwise as mentioned in s.14 of the Ordinance. A grant of land to a Land Trust carries no immunity from the laws of the Territory except that s.74 of the Land Rights Act reads: 'This Act does not affect the application to Aboriginal land of a law of the Northern Territory to the extent that that law is capable of operating concurrently with this Act'. Questions may arise in the future whether ordinances made pursuant to s.73 of the Act or indeed existing laws are capable of operating concurrently with the Land Rights Act, but except in one respect it is unnecessary and probably undesirable for me to venture into this area.

158. The exception is the case of the McArthur River, part of which flows through the common and which is tidal to the Burketown Crossing at the southern end of the townsite. The Control of Waters Ordinance does not distinguish between tidal and non-tidal waters and as already mentioned its effect is to vest the property in and the right to the use and flow and to the control of water in a watercourse in the Crown. There is no reason why the ordinance should not apply if the common is vested in a Land Trust.

159. Returning to the question of a grant there are two important considerations at work. The first is the usual practice of the Territory when Crown grants are made and that is to confine land to the high water mark. The second is the selection by Parliament of the low water mark as the boundary of the land in Schedule 1 to the Land Rights Act. It may be said that if a grant is made to a Land Trust extending to the low water mark it will be at variance with the usual practice. On the other hand if such a grant is confined to the high water mark it will mean a distinction between Aboriginal land so constituted and Aboriginal land existing by reason of s.4 of the Act. There is a dilemma but in my view and assuming it to be something on which a recommendation is called for it ought to be resolved in terms of the legislation rather than practice. In so far as I have recommended that land within the Sir Edward Pellew Group be granted to a Land Trust, my recommendation is that the grant extend to the low water mark.

160. There was a submission made by Mr Withnall that the description of land in Schedule 1 to the Act was merely fortuitous, having been borrowed from the Social Welfare Ordinance 1964. The description may correspond but there is nothing to suggest that it was borrowed without consideration of the consequences.

Public Roads

161. The Act makes it clear that public roads are excluded from its operation. It does this in two ways. Section 3(5) provides that a description of land in Schedule 2 shall be deemed not to include land on which there is a road over which the public has a right of way. Section 11(3) provides that a reference to sub-s.(1) of that section to land (being a reference to land the subject of a recommendation and a Land Trust) shall be read 'as not including land on which there is a road over which the public has a right of way'. By way of corollary s.12(3) requires that a deed of grant shall identify any land on which there is at the time of the grant a road over which the public has a right of way and it shall be expressed to exclude such land from the grant.

162. The Act does not define 'road' although the intent clearly is to confine it to what may be called public roads. By reason of s.7 of the Control of Roads Ordinance 1953 all roads in the Northern Territory are the property of and vested in the Commonwealth. Section 5 of that Ordinance contains a definition of road. It may be necessary to fall back on the Ordinance to determine whether the public has a right of way over a particular road. Part of the definition includes land 'used as a thoroughfare passing through or over Crown land'.

163. In fact the area of dispute in the present claim is quite narrow. Exhibit 41 is a map tendered through Mr O'Brien showing roads in the Borroloola area and Exhibit 65 is a document tendered on behalf of the Commonwealth listing and describing roads in the area. They are:

1. Carpentaria Highway
2. Cape Crawford to Ryans Bend.
3. Bing Bong Access
4. Access road to McArthur River Cargo Landing
5. Borroloola-Wollogorang
6. Spring Creek Access
7. Internal Station Access Road

164. In his final address Mr Laurie said: 'We accept the position that the roads that exist in the area are roads over which the public has a right of way. The real question here is if there is to be no grant in relation to roads, what is there that is to be excised from any grant?' (transcript of proceedings, p. 1663). Later he qualified that concession by excluding what he referred to as 'the Spring Creek Road' (transcript of proceedings, p. 1665). That must be a reference to the Spring Creek Internal Station Access Road, No. 7 above, and not the Spring Creek Station Access Road, which is No. 6. It is clear that the Spring Creek Internal Station Access Road is not a public road and it is equally clear that the others are.

165. Any grant of the unalienated Crown land in Areas B, C and H will exclude the roads numbered 1 to 6 in paragraph 163.

166. The question of how much land should be excluded is essentially a practical matter in which no doubt the Minister will be advised by government officers who will have regard to the purpose for which a particular road is or may be used, the amount of traffic it is likely to bear and considerations such as earthworks, bridges, viaducts

and services. The Department of Construction recommends that 'rural road reserves should be 100m wide . . . '(Exhibit 65, p. 4).

Matters for Comment - section 50(3)

167. Section 50(3) requires the Commissioner to comment on a number of matters. As indicated I regard these as matters for comment and some evaluation, their relevance and importance being a matter for the Minister. In the language of the Act they are:

(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 pan would have on the existing or proposed patterns of land usage in the region.

Advantage to Aboriginals

168. The number of Aboriginals with traditional attachments who would be advantaged and the nature and extent of their advantage are very much interrelated. A starting point is simply to list the number of claimants in respect of each area of land:

Area A: 41 adults and children
Area B: 24 adults and children approximately
Area C: 36 adults and children
Area D: 32 adults and children
Area E: 24 adults and children
Area F: 39 adults and children
Area G: 24 adults and children
Area H: 15 adults and children
Area 1: 17 apparently all adults

169. Each group of traditional owners would be advantaged if its claim were acceded to. So too would those entitled to the use or occupation of the land. Speaking generally the traditional owners of island land are entitled to the use or occupation of the islands and the traditional owners of common land are entitled to the use or occupation of the common. The entitlement may be wider in each case but it is not possible to give numbers.

170. It was suggested by Mr Laurie that an important advantage to accrue would be the very recognition of traditional ownership and the sense of identity that would result. There is some difficulty in treating the recognition of a traditional land claim as itself an advantage if only because the comments required by sub-s.(3) may follow the making of a recommendation that has already recognised the existence of traditional ownership. On the other hand it is appropriate to recognise a sense of identity as an advantage to a particular group of Aboriginals. The Ranger Inquiry looked at the advantages under three heads and it is helpful to follow that approach. In the words of the Inquiry: 'The advantages which would accrue if title were recognised to

the traditional land are mainly of three kinds: (a) use or occupation, (b) mining royalties, rent and agreed payments, (c) spiritual and psychological consequences'
(p. 268).

(a) Use or Occupation

171. As mentioned earlier (paragraph 127) there is a desire on the part of some of the traditional owners to live on Vanderlin Island (Area A) and the northern part of the common (Area B) and a wish to spend time on West Island (Area G) and other parts of the common (Area C). There is a real possibility of a growth of outstations, more so on the common than on the islands.

