

CITATION: *Minister for Lands, Planning and Environment v Huddleston and others LMT 12*

PARTIES: MINISTER FOR LANDS, PLANNING AND ENVIRONMENT

v

PADDY HUDDLESTON AND OTHERS

TITLE OF COURT: Lands and Mining Tribunal

JURISDICTION: Lands and Mining Tribunal Act

FILE NO(s): LMT 12-2000-LA(N) (20015537)

DELIVERED ON: 18 February 2003

DELIVERED AT: Darwin

HEARING DATE(s): Not applicable

RECOMMENDATION OF: David Loadman

CATCHWORDS:

COMPULSORY ACQUISITION OF LAND; LAND SUBJECT TO REGISTERED NATIVE TITLE CLAIM; RECOMMENDATION TO MINISTER

Native Title Act 1993 (Cth), s26, s253

Lands Acquisition Act 1978 (NT), s38AA

Lands and Mining Tribunal Act 1998 (NT), s5

REPRESENTATION:

Counsel:

Applicant: Sinclair Whitbourne

Objector: Phillipa Hetheron

Solicitors:

Applicant: Ward Keller

Objectors: Northern Land Council

Recommended category classification: B

Recommended ID number: NT LMT 12

Number of paragraphs: 217

IN THE LANDS AND MINING TRIBUNAL
AT DARWIN IN THE NORTHERN
TERRITORY OF AUSTRALIA

No. LMT12-2000-LA(N) (20015537)

BETWEEN:

**MINISTER FOR LANDS, PLANNING AND
ENVIRONMENT**
Applicant

AND:

**PADDY HUDDLESTON,
GEORGE HUDDLESTON (SENIOR), GEORGE
HUDDLESTON (JUNIOR), NELLIE
HUDDLESTON,
DAPHNE HUDDLESTON AND THERESA
BANDISON ON BEHALF OF THE WAGIMAN
PEOPLE**
Objector

DECISION

(Delivered 7 February 2003)

David LOADMAN, CHAIRMAN:

RELEVANT HISTORY

1. Various antecedent steps were necessarily taken before the matter was referred to the Tribunal, including:
 - (A) Notice of Proposed Acquisition of Land dated 6 September 1999
 - (B) Notice of Proposal dated 24 December 1999
 - (C) Notice of Objection dated 23 December 1999
2. On 20 September 2000 the Tribunal was formally seized of the matter. The Tribunal made formal orders on 26 October 2000 for filing of material by the parties on or before 21 December 2000. On the application of one or other or both the parties, this date was extended from time to time to allow further affidavit material to be filed. Various affidavits were filed on behalf of the Applicant and Respondent pursuant to an agreed timetable.
3. On 22 November 2002 the hearing dates for 5 days commencing 16 December 2002 were vacated and by consent of the parties an order

made that the parties were to file submissions and that the Tribunal was to formulate its decision on the material filed with the Tribunal, each party waiving any right to cross examine or make oral submissions as a consequence and liberty to apply generally to both parties.

4. The Respondent filed Submissions on Jurisdiction on 2 December 2002.
5. On 12 December 2002 the parties filed Minutes of Consent and an order was made as follows: (a) Applicant to file and serve any written submissions by 16 December 2002; (b) Objectors to file and serve any further submissions by 13 January 2003.
6. The Applicant filed further submissions on 17 December 2002 and the Respondent filed further submissions on 16 January 2003, with consent from the Applicant for late filing.

PRELIMINARY MATTERS

7. By letter dated 13 September 2000 received by the Tribunal on 20 September 2000, the Minister referred to the Tribunal the issue of the compulsory acquisition of:-

All interests, including native title rights and interests (if any), in all that parcel of land in the Town of Pine Creek in the Northern Territory of Australia containing an area of 8 hectares more or less and bounded by lines depicted on the attached locality plan”.

A more complete description of the area is as follows:

Commencing at the most southern corner of Lot 293 Town of Pine Creek; thence southeasterly by the southeasterly prolongation of a southwestern boundary of the said Lot and across a road 20.12 metres wide to the southeastern boundary of that road; thence southeasterly to the most western corner of Lot 181; thence northeasterly and southeasterly by the northwestern and the northeastern boundary of the said Lot to its most eastern corner; thence northeasterly by the northeasterly prolongation of the southeastern boundary of Lot 181 to the southwestern boundary. of the Stuart Highway; thence generally northwesterly by southwestern boundaries of the said Highway and across a road 20.12 metres wide to an eastern corner of Lot 293; thence generally southwesterly, northwesterly and southwesterly by southeastern, a southwestern and a southeastern boundary of the said Lot to the point of commencement

("the land"). Such reference to the Lands and Mining Tribunal, which in terms of section 4(1) of the *Lands Acquisition Act 1998* ("LAA") is the Tribunal to which the matter has to be referred.

8. From the Notice of Proposal dated 24 December 1999, the manner in which the Territory proposes to deal with the land if it is acquired is as follows:

Consolidation with Lot 293 Town of Pine Creek and grant of an Estate in Fee Simple, under the provisions of the Crown Lands Act, to Mr Edward AhToy or his nominee.

9. To the Notice of Objection dated 23 December 1999, Attachment A reads:

1. *All of the land proposed to be acquired is subject to an application ('the Application') for determination of native title filed in the Federal Court on 23 December 1999, and is pending registration by the National Native Title Tribunal.*

2. *The native title holders are, traditionally, the owners of the land and waters subject to the Application ('the application area'). The native title rights and interests of the native title holders are set out in the Application. The rights and interests may be summarised as follows:*

- (a) to possess, occupy, use and enjoy the application area to the exclusion of all others;*
- (b) to speak for and to make decisions about the use and enjoyment of the application area;*
- (c) to reside upon and otherwise have access to and within the application area;*
- (d) to control the access of others to the application area;*
- (e) to use, enjoy and manage the resources of the application area;*
- (f) to control the use and enjoyment of others of the resources of the application area;*
- (g) to share, exchange and/or trade resources derived on and from the application area,*
- (h) to maintain and protect places of importance under traditional laws, customs and practices in the application area;*
- (i) to maintain, protect, prevent the misuse of and transmit to others their cultural knowledge, customs and practices associated with the application area;*
- (j) to determine and regulate membership of and recruitment to, a landholding group.*

3. *The native title holders object to the acquisition and proposed development of the land included in the notice of proposal on the following grounds:*

- (a) the acquisition will extinguish all native title rights and interests in the land proposed to be acquired;*
- (b) native title holders will no longer be able to possess, occupy, use and enjoy the land in the exercise of their native title rights and interests;*
- (c) the proposed development will or is likely to interfere with or otherwise affect:*

- (i) the freedom of access by any of the native title holders to the land concerned or adjacent land and their freedom to carry out activities of cultural significance on or adjacent to the land in accordance with their traditions;*

(ii) *sacred sites on or adjacent to the land and .Dreamings which pass through or are adjacent to the land; and*

(iii) *prevent native title holders from:*

(A) *protecting and maintaining sites on or adjacent to the land;*

(B) *caring for the land in accordance with their spiritual obligations;*

(C) *protecting the land from harm by observing and engaging in their customs, laws, practices and usages in relation to the land;*

(D) *visiting and camping special or exclusive places; and*

(E) *maintaining and passing on their spiritual knowledge of the land and retaining their knowledge of the connection. of individuals or groups to particular parts of the land.*

(d) *the proposed development will permanently alter the topography of the land and the spiritual, environmental and ecological character of the land and adjacent land.*

(e) *the acquisition and proposed development will or is likely to affect:*

(i) *the way of life, culture and traditions of the native title holders;*

(ii) *the development of the social, cultural and economic structures of the native title holders.*

(f) *fundamentally, the acquisition and proposed development will deny native title holders, .in the exercise of their native title rights and interests, the right to:*

(i) *manage, use or control the land;*

(ii) *use or develop the land or its resources (or their own social, cultural or economic purposes; and*

(iii) *control the access of, or use by, others of the land".*

10. Pursuant to an order by the Tribunal on 20 September 2001, it was inter alia ordered that the Objectors have leave to file and serve amended grounds of opposition in the same terms as those which were attached to the Form 4 filed in the Tribunal on 5 September 2001. That does not appear to have occurred, but for practical purposes the Tribunal will regard that as having been done and the amended grounds for opposing the application are in the following terms.