(b)Mining Royalties, Rent and Agreed Payments

172. The mining operations in the area are those of Mt Isa Mines on McArthur River Station. As I see it the company's only obligation to make payments to traditional land owners in the event of land being granted to a Land Trust would arise for the right to use land for the carriage of ore from the mine to a port on say Horn Islet and to use the islands for facilities connected with the shipping of ore. I shall look more closely at the question of Mt Isa Mines' operations when considering the question of detriment.

(c) Spiritual and Psychological Consequences

173. If any of the land claimed is vested in a Land Trust it will undoubtedly give those claimants a sense of identity as traditional people that they are rapidly losing. It may well be said that such an identity is likely to be more important to the older people but such a comment loses sight of the fact that the destruction of Aboriginal society has been very much related to the deprivation of land. There is good reason to believe that the recognition of traditional land claims will help to arrest that destruction and to some extent restore the dignity of the people concerned.

Detriment to Others

174. Section 50(3) para. (b) calls for comment on the detriment to persons or communities including other Aboriginal groups that might result if a claim were acceded to either in whole or in part. 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 para. (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.

175. 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 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.

Notice of Intention to be Heard

176. In response to an invitation contained in correspondence and advertisements a number of persons and organisations lodged notice of intention to be heard. I shall list them summarising each interest as expressed in the notice and shall then comment on the evidence. Some government departments lodged notice but their submissions will be dealt with under 'Land Usage'.

(a) Mt Isa Mines Limited:
is the registered proprietor of mining tenements to the south of Borroloola and the development of those tenements will be materially affected by an unconditional grant of an estate in fee simple of either the town common or the islands.

(b) Dampier Mining Company Limited:
is the applicant for Exploration Licence No. 1300. Its notice stated that it did not wish to challenge any evidence of traditional ownership nor did it seek to have the application refused. The company did not appear but I shall mention it again under 'Land Usage'.

(c) Ronald John Kerr:
has applied for a lease of part of the common for grazing purposes and has built on Crown land near Borroloola under a miner's right. He has lived at Borroloola for 15 years and has a wife and five children living with him.

(d) Max Herbert Weise:
applied for an occupation licence on Law Island as early as 1972 and was granted Occupation Licence No. 956 on 1 May 1975.

(e) Leslie Kevin James and Arthur James:
claim an interest in a special purposes lease and an adjoining grazing licence at Ryan's Bend.

(f) The Johnston family:
has a special purposes lease at the southern end of Vanderlin Island and two grazing licences which between them cover the rest of the island. The family is part Aboriginal and has lived on the island for many years.

(g) Willie Shadforth:
is the lessee of Seven Emu station. He wished to be heard on such matters as fencing and cattle movements. Although present at Borroloola he did not wish to give evidence. I say no more about him.

(h) Leonard Mortimer Retter,
George Patrick Pollard,
Judith Margret Doyle and
Borroloola Inn Pty Ltd:
claimed that their ownership of land and their business interests in the Borroloola area would be prejudiced. Mr Retter gave evidence from which it appeared that neither he nor his associates stood to suffer any real detriment.

(i) William Barrett:
is a self-employed professional fisherman working the reefs of the Sir Edward Pellew Group and with a small base camp on Harney Island between South West and Centre Islands. Mr Barrett did not give evidence. I say no more about him.

(j) John Reed:
lodged notice of intention to be heard but later withdrew that notice.

(k) Harold Brennan, A.O.:

Mr Brennan's appearance was as a concerned citizen although his notice referred specifically to the Johnston family and to Mt Isa Mines. He did not suggest that he would suffer any detriment by reason of any grant of land to a Land Trust.

(l) John Leslie Stuart MacFarlane:
sent a telegram stating an intention to contest the claim to the common and the islands and stating an intention to forward a submission. No submission was forthcoming and although Mr MacFarlane was told of the hearings at Darwin and Borroloola he did not appear.

(m) Northern Territory Commercial Fishermen's Association:
was concerned that a grant of land in the islands to the low water mark would adversely affect barramundi fishermen.

(n) Northern Territory Fishing Industry Council:
wished to protect the interests of its members in their fishing activities both at sea and on shore.

(o) M.G. Kailis Gulf Fisheries Pty Ltd:
has applied for a lease of land on North Island to establish a receival depot for prawns.

(p) Northern Territory Cattle Producers Council:
its interest was in the effect of the application on freedom of access to the Borroloola township and associated facilities, the status of grazing licences, access to and the use of the McArthur River, access to recover straying cattle, responsibilities for fencing and the effect that the application might have on mining and port development which in turn could affect the cattle industry.

177. In addition I received a notice of intention to be heard signed by a number of persons most of whom seem to be pastoralists. The notice authorised Mr Hammer of Bauhinia Downs Station and Mr L. James to appear on behalf of the signatories. Some of these people in fact lodged individual notices, and to the extent that the general interests of pastoralists were represented by The Northern Territory Cattle Producers Council I take it the others had nothing to add.

178. It can be seen from this list that a diversity of interests is involved, mining, pastoral and fishing. Put that way there may be some overlap with para. (c) of sub-s.(3) relating to land usage but I shall try to keep the two separate as far as possible.

Detriment to Aboriginal Groups

179. But first there is the possibility of detriment to Aboriginal groups in or around Borroloola who are not among the claimants. There are such people, mainly Kurdandji and Karawa. The number is not known; what is known is that there are about 250 claimants, most of whom live at Borroloola, and according to Mr W.J. Gray of the Department of Aboriginal Affairs there are 350 to 400 people at Borroloola (Exhibit 52, p. 4). The traditional country of the Karawa people lies south-east of the common and that of the Kurdandji more directly south, in the region of McArthur River Station. Not long ago the Aboriginal Land Fund Commission sought to buy this station on behalf of the Kurdandji people but in fact it was sold to Mt Isa Mines.

180. There is a sense in which everyone in the Borroloola area, black and white, may be affected by the success or failure of these claims. For instance job opportunities will

be influenced by the development of a mine or port or for that matter a fishing industry. These are very intangible considerations and in any event the development of these industries does not depend upon the question of title to land although it may be influenced by it.

181. However, there is a sense in which Aboriginals in and around Borroloola may be affected in a way not felt by Europeans. At present the Borroloola common is available to all who wish to use it for hunting and camping. Land vested in a Land Trust may not be available in the same way. There is no reason to assume that Aboriginal people not entitled to enter by Aboriginal tradition will be denied access for these limited purposes. In any event such considerations operate not against the granting of land but rather to point up the need for other Aboriginals to consider their traditional country and where permissible to make an application.