AMENDED GROUNDS FOR OPPOSING APPLICATION

The amended grounds on which the respondent opposes the application to start a proceeding are as follows:

1. *The Objector does not dispute that it is the Applicant's position that s.24MB(1) and s.24MD(1) of the Native Title Act 1993 ("the NTA") are the provisions of the NTA that form the basis of the Application.*

2. *The Objector does not dispute that it is the Applicant's position that sub-division P of Division 3, Part 2 of the NTA does not apply, but contends that that position is correct only if the proposed compulsory acquisition is or would otherwise be a valid compulsory acquisition.*

3. *The Objector makes no admission that the Applicant has complied with sections 36, 37 and 38 of the Lands Acquisition Act (NT) or any other provisions of that Act.*

4. *The proposed compulsory acquisition, being an acquisition of native title rights and interests in Crown land where there are no non-native title rights and interests in that land and being made for the purpose of granting a freehold interest in the land, would not have been made if the land was subject to freehold title and the proposed compulsory acquisition is therefore invalid by virtue of ss.9-10 of the Racial Discrimination Act 1975 (Cth).*

5. *The purpose of the proposed compulsory acquisition or a substantial purpose of the proposed compulsory acquisition is to extinguish native title rights and interests in the land and thus the proposed compulsory acquisition is not for a purpose permitted by the Lands Acquisition Act (NT).*

6. *The purpose of the proposed compulsory acquisition or a substantial purpose of the proposed compulsory acquisition is to confer private interests in the land and thus the proposed compulsory acquisition is not for a purpose permitted by the Lands Acquisition Act (NT).*

7. *The grounds for the Objector's objection to the proposed compulsory acquisition are otherwise set out in the objection dated 23 December 1999 lodged with the Minister by it in relation to this matter.*

Dated: 11 November 2000

Date of filing:

Date amended:

11. By virtue of section 5A LAA this intended acquisition invokes the application of LAA because the act is

in relation to an acquisition of an interest in land that comprises native title rights and interests -

(a) that is an act to which the consequences in section 24MD(6A) or (6B) of the Native Title Act apply....

12. Sections 24MD(6A) and (6B) NTA are part of Subdivision M of the Commonwealth *Native Title Act* ("NTA") which deals with acts that pass the freehold test.

13. Section 24MB NTA (freehold test) applies Subdivision M, NTA, to a "future act", which is not an act comprising the making, amendment or repeal of legislation and (relevantly) the act could be done if the native title holders held ordinary title to the land and there is Commonwealth, State or Territory legislation which in essence preserves the existence of sacred sites.

14. Section 233 NTA defines “future act” and provides relevantly that the section applies, in summary, if it is an act that takes place after 1 January 1994, it is not a past act and (apart from NTA) it validly affects native title to the land.

“Past act” is defined in section 228 of NTA and, for the purposes of this application, it is common ground the act in question is not a “past act”.

15. In Subdivision P, NTA, the “Right to Negotiate” provisions are set out in section 25 NTA.
16. Section 26 NTA specifies when the Right to Negotiate provisions apply.
17. By section 26(1)(c)(iii) NTA, the Right to Negotiate provisions apply to the compulsory acquisition of native title rights and interests unless, amongst other exclusions or exceptions) it is (2)(f) “an act that is the compulsory acquisition of native title rights and interests and interests that relate solely to land or waters wholly within a town or city” (see 251(C)),
18. Section 251C NTA defines “towns and cities” and, in relation to the Northern Territory, provides:

Areas in the Northern Territory –

Subject to subsection (4), a particular area in the Northern Territory is a town or city if, as at 23 December 1996, it was:

gazetted as a town (other than the town of Darwin, Hatches Creek, Brocks Creek, Burrundie or Urapunga) under subsection 95(1) of the *Crown Lands Act* of the Northern Territory; or

the area in the Schedule to the *Darwin Lands Acquisition Act* 1945 of the Commonwealth; or

within a municipality constituted under section 29 of the *Local Government Act* of the Northern Territory.

19. The proposal in this case relates to a proposed consolidation of the land with Lot 293 Town of Pine Creek and grant of an Estate in Fee Simple, under the Provisions of the *Crown Lands Act* to Mr Edward AhToy or his nominee.

20. In the Applicant's Form 2, it is asserted that section 251C(3)(a) NTA defines a particular area in the Northern Territory as a town or city if as at 23 December 1996 it was gazetted as a town (other than the town of Darwin, Hatches Creek, Brocks Creek, Burrundie or Urapunga) under Section 95(1) of the *Crown Lands Act* of the Northern Territory.
21. Attachment A to the Applicant's form 2 is a proclamation by the then Administrator of the Northern Territory of Australia, His Honour Eric Eugene Johnston, given on 15 September 1983 pursuant to section 111(1)(c) of the then *Crown Lands Act* of the Northern Territory and as published in the Northern Territory of Australia Government Gazette No G38 23 September 1983.
22. The Applicant asserts that the transitional provisions of the current *Crown Lands Act* of the Northern Territory ("CLA") as set out in section 108 of Part 9 CLA state, amongst other things, that Proclamations such as that set out in the attachment A to the said Form 2 shall continue in force as if made under the relevant corresponding provisions of CLA. In this case it is asserted that the relevant corresponding provisions will be section 95(1) CLA in its current form.
23. Attachment B to the Applicant's Form 2 is a map prepared by the Department of Lands, Planning and Environment identifying the town boundaries including the location of the land the subject of the proposed acquisition. The land it is asserted falls within the area described in the Proclamation at Attachment A to the said Form 2 and therefore sub-division P NTA does not apply.
24. The Objector in his initial grounds for opposing the application "*does not dispute the Applicant's position that s24MB(1) and s24MD(1) of the Native Title Act ("the NTA") are the provisions of the NTA that form the basis of the Application*" and in paragraph 2 "*does not dispute the Applicant's position that sub-division P of Division 3, Part 2 of the NTA does not apply*". In the amended grounds for opposing the application contends this

position pertains only if the proposed compulsory acquisition is or would otherwise be a valid compulsory acquisition.(Tribunal underlining)

25. Section 5 *Lands and Mining Tribunal Act* 1999 (“LMT”) provides for the Lands and Mining Tribunal (“the Tribunal”) to hear and make recommendations about objections to the acquisition of land under LAA which include objections by “registered native title claimants” amongst others “so far as it affects the registered native title rights and interests of the claimants...”.
26. “Registered native title claimant”, in terms of section 3(1) LMT, “has the meaning given in section 253 of the Native Title Act...”
27. Section 253 NTA provides that “registered native title claimant, in relation to land or waters, means a person or persons whose name or names appear in an entry on the Register of Native Title Claims as the Applicant in relation to a claim to hold native title in relation to the land or waters”.
28. “Registered native title rights and interests” as defined in section 3(1) LMT means –
 - (a) in relation to a registered native title claimant – the native title rights and interests of the claimant described in the relevant entry on the Register of Native Title Claims; and
 - (b) in relation to a registered native title body corporate – the native title rights and interests of the body corporate described in the relevant entry on the National Native Title Register established and maintained under Part 8 of the Native Title Act.
29. The power in section 5(1) LMT is expressed to be subject to subsection (2), which prohibits the Tribunal becoming seized of the matter, relevantly in this case, unless the parties have complied with sections 36, 37 and 38 LAA.
30. The above provisions (in broad compass) deal with compulsory consultation and mediation issues.

31. The Tribunal holds that it cannot deal with issues of compensation until or unless the Federal Court has ruled that a Native Title claim should be upheld.
32. The parameters of the Tribunal's powers in regard to objections are set out in Division 2, Part 3 LMT at sections 22 and 22A.
33. In terms of section 22, the Tribunal is empowered *inter alia* to make a recommendation under section 5(1)(a) LMT (which empowers the Tribunal to hear and make recommendations about objections to the acquisition of land including objections by registered native title claimants and registered native title bodies corporate to the acquisition so far as its affect the registered native title rights and interests of the claimants and bodies).
34. Section 22(1) LMT provides relevantly that the Tribunal may make a recommendation under section 5(1)(a) -
 - (a) **upholding an objection to the act so far as it affects registered native title rights and interests; or**
 - (b) **that contains conditions about the doing of the act that relate to registered native title rights and interests and that are to be complied with by any parties to the proceeding.**
35. Section 22A LMT empowers the Tribunal to dismiss an objection by virtue of subsection (2) on specified grounds.
36. Section 38AA LAA specifies the criteria, which must be considered by the Tribunal in making its recommendation. That section is in the following terms:-
 - (1) **In making a recommendation in relation to the acquisition of land, the Tribunal must take into account all matters that the Tribunal considers relevant.**
 - (2) **Where registered native title rights and interests will be or may be affected by the acquisition, the matters that the Tribunal must take into account under subsection (1) include -**
 - (a) **all objections in relation to the effect that the acquisition will have or is likely to have on registered native title rights and interests that were referred to the Tribunal and all submissions made to the Tribunal about those objections, which may include objections and submissions about those objections as to the effect of the acquisition on any of the following:**

- (i) the enjoyment by the native title claim group of those registered native title rights and interests;**
- (ii) the way of life, culture and traditions of the native title claim group;**
- (iii) the development of the social, cultural and economic structures of the native title claim group;**
- (iv) the freedom of access by the native title claim group to the land or waters concerned and their freedom to carry out rites, ceremonies or other activities of cultural significance on the land or waters in accordance with their traditions;**
- (v) any area or site, on the land or waters concerned, of particular significance to the native title claim group in accordance with their traditions;**
- (b) ways of minimising the impact of the acquisition on registered native title rights and interests, including in relation to access to the land the subject of the acquisition;**
- (c) the economic or other significance of the acquisition to the Territory and to the region in which the land the subject of the acquisition is located, including the Aboriginal peoples who live in that region; and**
- (d) the public interest in the acquisition.**

THE EVIDENCE

37. In support of the application the Applicant has caused to be filed and served an affidavit sworn by Beverley Joan Griffiths, Senior Project Officer with the Department of Lands, Planning & Environment, which affidavit was sworn 12 December 2000 (“Griffiths’ affidavit”), dealing with various formal matters. The allegations set out in paragraphs 4 to 9 deal with the various formal steps taken in pursuance of this application.
38. Despite the fact as asserted in paragraph 4 of Griffiths’ affidavit that there was then no registered native title claim, paragraph 10 of Griffiths’ affidavit sets out the fact that the relevant Notice of Proposal was faxed to the Objector’s representatives as requested.
39. Despite the absence at that time of a registered native title claim, in paragraphs 11 to 16 of Griffiths’ affidavit she sets out the various steps taken in relation to the formal service of the relevant Notice of Proposal in accordance with LAA.

40. In paragraph 17 of Griffiths' affidavit, she asserts that a relevant native title claim was duly accepted by NTT for registration on 21 January 2000. The fact of that being so is advice by way of an email from the National Native Title Tribunal which is annexed and marked BJJ17 to Griffiths' affidavit.
41. Subsequent to receipt of the above advice it is alleged in paragraph 18 of Griffiths' affidavit that invitation to consult pursuant to LAA was addressed to the registered native title claimants on 25 January 2000. She annexed and marked BJJ18 to her affidavit a true copy of the letter.
42. By inference, nothing by way of response was received by the Applicant and in paragraphs 19 and 20 of Griffiths' affidavit, the various formal advices necessary to bring this application to the Tribunal were dispatched and or embraced.
43. Also filed in support of the application, is an affidavit of Noreen Alma Blackley, the Manager, Property Purchasing, Land Administration with the Department of Lands, Planning and Environment, sworn 23 November 2000 ("Blackley's affidavit").
44. In paragraph 3 of Blackley's affidavit, a physical description of the land is set out which is amplified in paragraph 4.
45. In paragraphs 5 and 6 of Blackley's affidavit, it is asserted in summary that the land is intended to be vested in Fee Simple in one Ah Toy in exchange for part of Lot 293 Town of Pine Creek acquired from Mr Ah Toy in circumstances that are not dealt with, but relate to the railway corridor for the Darwin to Alice Springs train line. NAB1 attached to Blackley's affidavit is referred to as being indicative of the position outlined above. Specifically in paragraph 6 of Blackley's affidavit, the allegation is made that the land is unalienated Crown land. Such allegation is not put in issue and is therefore accepted as a fact proved to the satisfaction of the Tribunal.

46. It is asserted that the simple exchange of land represents a practical means of dealing with the need to acquire Mr Ah Toy's land for the purposes of the railway corridor.
47. There is some speculation recited in Blackley's affidavit that upon acquisition Mr Ah Toy "*would consider*" using the land for the purposes of commercial development. In the absence of any other positive indication as to what is intended that statement cannot be regarded as a basis for any serious consideration of any of the criteria set out in section 38 LAA.
48. In paragraph 8 of Blackley's affidavit, the Minister asserts that no native title exists. This Tribunal pays no attention to such a stated point of view nor can it, at law, do so.
49. In the Tribunal's finding, correctly, it is asserted that consequent upon any compulsory acquisition, by virtue of section 24MD(2)(C) NTA such compulsory acquisition will extinguish all registered native title rights and interests claimed. Further that pursuant to the same section, together with section 59 LAA, compulsory acquisition of the land will afford a right to compensation in respect of native title rights so extinguished.
50. In relation to the "*native title rights and interests which may exist*" there are various allegations set out in paragraph 10 of Blackley's affidavit. In the absence of any controverting evidence, the Tribunal will accept the validity of the factual allegations contained in paragraphs 10.1.1, 10.1.2, 10.2, 10.3 and 10.4 (the latter annexing marked NAB2 to Blackley's affidavit a search which does not reflect the existence of any sacred sites):-

"10.1 in terms of the enjoyment by the native title claim group of any registered native title rights and interests and the way of life, culture and traditions of the native title claim group:

10.1.1 it is understood that the Land has not been the subject of any or any significant use by Aboriginal peoples for at least some 30 - 35 years. At one time it is understood that Aboriginal people camped on the land from time to time. However, it is understood that since the provision of reticulated water to Pine Creek, this use of the land ceased.; and

10.1.2 the actual Land it is proposed the Department will acquire and transfer to Mr Ah Toy does not have any creeks or other natural feature which would make it attractive for use by any native title claim group. The

westerly part of Lots 287 and 297 Town of Pine Creek has Pine Creek running through it. This part is not proposed to be acquired or transferred to Mr Ah Toy.