Mt Isa Mines Limited

182. I shall use the term Mt Isa Mines to include M.I.M. Holdings Ltd, Mt Isa Mines Ltd and Mimets Development Company Pty Ltd, all of which are related companies. Mt Isa Mines' interest in the area goes back to 1955 when its geologists discovered the McArthur Prospect. The exploration and drilling that has taken place since has proved an ore body of 190 million tonnes of ore in a band approximately 55 metres thick and containing 9.5 per cent zinc, 4.1 per cent lead and 44 g/tonne silver. The fine-grained nature of the ore has made processing difficult but so far the conventional grinding and flotation process has given the best result. In the written statement of Norman Harold Thompson, the company's senior civil engineer, appears this statement: 'The best results obtained in a laboratory have indicated that a 55 per cent recovery of zinc in a concentrate assaying 50 per cent and a 45 per cent recovery of lead in a concentrate assaying 40 per cent might be achieved. These results are not good enough to ensure a commercially viable operation' (Exhibit 14, para. 2). In 1975 a pilot plant was built on the McArthur site. Some $7m has been spent on exploration and research and a further $6m in connection with the pilot plant.

183. Mt Isa Mines' present activities do not fall within any of the areas claimed. Mining reserve No. 581 is an area of 692.67 square kilometres mainly within the northern section of McArthur River station but extending into the southern section of Tawallah. Within that reserve lie the mine site, the pilot plant and the proposed townsite. Some fifty-eight leases have been granted to the company within the reserve under the provisions of the Mining Ordinance 1939. According to Mr P.W.R. Crohn, the assistant secretary of the Mines Branch of the Department of the Northern Territory, sixteen were approved in the early 1960s and the remainder early in 1977. Whether or not leases have formally issued is not entirely clear but having regard to the terms of the Ordinance it is of little importance.

184. In anticipation of the creation of Mining reserve No. 581 Mt Isa Mines entered into an agreement with the Commonwealth of Australia, the agreement expressed to have been made 5 January 1977. The agreement is Exhibit 18 and was taken by me on a confidential basis, its distribution being confined to those directly involved in the hearing. I suggest that without the approval of the Commonwealth and the company the particular figures I am about to mention be not made public. [The balance of

paragraph 184 and the whole of paragraph 185, which give details of the agreement, have been deleted.]

186. If any of the claims are acceded to it will make no difference to the activities presently carried on by Mt Isa Mines and in that sense no detriment will result to it. The company's real concern lies in the facilities it will require if it proves worthwhile to develop the mine. In that event the company envisages an open cut mine with ore-handling facilities and a concentrating plant, power supply and water supply, major civil works including a diversion of McArthur River at the site of the ore body, a township and airfield, all with the necessary ancillary services.

187. In addition, and here is where the likelihood of detriment is said to exist, the company will need a road and possibly a pipeline and power line between the mine site and a port to be established, together with provision for the port itself. This is a long-term proposal involving hundreds of millions of dollars and will of course depend upon a range of considerations all going to the viability of such an operation. I heard evidence and was referred to material, historical and otherwise, in which was canvassed the best site for a port in the Borroloola region. To discuss this material in detail is unnecessary; it may be accepted that the best location for a port is on Centre Island, probably on Horn Islet.

188. From the mine site to Horn Islet is about 156 kilometres. For 67 kilometres from the mine site there is a sealed road, the Carpentaria Highway, and after that 39 kilometres of a roughly formed track between Borroloola and the Junction. In Mr Thompson's words: 'The residue is over trackless country, largely comprising low-lying soft estuarine mud with mangrove vegetation' (Exhibit 14, para. 16). Mr Thompson's written statement (Exhibit 14) and the map accompanying it show what in the company's view is the most suitable path for a road, railway and power line to take from the mine site to Borroloola, from there to the Junction, then to South West Island and from there through Centre Island to Horn Islet. Again a detailed consideration of these proposals is unnecessary. It was not seriously challenged that it is the most satisfactory way of handling the removal of ore from the mine and of course the existence of a port will have advantages to others as well, particularly those engaged in the pastoral industry.

189. Now none of this really answers the question what detriment might result to Mt Isa Mines if any of these claims were acceded to. The answer is that if it proves feasible at any time for the company, to proceed with the development of a mine, any grant of land which makes it difficult for the company to gain access to a port will impede that development. Specifically a grant to a Land Trust of Areas B and H would include land on which tile railway, pipeline and power line would run, along with an improved road. A grant of Areas F and G, or at any rate so much of G as relates to South West Island, would have a like effect, and a grant of Area A or again so much as relates to Centre Island and Horn Islet would affect not only tile question of access but directly the existence of the port site and associated facilities.

190. How likely is the development of the mine? The company recognises that development will depend upon a number of factors, including the resolution of its present

problems in the processing of ore, the availability of markets and the existence of satisfactory world metal prices. Its final address (Exhibit 821) tended to emphasise the subjective nature of a judgment to proceed with development, subjective in the sense that the decision will be made by its own personnel based upon their own experience and skills. Unfortunately that approach does not help me a great deal and there is force in the criticism made by Mr Laurie of the company's failure to present a clearer picture of what the future might hold, particularly having regard to the very strong attack made on the viability of the entire project. Mr Thompson recognised that the best results obtained so far are not good enough to ensure a commercially viable operation' (Exhibit 14, para. 2).

191. The claimants called Stephen Alan Zorn, an American consultant on mining finance and mining negotiations. Mr Zorn did not hold himself out as an expert on mining but rather as someone whose experience with governments and organisations had made him familiar with the economics of that industry. Some attack was made on Mr Zorn's expertise and on the material upon which he based his opinions, but bearing in mind the general nature of his evidence and the fact that he worked largely upon information given by Mr Thompson, I see no reason why it should not be accepted. In his own words, 'What I have attempted to do from the evidence that has been presented has been to take the numbers that were introduced in evidence and then make certain calculations from them which could only be used to indicate a range of possibilities' (transcript of proceedings, p. 501).

192. Mr Zorn took as a starting point Mr Thompson's evidence regarding the size of the ore body and the zinc, lead and silver content. He also took from Mr Thompson's evidence the possibility that roughly half the ore body will be mined by open cut methods over a period of 20 to 40 years and also to a possible production figure of 20 000 tonnes of ore a day. In summary his conclusions were that if half the ore body was mined over a period of 30 years at an even annual rate, the recovered metal content would be 165 000 tonnes of zinc and 58 500 tonnes of lead each year. If half were mined over a period of 20 years the figures would be 248 000 tonnes of zinc and 88 000 tonnes of lead a year. Given a production rate of 20 000 tonnes a day on a 7-day week the likely result is 380 000 tonnes of zinc and 150 000 tonnes of lead a year.