10.2 *In terms of the development of the social, cultural and economic structures of the native title claim group, because the Land does not appear to be the subject of any usage by the native title claim group, the development of social, cultural and economic structures of the native title claim group are unlikely to be negatively impacted by the proposed acquisition. ,*

10.3 *In terms of freedom of access by the native title claim group and their freedom to carry out rites, ceremonies or other activities of cultural significance:*

10.3.1 *by reason of the location of the Land within the area of the Town of Pine Creek, the length of time since it is known that the Land was used in any regular way by any Aboriginal group, the lack of any known or any registered sacred sites and the lack of any special features of the Land, it is submitted the way of life culture and traditions of the native title claim group will be minimally impacted by the proposed acquisition; and*

10.4 *In terms of any area or site of particular significance to the native title claim group it is noted that no registered sacred sites are recorded in respect of the Land and an Aboriginal Areas Protection Authority advice issued on 22 November 2000 (a true copy of which I annex to this my Affidavit and mark with the letters "NAB2") did not disclose any sacred sites. As such, it is not expected that the acquisition of the Land would have any or any significant impact of the way of life, culture and traditions of the native title group nor is it understood that the land has any particular significance to the native title claim group."*

51. In paragraph 11 and 12 of Blackley's affidavit, there are allegations relevant to certain of the criteria expressed in section 38 LAA which are adopted by the Tribunal as part of its findings, particularly in relation to those criteria set out in section 38AA LAA (2)(c) and (d):-

"11. The continuation of any native title claim, rights or usages (the existence of which are denied) would be inconsistent with the exchange between Mr Ah toy and the Northern Territory of Mr Ah toy's freehold interest in Lot 293 Town of Pine Creek and the land which the Territory proposes to acquire and transfer to Mr Ah Toy.

12. It is submitted that there is substantial public interest in the smooth progression of acquisition of land to be utilised for the proposed railway corridor for the Darwin to Alice Springs train line. The Darwin to Alice Springs train line project has the potential to provide extensive benefits to the Northern Territory. The Territory will enjoy improved access to market by way of provision of fast, efficient and cheap transport and it is anticipated there will be a considerable pick-up in economic activity associated with the provision of services needed for the infrastructure layout for the railway line."

52. On behalf of the Objectors, Christopher James Healey, Senior Professional Officer Darwin/Daly Region, Anthropology and Land Tenure Branch,

Northern Land Council, swore an affidavit on 28 May 2001 (“Healey’s affidavit”).

53. Healey’s affidavit commences with the usual recitation of his expertise and experience, which recitation terminates at paragraph 3.
54. In paragraph 4 of Healey’s affidavit, he alleges an ability to identify “*the Aboriginal native title holders ...*”. This presumably should be a reference to Native Title Claimants. He refers to the material presumably lodged with the National Native Title Tribunal in support of the successful establishment of complying with the criteria for the registration test applicable before that Tribunal.
55. It is further contended in Healey’s affidavit, that the Objectors are members of the Wagiman people. He further propounds that the “*Wagiman people*” have lodged a native title claim over the land. Whether that is accurate or not is perhaps inconsequential. Part of annexure B to Healey’s affidavit is Schedule G, said to be an document lodged in support of the said claim and describing the activities of the Wagiman people on the land. While to some extent that is contrary to evidence adduced on behalf of the Applicant, and although not even expressed to be exhaustive, it is in this Tribunal’s perception exceedingly unlikely in any event that those activities, let alone any further activities, are likely to have been exercised. More importantly there is no evidence of any description which is site specific or fact specific which could possibly support the contentions (a) to (h) inclusive and (j) (k) (m) and (o). The other alleged activities, for instance, (q) are also not supported by any evidence.
56. In paragraph 5 of Healey’s affidavit, he states that the Wagiman were successful claimants in a land claim under the *Aboriginal Land Rights (Northern Territory) Act 1976*. He attaches as Annexure C to his affidavit what is claimed to be relevant parts of the report made by the Aboriginal Land Commissioner in relation that that claim. He also states “*the Land Commissioner’s report is replete with references to the spiritual*

responsibility of the Wagiman people for sites and land in or near the area claimed [this Tribunal's underlining].

57. Having read the entirety of annexure C to Healey's affidavit, it is this Tribunal's deduction that the claim referred to was in relation to areas 1, 2, 3 and 4 shown on a map which comprises the first document of annexure C. There is a reference in page 63 of the Report to a compound "*in and around Pine Creek for Aboriginal People*". Paddy Huddleston, the first named of the Objectors in the matter before this Tribunal, provided some testimony, part of which in relation to the Pine Creek area (at page 66) records "*Near Pine Creek he identified a place near a waterhole where the Wagiman also camped*". There is no waterhole identified in relation to the land, the subject of the application to this Tribunal. There are a couple of references to individuals working in Pine Creek. One Don Liddy (at page 70) is recounted in the following terms: "*He believed his father, mother, grandmother and great-grandfather had been born at Kalay (287) and his father and mother were buried at Pine Creek...*". There is no reference to the precise location. At page 71 it is reported "*He said that in the 'olden days' a lot of the Wagiman used to camp at a place in Pine Creek...*". Again there is no expressed location which would enable this Tribunal to identify it, let alone to identify such a location as being in, on or near the land the subject of this application. Furthermore and in any event, His Honour Mr Justice Kearney at page 72 said the following:

[Para 46] "I consider that it flouts common sense to accept that, in pre-contact times, Wagiman country occupied an area as extensive as that which is suggested by the claim area"

58. And further

[Para 47] "I consider that the general thrust of the claimants' evidence points to Wagiman country as being historically on the west side of the Daly River. The most important part of their traditional country appears to lie in the south-west of the claim area"

59. Both of those conclusions render it even more untenable that the said claim and matters pertaining to it should serve as any indication of the existence of any native title rights of any description in relation to the land.

60. His Honour further stated at page 79, after making certain observations, relating to the validity of any evidence concerning common spiritual affiliations to sites on the land, the following:

[para 77] “I consider that it cannot be said that the evidence establishes that ‘all the Wagiman’ are spiritually affiliated to sites on the claim area, in the sense that they all have more or less equal spiritual ties to these sites and possess shared beliefs in their significance. This conclusion is perhaps an inevitable consequence of a claim put forward by ‘all the Wagiman’, when in fact the different families which compose that local descent group are not a fairly tightly-knit group of people bound by continuing associations to the land, but are dispersed and scattered, some of them pursuing very different lifestyles in places far away from the claim area.”

61. Of course His Honour is directing his attention to criteria which arguably have no relevance to the matter before this Tribunal. At para 95 on page 84, His Honour said “*I conclude that they are entitled by Aboriginal tradition to forage as of right over the claim area.*” [This Tribunal’s underlining]

62. In order to understand His Honour’s formal findings there are appendices which are not part of annexure C to Healey’s affidavit, but in the event having regard to this Tribunal’s function it is sufficient to say:

(a) none of His Honour’s conclusions related to the land which is the subject of this application;

(b) even in relation to the land which was the subject of the original claim, His Honour was not satisfied that the evidence established an entitlement in relation to several aspects said to constitute an entitlement under the relevant legislation

63. In paragraph 6 of Healey’s affidavit, he refers to certain matters which it seems, contrary to the findings of His Honour Mr Justice Kearney in the land claim referred to at paragraph 5 of Healey’s affidavit, resulted in land such as the Umbrawarra Gorge vesting by way of a freehold grant in the Wagiman people.

64. In paragraph 7 of Healey’s affidavit, he refers to annexure D which in part apparently, a map in respect of the native title determination lodged in respect of the land, and depicts in part the land.

65. In paragraph 8 of Healey's affidavit, he refers to consultation with the Wagiman people in relation to the railway corridor and attaches as an annexure marked E a report of the relevant impact assessment study (Final Report of the Railway Impact Assessment Study: *A Railway Through Our Country*). The relevance of the contents of that document in relation to the matters before this Tribunal is, to say the least, obscure and the document is in any event incomplete in that it omits maps which may have been relevant. For instance, reference to Pine Creek is made in the preface, and there are references to maps that are set out there. The text recites at page 151 "*Aboriginal people of the Pine Creek area live in two established locations – in the township at the town camp and at Kybrook Farm, approximately 5 km south of the town ...*". It appears that there was a recitation of issues that are specified which don't seem to coincide with the grounds of objection in relation to the proposed acquisition, but insofar as Pine Creek as a whole is concerned seemed to generate "*a Dreaming path to the north of Pine Creek which might be affected by the railway*". There is also nothing there which deals with problems concerning fishing and swimming in Pine Creek or the burial sites referred to in paragraph 11 of Healey's affidavit.

66. Further, at page 152:

"The town camp at Pine Creek comprises five houses. It is located quite close to the rail corridor, being approximately 600 metres from the centreline where it is to cross the Kakadu Highway."

And further,

"The area north east of Pine Creek (Mt Wells region) is used frequently for hunting, camping and cultural purposes".

(No reference to these activities in relation to the subject land)

67. Recommendation #53 at page 152, repeated at page 221, does not contain any recommendation to deal with any of the issues raised in relation to the matter before this Tribunal.

68. In paragraph 9 of Healey's affidavit, he alleges that specified people "*are native title holders of the country in the town of Pine Creek*". That as a matter of correctness must be quite wrong and presumably is a reference that they, on behalf of the Wagiman people, are native title holders of land elsewhere, but in any event it clearly cannot be correct if it is intended to allege that they are native title holders of the land, the subject of this application. The Tribunal is referred to annexure G, being an extract from the literary work *Wakgala mahan matjjin Wagiman: Stories in the Wagiman language of Australia's Northern Territory*.
69. There is nothing intrinsically in the material which this Tribunal is able to construe as remotely relevant to what is before the Tribunal.
70. In paragraph 10 of Healey's affidavit, he postulates "*Helen Liddy and Paddy Huddleston stated that they wished to know the proposed use of the site*" and relevantly further "*In my opinion concrete information on the proposed use of the site would have a bearing on the Wagiman people's views of the proposed compulsory acquisition*". The first response of this Tribunal in relation to those matters is that if they possessed any validity at all, the Tribunal would have expected that the Objectors of whom Helen Liddy and Paddy Huddleston are only 2, would have taken the opportunity to consult as they were invited to do with the Applicant. The Tribunal refers to Griffiths' affidavit referred to earlier in this decision where the invitation to consult is identified and which is constituted as "BJG18" to Griffiths' affidavit. From the matters referred to in Griffiths' affidavit the Tribunal observes that the vesting of a fee simple estate absolute in possession in Mr Ah Toy would entitle him to do whatever was permitted from a planning perspective.
71. Further and in any event, as is recounted in this decision, it is speculated and set out in Blackley's affidavit that Mr Ah Toy "*would consider*" using the land for purposes of commercial development.
72. It is in this Tribunal's perception, difficult to comprehend, given the grounds of objection set out in the Notice of Objection, precisely how any intended

use could have any affect on the views of the Wagiman people to the proposed acquisition of the land.

73. In relation to paragraph 11 of Healey’s affidavit, the statement is made “*I am aware of many sites of significance n the Pine Creek town area*” [This Tribunal’s underlining]. Suffice it to say that is an assertion of no value whatsoever and what follows is hardly capable of classification as “*many*”. In the event reference is made to annexure H to Healey’s affidavit. Annexure H is a letter from the Aboriginal Area Protection Authority. The relevant passage (after saying there is no record of sacred sites within the town of Pine Creek) is

“... but has records of two isolated Aboriginal burials that may be located within the area. These are shown on the attached map but have not been positively located on the ground” [This Tribunal’s underlining]

74. That sort of assertion ought not, and in this Tribunal will not, be accorded any weight whatsoever. Further and in any event, this Tribunal simply does not understand how any conclusion can be drawn from the map attached to the letter. Having regard to the map referred to, it records on Lot 287 and that is north of the Stuart Highway and separated by the Stuart Highway, the subject of this application, 2 specified recorded sacred sites. Having regard to the letter saying there is no record of such site, nothing whatsoever can be made of these matters by this Tribunal.
75. It is noted further from the allegations set out in paragraph 11 of Healey’s affidavit (although clearly not recorded by the Aboriginal Areas Protection Authority), that Helen Liddy and Paddy Huddleston independently (presumably of each other) “*identified a site close to the Lot for compulsory acquisition on Lot 309 to the west of Pine Creek*”. It is further asserted that this site is of ceremonial significance where clothing and bedding of deceased persons were burnt as part of funeral rituals. Assuming it is appropriate for this Tribunal to take those matters into account at all, firstly it can hardly be said to be established fact because of the nature of the assertion made. Secondly it seems to this Tribunal obvious that the location of such a site cannot suffer any interference from any development

of the land in question whatever form that development takes, bearing in mind the constraints imposed by planning considerations.

76. In paragraph 12 of Healey's affidavit, the assertion is made "*the Aboriginal Town Camp also known as the Aboriginal Compound adjoins the proposed compulsory acquisition area*". Presumably that is the area where there are five houses located, such fact being asserted in annexure E to Healey's affidavit. There is no map or document from which this Tribunal is able to positively discern the location and there is no annexure K as referred to in Healey's affidavit as "*The location of the Aboriginal Town Camp is marked on annexure K*". Assuming the second map after a plan styled "*Pine Creek Location Plan*" is intended to be Annexure K, the area described on that document as "*Aboriginal Living Area*" can hardly be said to adjoin the land, the subject of this application. The Tribunal is also unclear as to whether that "*Aboriginal Town Camp*" is synonymous with the area referred to (in the second sentence of paragraph 12 of Healey's affidavit) as Lot 179.
77. Lot 293 is located to the north of Stuart Highway and is separated from the land the subject of this application by the Stuart Highway. The precise location of Aboriginal housing on that Lot (the Tribunal doesn't understand the reference to Lot 309) cannot be discerned by the Tribunal, but in any event assuming that it is located on Lot 293, in the Tribunal's perception it cannot be located in a position where any usage of the land, the subject of this application, is going to give valid effect to any of the grounds of objection specified in the Notice of Objection in regard to that land. The fact that the Aboriginal Town Camp, which may or may not be the same thing as the Aboriginal Community Living Area, is an important place for Aboriginal people etc is accepted by this Tribunal, but having stated that to be so, the relevance of that being the case in relation to the considerations that this Tribunal must embark upon, is not comprehended by this Tribunal.
78. In relation to paragraph 13 of Healey's affidavit, it is stated "*The native title holders associated with Pine Creek and other Aboriginal residents of the Aboriginal Town Camp make extensive use of country for hunting and gathering activities*". Insofar as the allegation has any relevance, it can

only be relevant if the alleged usages occur on or at the very least necessarily involve somehow the use of the land, the subject of this application. The bald assertion such as is made, is not something which this Tribunal is able to take into account.