193. Mr Zorn then went on to consider the likely capital expenditure involved having regard to evidence given by Mr Thompson and other information available to Mr Zorn. He then looked very generally at operating costs (there being no direct evidence of this) in order ultimately to arrive at a discounted cash flow, his conclusion being that on the information available to him the discounted cash flow ratio of return before tax over a 30-year mining operation would be an annual return of 3 per cent, over 20 years 6 per cent and at a production rate of 20 000 tonnes a day 91/2 per cent. Other possibilities were considered as well. These figures he said fell short of the 15 per cent to 20 per cent after tax rates usually looked for by mining companies.

194. Now much of what Mr Zorn said was hypothetical but the intent of his evidence was I think to do little more than show that with present rates of recovery Mt Isa Mines cannot expect to launch a viable mining operation. And I do not think the

company would dissent from that proposition. In essence what it says by way of reply is that mining is a long-term high risk activity and that the company is confident that at some time in the future given the right market and price situation it will be able to go ahead. Clearly enough the future of the mine can be no more than a matter of speculation, particularly since no attempt was made by the company to counter Mr Zorn's assessment.

195. If at some future date the company should decide to proceed to develop the mine and should find the need to have access through land held by a Land Trust there are perhaps two ways in which the problem can be met. One is by negotiation and agreement with the Land Trust to create an easement of way or in some other form to provide access. The other may be through the provisions of the Mining Ordinance.

196. During the hearing I was referred to s.45 of that Ordinance which authorises the Administrator to grant a mineral lease of Crown land for mining and other purposes including '(b) for cutting and constructing thereon, water races, drains, dams, tramways and roads, to be used in connection with such mining'. The extent of this power is debatable, I simply draw attention to it. But in any event s.45 is concerned with Crown land, which has its own special meaning under the Ordinance, a meaning which is wide enough to include a pastoral lease but not land alienated in fee simple.

197. Section 54B of the Mining Ordinance permits an application to be made for a grant of a special mineral lease 'of Crown land, of Aboriginal land or of land that is, or is included in, and Aboriginal reserve . . .' The reference to Aboriginal land was introduced in 1977 by an amendment which defined Aboriginal land to have the same meaning it has under the Land Rights Act. This provision must be read subject to s.40 of the Land Rights Act.

Ronald John Kerr

198. Mr Kerr's situation is mentioned in paragraph 132 of this report. In the last ten years he has been trying without success to get a lease or grazing licence at the southern end of the common. There is not much to suggest he is even likely to succceed. A grant of either Area A or Area B will mean that Mr Kerr will have to deal with a Land Trust under s.19(4) of the Land Rights Act. There is no reason to conclude that this will be to his detriment.

Max Herbert Weise

199. Mr Weise holds Occupation Licence No. 1004 on Law Island. See paragraph 134 of this report. He has been seeking an occupation licence on that island to cultivate oysters. He fishes commercially, mainly around Centre Island. A grant to a Land Trust of Vanderlin Island or West Island will not interfere with his fishing activities. A grant of Vanderlin Island taking in Law Island will mean that he must negotiate with a Land Trust under s.19(4) of the Act. This will be to his detriment if the Land Trust refuses to negotiate or demands unreasonable terms.

Leslie Kevin James and Arthur James

200. Mr Arthur James has a special purposes lease which will not be affected by any grant of land under the Act. Otherwise this family has nothing by way of occupation

licence or grazing licence and will not suffer any detriment by reason of any grant that may be made.

The Johnston Family

201. The situation of this family is mentioned in paragraphs 131 and 135 of this report. They have lived on Vanderlin Island for many years. They have built homes and a slipway on the lease and fencing and yards on the licences. They run about 900 head of cattle. Mr Stephen Johnston holds a commercial fisherman's licence and earns money from fishing.

202. If the special purposes lease or grazing licences are determined the family will get compensation for all improvements made with permission. But the real detriment they will suffer is if they are asked to quit Vanderlin Island in the event of a grant being made to a Land Trust. The traditional owners have expressed a willingness for the Johnstons to remain on the island; the family's concern is that they may be asked to pay higher rents than they are now paying. Section 23(3) of the Land Rights Act gives them some protection but not much.

Northern Territory Commercial Fishermen's Association

203. The Association consists mainly of fishermen holding net and line licences issued under the Fisheries Ordinance. It has thirty-six financial members. Mr G. McMahon, its chairman, described the system of fishing for barramundi and the need to have access to the area between high and low water marks. Barramundi cannot be caught in commercial quantities below low water mark. The main areas of fishing are the river estuaries, their associated coastal tidal mud flats and islands.

204. At the present time there is not a great deal of commercial fishing around the Sir Edward Pellew Group but to the extent that it takes place and continues to do so detriment will be suffered by commercial fishermen if they do not have access to the bed of the sea between high water mark and low water mark.

205. It would be remiss of me not to mention the help given by Mr McMahon through his continued attendance (at his own cost) during the hearing and the role lie played in presenting evidence and cross-examining witnesses.

Northern Territory Fishing Industry Council

206. The Council is a branch of the Australian Fishing Industry Council and it has thirteen members, one of which is the Northern Territory Commercial Fishermen's Association. The members are concerned primarily but not exclusively with prawn fishing.

207. Through its president, Mr J.C. Hickman, who gave evidence, the Council emphasised that the fishing resource is a common resource, that if properly managed it is perpetual and that strict control is necessary to prevent the destruction of any fishing. The fear is that because prawns spawn at sea and minute larvae are washed into the tidal reaches of the coastal rivers to grow up and come back to sea and because many species of commercial fin fish spawn in the rivers and mangrove swamps. uncontrolled fishing by Aboriginals (or others) will seriously harm the industry. The

Council is concerned too at the impact on the fishing industry and in particular the conservation of fishing resources if control is split between those statutory and governmental bodies to which its members are subject and Aboriginal owners in certain areas.

208. Much of this concern is I think unjustified. Ownership of land under the Act does not include water. The controls imposed by the Fisheries Ordinance are of general application. The reciprocal legislation envisaged by s.73 of the Act must provide for the right of Aboriginals to enter and use the resources of the waters of the sea within 2 kilometres of Aboriginal land but only 'in accordance with Aboriginal tradition' (s.73(1) para. (d)). Certainly there was no evidence that the activities of Aboriginals were destructive of the fishing resource.