79. In paragraph 13 of Healey's affidavit, there are then 2 confusing issues addressed. Pine Creek is for instance shown on the locality plan comprising the last page of annexure E to of Healey's affidavit. Apart from observing that both the Stuart Highway and the railway corridor must pass at best above such creek, it is obvious that the land, the subject of this application cannot in any objective sense impede access or egress to or from that creek. There cannot be, in the perception of this Tribunal, any interference either with swimming.
80. The confusion referred to is then exacerbated from expressions of concern attributed to Helen Liddy and Paddy Huddleston at paragraph 13 of Healey's affidavit as to the "*potential(ly) impact on the preservation of the ceremonial and heritage values of the Town Camp, the current living arrangements of Aboriginal residents, and the access to and use of the creek.*". Having dealt with the issue of the use of the creek, the Tribunal refers to its comments in relation to the allegations in paragraph 12 of Healey's affidavit. The Tribunal concludes it is unable to find that there is an impact, potential or actual, which could occur "*on the preservation of the ceremonial and heritage values of the Town Camp, the current living arrangements of Aboriginal residents, ...*".
81. In paragraph 14 of Healey's affidavit, again unsworn statements attributed to Helen Liddy and Paddy Huddleston, are to the effect that the land, the subject of this application, "*was formerly occupied by a butcher's business and other European residents*". Whilst unsworn hearsay evidence of this nature ought not in this Tribunal's perception to be accorded much or any weight at all, the Tribunal observes that the penultimate document which may or may not have been intended to be exhibit K to Healey's affidavit, but which is a two sided plan, has on its reverse side an indication "Old Pine Creek Butchery (Fred Frith's House)". It seems more than likely then

that the author's statement is not correct and that the butchery and house they refer to are located to the west of the land, the subject of this application.

82. The final matter referred to in Healey's affidavit is "*Mrs Liddy in particular spoke of the historical significance of the site for the Pine Creek community in general*". This Tribunal cannot consider matters which are not expressly part of, and identified as being part of, valid objections taken and notified to the Applicant. The Tribunal cannot conceive of how that hearsay statement is of any use or any reason why it should be taken into account.
83. On 15 February 2001 Penelope Anne Creswell swore an affidavit on behalf of the Respondents ("Creswell's February affidavit"). In Creswell's February affidavit relevantly she refers to the execution of an agreement with the Territory comprising two Deeds apparently dated 18 September 1998, such Deeds being to facilitate the Alice Springs to Darwin railway. She refers to it as the railway agreement and sets out the fact that monetary compensation was to be paid as consideration together with an undertaking of joint management of the Umbrawarra Gorge National Park.
84. In paragraph 4 of Creswell's February affidavit she refers to the fact that on 15 November 1999, the Wagiman People in the Northern Territory executed an agreement and settlement of the Upper Daly (Repeat) Land Claim number 128. This agreement she states provided that the Umbrawarra Gorge National Park be granted as NT freehold to an Association on behalf of the Wagiman People with a lease-back arrangement of nominal rental to the park authorities.
85. On 11 May 2001 Beverly Joan Griffiths swore an affidavit on behalf of the Applicant ("Griffiths' May affidavit").
86. After identifying herself she annexes to her May affidavit marked BJG1 a true copy of an agreement entered into "*by the Northern Territory of Australia and Mr Edward Ah Toy contemplating a grant of land in compensation of the acquisition of part of Lot 293 Town of Pine Creek for the purposes of the Darwin to Alice Springs railway corridor.*"

87. The Deed itself is dated 25 November 1999.
88. With leave the Objectors filed further material in the form of affidavits and the first one of those is an affidavit by George Huddleston affirmed 17 July 2002 (“George Huddleston’s Affidavit”). He refers to the land as being very close to the town camp which must be the major residential area occupied by Aboriginal people.
89. In paragraph(s) 3-8 inclusive of George Huddleston’s affidavit he refers in general terms to instruction of children, presumably in cultural matters: issues relating to hunting and the location of “bush tucker” and other apparently cultural predilections. There is also reference to native animals and the hunting of such animals on the land.
90. From the allegations in paragraph 9 George Huddleston’s affidavit the Tribunal infers that there were some complaints about the fire prevention practices of the Council, which are seemingly not in accord with the practices which would be employed by the Objectors or some of them.
91. In paragraph 10 of George Huddleston’s affidavit he refers to the grave of the woman murdered by her husband in 1962 or 1963 and his fear of the “*old spirit people*” punishing him for damage occasioned by others to the grave site. The location cannot be fixed by the Tribunal.
92. In paragraph 11 George Huddleston’s affidavit he refers to a ceremony place but it is not clear from the allegations that are contained in that paragraph whether that “*ceremony place*” is located on the land.
93. Finally in paragraph 12 he refers to the worry which would be occasioned to the first named Objector if the land was acquired and some other allegations which have no particular relevance.
94. A further affidavit on behalf of the Respondent was affirmed on 17 July 2002 by Maureen Smith (“Maureen Smith’s Affidavit”). In paragraph(s) 3-7 inclusive she refers to the use of the land by herself and others it not being clear as to whom the pronoun “we” is intended to embrace. She refers to a

“men’s business place” which it appears is not located on the land and the relevance consequently is obscure. The remaining paragraphs do not warrant being summarised.

95. Paddy Huddleston, the first named Objector, affirmed an affidavit on 17 July 2002. He identifies the land as being Wagiman country. He then refers to various activities in which he participated as a child and subsequently he refers to a variety of other locations, activities, and matters relating to other activities. The relevance escapes the Tribunal.
96. In pursuance of subsequent leave an affidavit was filed on behalf of the Objectors by Phillipa Jane Hetherton affirmed 14 August 2002 (“Hetherton’s Affidavit”). [The affidavit itself is typographically incorrect in the sense that it purports to have been affirmed on the 26 April 2002, but manifestly that date should be 14 August 2002.]
97. In Hetherton’s affidavit relevantly she refers in paragraph 4 to a map (PJH-3) identifying both the land and also another piece of land acquired from Edward Chung Ah Toy (“Ah Toy”).
98. In paragraph 5 of Hetherton’s affidavit she refers to a valuation of Ah Toy’s land and the land, and annexes a copy of that valuation marked PJH4. The basis of the valuation in each case is the market value of the relevant land.
99. In paragraph 6 of Hetherton’s affidavit she refers to a document **Pine Creek Planning Concepts and Land Use Objectives 2001** and annexes a copy marked PJH-5.
100. On 21 November 2001 Penelope Alice Creswell swore an affidavit on behalf of the Objectors (“Creswell’s affidavit”). She deposes to her position as solicitor employed by the Northern Land Council having the care and conduct of this proceeding on behalf of the Objectors.
101. In Creswell’s affidavit, she analyses various aspects of the Upper Daly Report related to the Upper Daly Land Claim. She also deals with the Upper Daly (Repeat) Land Claim (No 128).

102. In paragraph 10 of Creswell's affidavit, she refers to the fact that the Upper Daly (Repeat) Land Claim was settled by negotiation and annexes marked PAC-3 a true copy of the terms of settlement. She also canvasses various other aspects of considered, unsuccessful or pending land claims.
103. In paragraph 12 of Creswell's affidavit, she refers firstly to the land being the subject of Federal Court proceeding D6019 of 1999. She then refers to the land being "*the subject of the proposed compulsory acquisition that is to be considered by the National Native Title Tribunal ('the Tribunal')*". *The Tribunal has allocated the reference DC99/19 to the application D6019 of 1999*". The Tribunal admits to confusion in respect of this allegation. It is the Federal Court and not the National Native Title Tribunal which will have to make a decision in relation to whether or not there is native title to the land.
104. In Creswell's affidavit, in paragraph 13 she refers to annexure PAC-5 as a true copy of application of D6019 of 1999 and in paragraph 14 she asserts the fact of registration by the Registrar of Native Title Claims. She annexes marked PAC-6 a true copy of the decision for registration and highlights the fact that the registration includes "*the right of the Respondents to possess, occupy, use and enjoy the application area to the exclusion of all others*". That of course does not represent a decision, but merely an acknowledgement that there is sufficient evidence for the purposes of registration, without which of course the Federal Court application could not proceed. Neither for that matter could the objection to the intended compulsory acquisition of the land.
105. In further allegations contained in paragraph 15 of Creswell's affidavit, she deals with matters said to be relevant. This Tribunal does and will continue to commence its deliberation and decisions from the premise that native title exists in relation to the land. That is in accordance with the decision in *Minister for Lands v Strickland* (1998) NNTTA 2 (20 February 1998) ("*Strickland*") and in accordance with this Tribunal's practice. In the circumstances it is not conceived or perceived by this Tribunal that the substantial material filed and referred to in Creswell's affidavit takes the

matter any further in relation to the function of the Tribunal is required to discharge. These allegations will not as a consequence be traversed in this decision.

106. Pursuant to leave, the Applicant filed an affidavit sworn by Edward Cheong Ah Toy ("Ah Toy's affidavit") on 20 November 2002.
107. In Ah Toy's affidavit there is set out some early history relating to his family, the relevant thrust of relevant allegations being effectively that he was at primary school in Pine Creek between 1945 and 1950. It seems between 1955 and the present time he has continued to reside in Pine Creek. Of his four children two reside in Pine Creek. One of his children, together with her husband, owns an art gallery located there.
108. In paragraph 4 of Ah Toy's affidavit he states that as a consequence of his long association with Pine Creek he has come to know most of the local residents. He sets out that in the early 1960's he was the inaugural president of the Pine Creek Aboriginal Advancement Association. He sets out the fact that he used to liaise with the resident Aboriginal Welfare Officer during the 1960's.
109. Ah Toy's affidavit then sets out a relationship with one Don Kulumuburra. Lenny Liddy, he says, was also a family friend. He recalls growing up playing cricket on the main road with Lenny and his friends. This obviously comprises something you would not currently expect to find taking place which is no doubt the reason for his concluding comment "*That's the way Pine Creek was in those days*".
110. In paragraph six of Ah Toy's affidavit he states he has known Paddy Huddleston since the 1960's. He identifies him as being from the "*Wagiman Tribe*". He states that George Huddleston came to Pine Creek "*later*". He says he also knows Maureen Smith whose mother's name was Violet and who was from the Jawoyn People. He concludes that paragraph by saying that Maureen's parents worked at "*Bonrook Station*" (then no doubt a cattle station and now a tourist resort).

111. In paragraph 7 of Ah Toy's affidavit he states that most of the Aboriginals (presumably of Pine Creek), but in the event relevantly including the deponents of affidavits filed in this proceeding on behalf of the Objectors, lived "*in the town camp*". He claims that because of tribal differences Kybrook Farm was purchased in 1975 so that the Wagiman (People) could be on their own. Paddy Huddleston he says tends to live out that way. By contrast George Huddleston with his wife "*came into town*".
112. In paragraph 8 of Ah Toy's affidavit he says that he used to be on the town council with Joe Huddleston now married to Maureen Smith and in paragraph 9 states that his office as President of the said Association involved him in helping to "*get funding for facilities, housing and so forth at the Town Camp*".
113. In paragraph 10 of Ah Toy's affidavit he notes a reference to "*Part Lots 287 and 297 and Road Town of Pine Creek*" as "*the paddock*". He says that is a name he used because that is precisely what the land is. It is fenced on all sides he says and has been for "*a good many years*". One part of that land is bounded by the Stuart Highway. Another boundary is the boundary of freehold land namely Lot 181 Town of Pine Creek a caravan park so used since 1985 and owned by him. On all other sides he says the paddock is surrounded by freehold land owned by him.
114. In paragraph 11 of Ah Toy's affidavit he says that the paddock is heavily overgrown "*with various grasses and weeds and some smallish trees*". Running down of the middle more or less of the paddock is an open unlined drain ("OUD") estimated to be more than 5 feet below the level of the surrounding land and constituting a watercourse discharging storm water run off from Pine Creek streets during "*certain parts of the Wet Season*". He describes one part of the OUD where there is a natural pool or billabong containing muddy water for "*a fair part of the year beyond the Wet Season although by the end of the Dry it is usually just a smallish mud patch*". The paddock he says "*can be largely waterlogged during a good Wet Season*". He does not believe that all the paddock could be used for residential purposes. If he has the opportunity he would use such of it as

was possible for the purposes of a mango plantation having purchased land, plant and equipment to establish a mango winery in Pine Creek adjacent to the paddock. Such is the commercial use speculated upon by Ms Blackley no doubt.

115. In Ah Toy's affidavit in paragraph 12 he says that he has never seen Aboriginals using the paddock or even crossing the paddock in the time he has lived in the area presumably from 1945. He says that the paddock is to the south of the Town Camp about half a kilometres away. It is not on the direct route from the Town Camp to any other Town facilities. He says that not only has he never seen any people hunting on the paddock but there is nothing to hunt because of its proximity to Pine Creek.
116. In paragraph 13 of Ah Toy's affidavit he refers to the affidavit of George Huddleston and in respect of the grave he refers to states that it is not located on the paddock and access to it would not be "*affected*" [sic] by his gaining freehold title to the paddock.
117. In paragraph 14 of Ah Toy's affidavit he states that the ceremony place referred to in George Huddleston's affidavit is not located on the paddock. He denies access to the ceremony place would be "*affected [sic] by me owing [sic] the paddock*".
118. In paragraph 15 of Ah Toy's affidavit it is his conception that all of the locations referred to in paragraph 2-12 of Paddy Huddleston's affidavit "*appear to be about places located other than on the paddock*". He points out that the OUD is not the creek referred to in the affidavits of Paddy and George Huddleston or Maureen Smith. He concludes that the creek they refer to is "*Pine Creek*". At its closest he says that creek is a half a kilometre from the paddock. Travelling towards the paddock from town camp "*you get to Pine Creek before you get to the paddock*". Access to Pine Creek he says would not be "*affected as I see by his owning the paddock no matter which camp or settlement you came from*".
119. In paragraph 16 of Ah Toy's affidavit, he restates what has he already set out earlier, namely, the paddock has been fenced for many years. He

further claims "*the Aboriginals*" have known for a long time to respect fences especially in town areas.