209. There are prawning grounds around the Sir Edward Pellew Group and according to Mr Hickman they are likely to be worked more in the future. Although there is a trend towards larger 'freezer' trawlers and away from 'wet' boats that lack freezing facilities there is a need for land bases to process the catch and to service the boats. But unless there is a grant under the Act of the entire Sir Edward Pellew Group there should be enough land to meet that need. Even then it would be open to processor and Land Trust to negotiate for such a facility. The evidence did not suggest that a grant to a Land Trust of Vanderlin Island and West Island would be to the detriment of fishing interests.

M.G. Kailis Gulf Fisheries Pty Ltd

210. This company recently sought a special purposes lease of part of North Island to establish a receival depot for prawns and other fish caught in the Gulf of Carpentaria. The company wishes to fish in the Sir Edward Pellew Group where in its words 'there is a stable, although as yet unproved, tiger fishery' (Exhibit 75, p. 1). If granted such a lease it would use Aboriginal labour and would 'introduce the Aboriginals progressively to the island in a controlled situation and into the industry' (Exhibit 75, P. 2). I have no reason to doubt that the company has a good history of working with Aboriginal people in Groote Eylandt.

211. The question of detriment is very tenuous indeed. The most that can be said is that while North Island remains Crown land there is some prospect of the company obtaining a special purposes lease but the prospect may be less if the land is in Aboriginal ownership. Whether or not that will be so can only be a matter of speculation; with the company's past record it may well be that Aboriginal owners would welcome the opportunity to enter into some sort of commercial agreement.

The Northern Territory Cattle Producers Council

212. The Council comprises major pastoral industry organisations in the Territory, the Northern Territory Pastoral Lessees Association, the Centralian Pastoralists Association and the Cattlemen's Association of North Australia. Its submission emphasised that the cattle industry is the largest land-using industry in the Northern Territory with pastoral leases, pastoral homestead leases and grazing licences occupying 58% of the land. For some years the industry has been suffering from a serious depression, specially marked in the Territory and not least in the Borroloola area where properties are generally undeveloped.

213. In the view of the Council the future of the cattle industry in the area is closely linked with the successful development of a major mining enterprise which will bring in its train port facilities, thus enabling live cattle to be exported with shorter hauls and possibly leading to the establishment of an abattoir. While this may well be true it is stretching a long bow to say that the granting of land to a Land Trust may in a particular case preclude or interfere with the establishment of a port by a mining company and that therefore acceding to these claims will be a detriment to the pastoral industry. I have already dealt with the matter of port facilities and access to a port when considering the position of Mt Isa Mines.

214. There is no reason why a grant of Areas B, C or H should interfere with access by pastoralists to the township of Borroloola. The situation with roads is set out in paragraphs 161 to 166.

215. Mr W.E.L. de Vos, the secretary of the Council, referred in evidence to the Stock Diseases Ordinance 1954 with something of a suggestion that this might be more difficult to administer in the case of Aboriginal land with consequent problems for the pastoral industry as a whole. There was however no evidence to support such a suggestion.

Land Usage

216. I propose now to look at the effect which acceding to this claim either in whole or in part would have on the existing or proposed patterns of land usage in the region. To some extent this has been done already when considering the question of detriment but what is required now is a broader, long-term view not related to particular individuals or organisations.

217. Borroloola was surveyed as a townsite in 1885, it having been used earlier as a staging point for stock moving overland. The notion of a railway and port outlet in the McArthur River area has been canvassed over a number of years, certainly as early as the Royal Commission Report on Northern Territory Railways in 1914. The precise location of the port has varied over the years as different investigators have reported. Although Mt Isa Mines' discovery of minerals in 1955 and the exploratory activities that have taken place since have focused more attention on the concept of a railway and port, the potential use of land in the area for these purposes has been envisaged since early in the century. The Department of the Northern Territory seems to support Centre Island as the most, likely site for a port.

Tenures

218. As already mentioned there is a special purposes lease on Vanderlin Island as well as two grazing licences and there is an occupation licence on Law Island.

219. In 1968 Mt Isa Mines applied for an authority to prospect over part of the islands including Centre Island to investigate the feasibility of salt production from brines and also it is said to protect its interest in the proposed port site. This was approved and renewed on several occasions until January 1972. In December 1971 the

company sought to change the nature of its interest by applying for an exploration licence, but this application was withdrawn in May 1973 when pursuant to s.147A of the Mining Ordinance a reserve was proclaimed with the aim of preventing any occupation of the area under the Mining Ordinance until a decision had been made on the development of the proposed port site. That reserve, No. 361, is still in force. It takes in the southern half of North Island, Centre Island, South West Island, the South-eastern portion of West Island and the northern section of Manangoora station.

220. There are no current mining tenures in the Sir Edward Pellew Group. In May 1976 Dampier Mining Company Ltd lodged an application for an exploration licence (E.L. 1300) over the islands. To the extent that the land involved in the application falls within Reserve No. 361 it cannot be granted and to the extent that it falls outside no decision has yet been taken pending the outcome of these proceedings.

221. Much of the land around Borroloola was held under grazing licence for many years until 1960. With a better outlook in the cattle industry a number of blocks were designed and advertised for lease including Bing Bong, Tawallah, Spring Creek and Manangoora. The 400 square miles surrounding Borroloola were excluded from leasing because in the view of the Department of the Northern Territory the land might be required to provide facilities for holding and shipping cattle. The Borroloola town common covers about 132 000 hectares and takes in all the vacant Crown land outside the declared boundaries of the town of Borroloola, excluding Special Purposes Lease No. 207 at Ryan's Bend and part of Special Purposes Lease No. 395, the rest of which is within the town boundary. There are no mining tenures involved although there exists an application by Carpentaria Exploration Company Pty Ltd for Exploration Licence No. 1151 which takes in roughly the western half of the common. That too is in abeyance until these claims have been determined.

222. It can be seen then that a grant of Centre Island (Area A) or South West Island (Areas F and G) to a Land Trust will affect the proposals for a port on Horn Islet should those proposals ever proceed. A grant of the common or at any rate Areas B or H will affect the corridor envisaged by the Department of the Northern Territory not only for Mt Isa Mines but for the shipping of cattle and the general development of the area. That aspect of land usage can readily be met by reserving a strip perhaps a kilometre wide. It may also be necessary in terms of proposed usage to retain some land for holding and loading yards for cattle. See Exhibit 29, pp. 27-8.

223. The land within the proposed Robinson River reserve presents none of these problems. This land was withheld from leasing when in 1961 there was a conversion of the leasehold interest in Seven Emu station under s.48 of the Crown Lands Ordinance. In the early 1960s an attempt was made to establish a settlement for Aboriginals on this land, and indeed the whole Aboriginal population of Borroloola as it then was, some 150 people, moved to the Robinson River. The settlement was of very short duration and the people returned to Borroloola. Since then despite some attempts to re-establish a settlement nothing has eventuated. The Department of the Northern Territory has no immediate plans for this land except to provide an access esplanade along the bank of the Robinson River.

224. Exploration Licence No. 1285 granted to Dampier Mining Company Ltd in September 1976 included the northern portion of the proposed reserve but for the purposes of any renewal of that licence the company has agreed that the reserve be excluded.

225. It can fairly be said that a grant of the land within the proposed reserve would have no effect on the existing or proposed patterns of land usage in the region.

Fishing

226. In considering the interests of particular individuals and companies I have discussed the implications of a land grant for the fishing industry. To put the matter in some perspective, barramundi caught in the McArthur River system constitute less than 10 per cent of the Territory catch. As to prawns no specific figures are available for the Sir Edward Pellew Group as available information relates to the area between Groote Eylandt and the Queensland border. Figures given were as follows: 1974, 1375 tonnes; 1975, 78 tonnes; 1976, 559 tonnes (Exhibit 29, p. 21). It was pointed out that this does not necessarily reflect a decrease in the overall catch potential as the industry relates to Banana, Tiger and Endeavour prawns, with the abundance of the former fluctuating markedly.

227. It is reasonable to regard the fishing that takes place in and around the islands as part of land usage, particularly as so much relates to fishing the mud flats and estuarines and exposed localities adjacent to the open sea. No doubt the fishing industry would benefit from the development of a port on Horn Islet or indeed anywhere in the islands, but certainly at the moment the connection is a tenuous one. The real effect such a grant would have on commercial fishing, seen as an aspect of land usage, is in respect to the area between the high water mark and low water mark with the implications this would have for barramundi fishermen.

Roads and Stock Routes

228. Those roads mentioned earlier in this report as public roads seem to be sufficient to meet the requirements of the area. There was no suggestion that they are not. There are in existence two stock routes, one running from the east of the common through Manangoora and Greenbank to Robinson River Station. Another runs from Anthony's Lagoon through McArthur River Station and Tawallah stopping short just south of the southern boundary of the common. It was suggested by the Department of the Northern Territory that some link between these stock routes and possibly further stock routes to the port is desirable. In this sense it is reasonable to see a grant of Area B, C or H as relating to and affecting land usage.

Navigational Aids

229. If a port is developed on Horn Islet navigational aids will be necessary. In the opinion of Mr A. Borkus, the regional marine navigational aids engineer for the Department of Transport, the most suitable place for a lighthouse is on Cape Vanderlin at the north-western tip of Vanderlin Island. His second preference is North Hill on North Island and as a third choice Red Bluff on the eastern tip of North Island. In addition short-range navigational aids, in the form of light beacons, will be required

within Schofield Channel, the approach to the port, one on David Island and the other on Brown Islet.

Wildlife

230. A submission was made by the Wildlife Section of the Northern Territory Department of Resources and Health. Mr M.A. Elliott, who gave evidence, holds the position of Chief Inspector of Wildlife under the Wildlife Conservation and Control Ordinance. The Department's submission dealt with the need to try to ensure that offshore islands and island wildlife are protected and spoke of the species of mammals, birds, frogs and reptiles to be found on the Sir Edward Pellew Group.

231. The islands have, in the words of the submission, 'diverse and abundant wildlife populations with characteristics quite distinctive from the adjacent mainland' (Exhibit 67, p. 6). I accept this although it is unfortunate that the Department itself has done very little work in the area; most of its comments and recommendations are based upon a wildlife survey of the islands carried out in 1966-67 by CSIRO. As a result of that survey the Northern Territory Wildlife Advisory Council recommended to the Northern Territory Administrator in 1972 that all vacant Crown land in the Pellew Group be declared a wildlife sanctuary. The recommendation of CSIRO, which I take to be endorsed by the Department, was that all the islands, with the exception of Vanderlin, South West and Centre Islands, be proclaimed as high security fauna and flora reserves with restricted right of entry. It is not clear to me whether the exception of those three islands was because of the lower contribution they make to the wildlife scene or whether in fact it is a practical recognition of other uses to which they may be put.

LEGAL REPRESENTATIVES
Mr E.A.H. Laurie, Q.C., and Mr G. Eames for the claimants
Mr J. Clarke, Q.C., with Mr J. Mahon and Mr R. Dunstan for the Commonwealth Government and the Department of the Chief Secretary of the Northern Territory
Mr C.E.K. Hampson, Q.C., and Mr J. Macpherson for Mt Isa Mines Limited
Mr R.J. Withnall for the Northern Territory Cattle Producers Council and the Northern Territory Fishing Industry Council and for Mr L.K. James and Mr A. James
Mr J. McCormack for M.G. Kailis Gulf Fisheries Pty Ltd
Ms J. Lee-Gray for Leonard Retter, George Pollard, Judith Doyle and Borroloola Inn Pty Ltd

WITNESSES
Mr J.T. Avery
Mr A. Bishaw
Mr A. Borkus
Mr H. Brennan, A.O.
Mr J.F. Chudleigh
Mr J.G. Colero
Dr H.C. Coombs
Mr P.W.R. Crohn
Mr W.E.L. de Vos
Mr M.A. Elliott
Mr Leo Finlay
Mrs C.E. Furby
Mr E.S. Furby
Mr W.J. Gray
Mr M. Harvey
Mr J.C. Hickman
Mr L.K. James
Mr S.C. Johnston
Mr R.J. Kerr
Mr G.W. Kirby
Mr G. Lansen
Mr D. McDinny
Mrs E. McDinny
Mr G. McMahon
Mr D. McLaughlin
Mr D. Miller
Mr M.A. Nicholson
Mr V.T. O'Brien
Old Davey
Old Echo
Mr L.N. Penhall
Piro
Mr B. Pluto
Dr M.O. Reay
Mr L.M. Retter
Mr B.L. Rideout
Mr D. Rory
Mr T. Simon
Mr R.J. Slack-Smith
Mr N.H. Thompson
Mr M.H. Weise
Mr S.A. Zorn

LIST OF EXHIBITS

No. Item

1. Claim book (Parts A-E); Part F; errata sheets. Key to diagrams. RESTRICTED: Part E.
2. Map - showing named Aboriginal localities, plastic transparency.
3. Map - overlay of clan areas to be superimposed over Exhibit 2.
4. Map - traditional details of proposed Aboriginal Reserve at Robinson River.
5. Map - named Aboriginal localities - used at Northern Land Council meeting at Borroloola on 6 and 7 September 1977.
6. Map - showing boundaries of the town common and proposed Robinson River reserve used at Borroloola meeting 6 and 7 September 1977.
7. Map - Robinson River reserve used at Borroloola meeting 6 and 7 September 1977.
8. Map - town common area with clan areas marked used at Borroloola meeting 6 and 7 September 1977.
9. Map - explorers routes.
10. Map - composite topographic map of claims and interests over claims.
11. Map - outcamps.
12. Photocopy of Police Journal, extracts of which appear in Exhibit 1.
13. Ten videotapes numbers 1-10 of meeting at Borroloola 6 and 7 September 1977.
14. Statement by Norman Harold Thompson relating to the Engineering Aspects of the McArthur River zinc-lead deposits.
15. Plan with photographs attached.
16. Map - McArthur River area showing Aboriginal land claims.
17. Map - McArthur River project, typical cross-sections of proposed road/rail services reserve.
18. Agreement made on 5 January 1977 between Mt Isa Mines Limited and the Commonwealth of Australia. RESTRICTED.
19. Report by Mr McLaughlin to Joint Select Committee on Aboriginal Land Rights in the Northern Territory.
20. Map - showing sites in and around the area of the mine site.

20A. Transparent overlay of the model mine area related to Exhibit 20.

21. Receipts for: 1. $50 No. 451411 and 2. $4.80 No. 451412 in the name of A.B. Cant and A.K. James.
22. Occupation Licence No. 1004 from Department of the Northern Territory issued to Mr Weise (original returned to Mr Weise - photocopy retained).
23. Letter from Department of the Northern Territory to Mr Weise dated 15 December 1976 (photocopy).
24. Letter from Department of the Northern Territory to Mr Weise dated 5 February 1974 concerning oyster leases (photocopy).
25. Letter from Mr Weise to Mr V. T. O'Brien dated 12 November 1974.
26. Receipt and two letters from Department of the Northern Territory, one undated and one dated 5 February 1974 to Mr Weise.
27. Letter from Department of the Northern Territory to Mr Weise dated 9 July 1976 concerning oyster culture operations.

No. Item

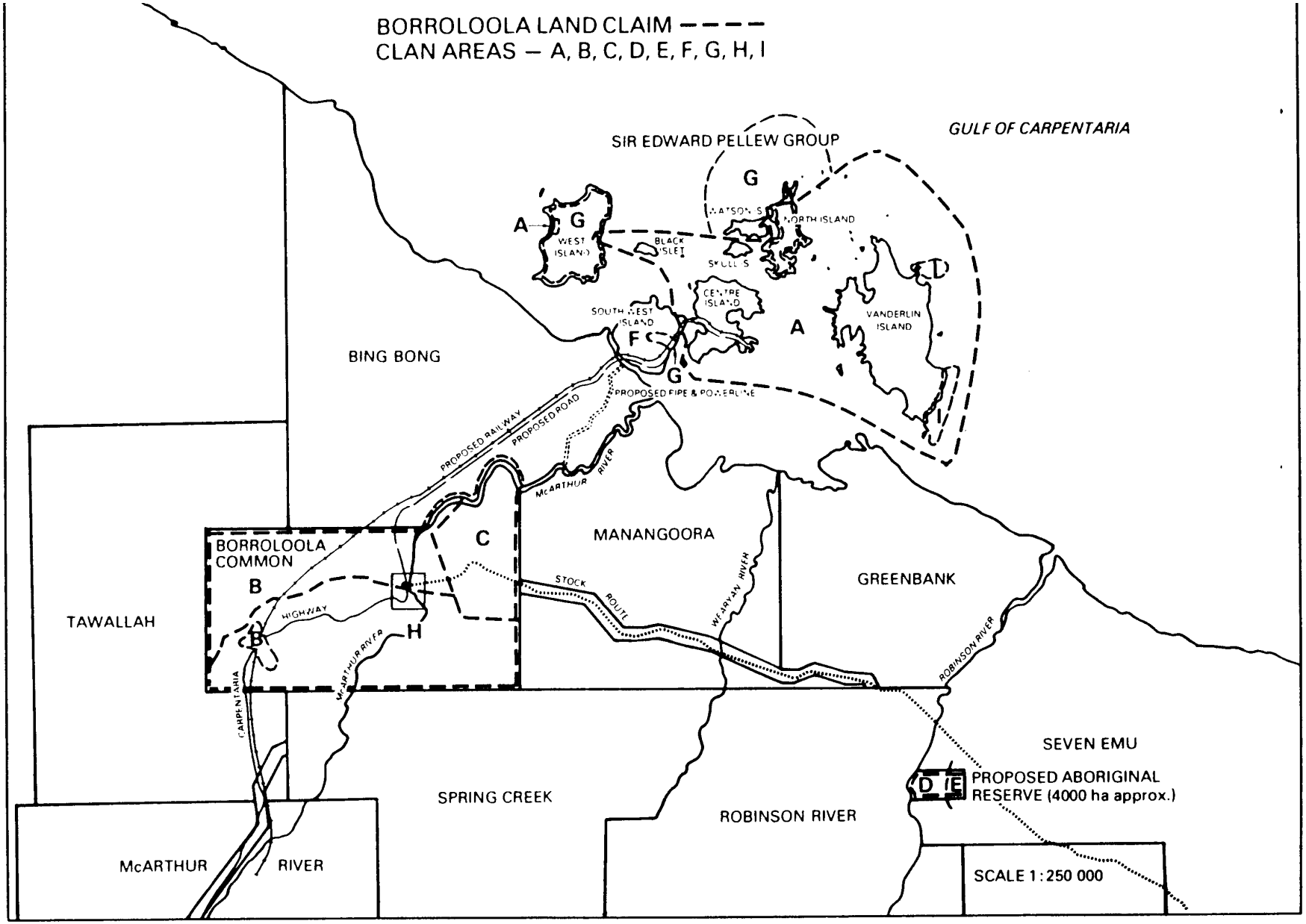
28. Map-showing data gathered on Clans D and E via Aerial Survey of 23 October 1977.
29. Statement by Department of Northern Territory relating to land use.
30A. Plan number 37 of the Town of Borroloola.
30B. Plan number 38 of the Town of Borroloola.
30C. Composite plan of Town of Borroloola.
31. Copy of the South Australian Government Gazette dated 10 September 1885.
32. Copy of Government Gazette of 17 August 1972 showing 'Proclamation'.
33. Plan showing the boundaries of the Town of Borroloola.
34. Extract from the Royal Commission Report on N.T. Railways and Ports in 1914.
35. Extract from the Report of Payne-Fletcher Inquiry in 1935.
36. Map - tenure plan showing areas of land claimed.
37. Proclamation of March - April 1963. Corrigendum re pastoral lands open for leasing in terms of Crown Lands Ordinance.
38. Grazing Licence No. 1857 in name of Stephen Colester Johnston for Vanderlin Island. Grazing Licence No. 1956 in names of S.C., J., A., D.J. and W.G. Johnston for Vanderlin Island.
39. Report of Senior Pastoral Inspector on the Gulf Area, and accompanying letter from Mr Egan dated 5 May 196 1.
40. Three memoranda from Mr Richardson, Mr O'Brien and Dr Letts.
41. Map - of Borroloola area showing roads.
42. Special Purposes Lease No. 108 granted to S.C., W.G., A., J. and D.J. Johnston.
43. Special Purposes Lease No. 395 granted to the Borroloola Amateur Race Club Incorporated.
44. Special Purposes Lease No. 207 granted to A.B. Cant.
45. Northern Territory Government Gazette No. 20 of 17 May 1973 at p. 170.
46. Bundle of correspondence between the Government and Mt Isa Mines from 1 June 1966 to 14 May 1973.
47. Minutes of evidence relating to proposed construction of Beef Roads Western Barkly Tablelands, N.T., to Parliamentary Standing Committee on Public Works.
48. Bundle of correspondence between Lands Department and Mr Cant and Mr James. Grazing Licence No. 2012 of A.B. Cant.
49A. McArthur River Project description of areas of mining tenements.
49B. McArthur River Project maps.
49C. Map - lease map locality plan.
50. Extract from Northern Territory Government Gazette 45/77, p. 52, reservation from occupation No. 581.
51. Letters from:
    1. Mimets Development Pty Ltd to Director of Mines dated 9 August 1974
    2. Mimets Development Pty Ltd dated 17 September 1974.
52. Statement by Mr W. Gray - Department of Aboriginal Affairs.

No. Item

53. Letter from First Assistant Secretary (Lands and Rural Development) to the President, Rumbaria Malandari Housing Association, dated 7 September 1977.
54. Part of a series of National Topographic Maps showing Sir Edward Pellew Islands prepared by the Division of National Mapping.
55. Bundle of correspondence relating to Aboriginal sites in the Borroloola area.
56. Letter from T. Festing dated 29 October 1975 to Director, Department of Aboriginal Affairs.
57. Correspondence:
    1. Letter dated 23 November 1944 from Superintendent of Police to Administrator.
    2. Report - W.E. Harney to Director of Native Affairs dated 6 November 1944.
    3. Report - W.E. Harney to Director of Native Affairs dated 7 November 1944.
58. 1. Report on 'patrol of western stations' dated 29 June 1945, W.E. Harney.
    2. Report on Aboriginal Nelson and Gin Kathleen dated 7 April 1944, S. J. Bowie.
    3. Letter dated 21 April 1944 to Director, Native Affairs.
    4. Report dated 11 April 1944, H. C. Giese to Department of Native Affairs.
    5. Report dated 11 January 1956, H. C. Giese to Chief Welfare Officer.
    6. Report - E.C. Evans to Director of Welfare re alternative site for Borroloola Settlement.
    7. Report - W. Hamilton to Director of Welfare re proposed new settlement site-Robinson River.
    8. Report - R.T. Smith to A/Director of Lands dated 19 August 1959-re proposed Robinson River reserve.
    9. Report dated 24 August 1959-H. C. Giese to Administrator re Settlement site in Borroloola.
    10. Extract from monthly report July-August 1960 Robinson River-J. T. Festing.
    11. Letter dated 30 May 196 1 - H.C. Giese to the Administrator.
    12. Various correspondence.
59. Map-showing barramundi statistical grids.
60. Extracts from Professor Cope's report on fishing.
61. Report dated 31 October 1977 of Mr Gray and Mr Slack-Smith, and map of operations area (prawn fishing).
62. Letter dated 28 October 1977 re location of stock routes from Surveyor General's Pastoral Lease No. 1899.
63. Application by M.G. Kailis Gulf Fisheries Pty Ltd for a lease of North Island dated 6 October 1977.
64. Map contained in report of survey of McArthur River prepared by Australian Hydrographic Services.
65. Document - statement on roads dated 13 October 1977 for Borroloola area.

No. Item

66. Letter dated 4 November 1977 from Mr Slack-Smith with information requested by Mr Eames regarding Mr Weise's fishing returns. RESTRICTED.
67. Statement by Wildlife Section.
68. Paradice Report of 1923-24.
69. Submission by Northern Territory Fishing Industry Council.
70. Map - Admiralty chart Cape Vanderlin to Cape Grey with principal prawning grounds in the area of the Sir Edward Pellew Group of Islands.
71. Extract from Professor Cope's report - summary of his conclusions.
72. Article by Dr McKnight-Maccassans.
73. Submission by Mr G. McMahon on behalf of the Northern Territory Commercial Fishermen's Association.
74. Northern Territory Cattle Producers Council's submission presented by Mr de Vos.
75. Written submission by M. G. Kailis Gulf Fisheries Pty Ltd dated 7 October 1977.
76. Two letters:
    1. Mr Nicholson to Mr Reed dated 7 November 1977.
    2. Mr Reed to the Aboriginal Land Commissioner date-stamped 22 November 1977.
77. Statement by Mark Anthony Nicholson showing the distribution of advertising of the application and material relating to the Borroloola Land Claim Hearing.
78. Affidavit of Dehne McLaughlin.
79. Affidavit of John Timothy Avery.
80. Letter from the Aboriginal Land Commissioner to Dr M. Reay dated 10 November 1977 and Dr Reay's Report which is date-stamped 7 December 1977.
81. Submission on behalf of the Commonwealth of Australia.
82. 1. Final address by Mt Isa Mines Limited.
    2. Submission by Mt Isa Mines Limited.
83. Extracts from transcript of proceedings relating to land use and foraging.
84. Extracts from transcript of proceedings relating to visits to islands.
85. Extracts from transcript of proceedings relating to outstations.
86. Extracts from transcript of proceedings relating to strength of traditional attachments.
87. Extracts from transcript of proceedings relating to ceremonies.
88. Document headed 'List of Claimants'.



(As originally shown on the transparency and map accompanying the claim)