120. In Ah Toy's affidavit in paragraph 17 he disputes that any of the locations said to be utilised as referred to in the affidavits of George Huddleston and Maureen Smith match up with the paddock. By way of example he quotes paragraph 10 of Maureen Smith's affidavit namely "*it would be bad if there was a fence there because then we can't walk through there, we can't go there*". As deposed to by him the paddock is fenced and has been for many years. Further he refers to paragraph 5 of Maureen Smith's affidavit and the allegation "*there was an old camp there*". He says there has never been a camp in the paddock in the last 60 years, although he can not exclude the possibility that there was a temporary camp there when he was not present. He does say however, "*I haven't heard of anyone speak of a camp on the paddock*".
121. In paragraph 18 of Ah Toy's affidavit he addresses paragraph 7 of Maureen Smith's affidavit where she refers to walking around "*here*" and "*there*". He reiterates that he has never seen Aboriginals on the paddock or walking through the paddock and concludes by saying there is no reason to do so.
122. In paragraph 19 of Ah Toy's affidavit he refers to paragraph 4 of Paddy Huddleston's affidavit and the allegation "*we used to camp in that place – where those three old houses are now – where Freddy Frith lived*" he states that that particular place is next door to the paddock. He further alleges that references to "*camps in paragraph 4 of Paddy's affidavit*" refer to many camp locations, but none of them are on or even particularly close to the paddock. He identifies the camp referred to as being on the Eastern side of the Stuart Highway and, if his conclusion is correct, states that those camps have not been used for about 40 years.
123. In paragraph 20 of Ah Toy's affidavit he addresses paragraph 5 of Paddy Huddleston's affidavit and to the "*kids playing in the creek*". He identifies the creek as Pine Creek excluding OUD because in that particular storm water channel the water is usually moving "*quite quickly or else it is just*

shallow muddy water". He says that he has seen local children both Aboriginal and non-Aboriginal playing in Pine Creek, but never in the OUD.

124. In paragraph 21 of Ah Toy's affidavit he refers to paragraph 6 of Paddy Huddleston's affidavit and the allegations of "*hunting in the country behind the old railway shed*". He locates the old railway shed as being to the west of the paddock adjacent to the mango winery.
125. In paragraph 22 of Ah Toy's affidavit allegations are made which have relevance to the criteria set out in section 38AA LAA. He says that he has been involved in the business and community life of Pine Creek for "*basically all of my life*". He says that his commitment is to Pine Creek and his interest in various businesses in the town "*including the general store, the mango winery and the caravan park*". "*I believe that Pine Creek has a good future as long as there are people who are committed to the town. I am one of those people. My businesses in the town employ about 6 people plus casuals depending on seasonal conditions. If I receive the paddock by way of the proposed land swap, I will be able to put the land to commercial use. The paddock is not likely to generate enormous amounts of economic activity but it will play its own small part*".
126. On 22 November 2002 the Applicant filed a valuation prepared by the Australian Valuation Office which is a valuation of the Land as at 25 November 1999 by John Saxelby. The valuation report discloses that the inspection of the land by Saxelby was 11 September 2002.
127. The Tribunal does not propose to set out the full content of the valuation. The basis of the valuation is to treat the land "*as being suitable for rural or residential occupation*". He states at page 3 "*there was no evidence of any Aboriginal occupation or activity on the land and I am advised that there are no sacred sites [sic] on the land*". Given the restraints and qualifications set out in his report he ultimately concludes that as at 25 November 1999 the market value of the "*subject property, as an unencumbered freehold parcel, is considered to be TWENTY THOUSAND DOLLARS (\$20,000.00)*".

128. The above market value is based upon on the basis of “*highest and best use*”, and makes full allowance for any additional costs associated with sewer connection.
129. The valuation was sent to The Department of Infrastructure, Planning and Environment under cover of the letter 13 September 2002 and that letter signed by the valuer was filed with the Tribunal.
130. In this letter of 13 September 2002 the relevant points made in this Tribunal’s perception are that although the land was valued as freehold as at 25 November 1999 it did not “*have an unencumbered freehold title*”. He then went on to state “*the allowance of a twenty percent discount represents the opportunity cost of Mr Ah Toys [sic] deferred use of the land, with the result that the value of the future possession of this land to Mr Ah Toy did not exceed sixteen thousand five hundred dollars (\$16,500.00) at the date of valuation*”. The Tribunal reiterates the allegation in paragraph 6 of Blackley’s affidavit, the land “*is unalienated Crown land*”.
131. The letter then goes on to address the contents of the valuation PJH-4 to Hetherton’s affidavit. The author asserts the following:
- (a) the primary sales evidence used by Mr Doyle is not correct;
 - (b) he abides by his valuation “*rather than the higher value derived by Mr Doyle*”;
 - (c) the pivotal sale of Lot 136 Town of Adelaide River did not occur;
 - (d) section 136 in the Hundred of Playford, containing about 36.5 Hectares and located about 10 kilometres north of Adelaide River, did sell for \$115,000.00 (one hundred and fifteen thousand) in October 2001. This property had a residence, bore, several sheds, fencing and clearing and the deduced land value did not exceed \$50,000.00 (fifty thousand dollars) or \$1,367.00 (one thousand, three hundred and sixty seven dollars) per Hectare. In any event a sale this far away from Pine Creek, and this far out of a town, has no relevance what so ever. He states that the other “*evidence alluded to is also considered to be totally irrelevant given my*

comment within my report as to the unique factors that determine the Pine Creek market”.

SUBMISSIONS

132. On 16 February 2001 the Respondents filed Submissions (“Respondents’ Submissions”) set out below:-

RESPONDENTS’ SUBMISSIONS

1. SUMMARY

- 1.1 The respondents object to the proposed acquisition on the following grounds.

- (a) The notice of proposal on its face does not comply with s 33(1)(b) of the *Lands Acquisition Act* (NT) (“the Act”) in that it does not contain details of the manner in which it is proposed that the land, if acquired, will be dealt with. Consequently the Minister has no power to acquire the land because the pre-acquisition procedures in Part IV have not been complied with as required by s 43(1)(b).
- (b) The notice of proposed acquisition on its face does not comply with s 33(3)(b) of the Act in that it does not contain details of the manner in which it is proposed that the land, if acquired will be dealt with. Consequently the Minister has no power to acquire the land because the pre-acquisition procedures in Part IV have not been complied with as required by s 43(1)(b).
- (c) The purpose of the proposed acquisition (which is not specified in the notices of proposal or proposed acquisition) is to implement an agreement purportedly entered by the Minister with a third party (Edward Ah Toy) in relation to the Alice Springs to Darwin railway (“the Ah Toy agreement”), whereby land is provided to Mr Ah Toy (in lieu of monetary compensation) for the separate acquisition by agreement of part of lot 293 (being land owned by Mr Ah Toy which is to become part of the railway corridor). Such a “purpose” is unlawful and is not contemplated by that term as used in s 43(1) of the Act (meaning that the Minister has no power to acquire the land) because:
 - (i) the pre-acquisition procedures in Part IV have not been complied with (s 43(1)(b)), in that the notices of proposal or proposed acquisition do not contain details of the manner in which it is proposed that the land, if acquired, will be dealt with (as required by ss 33(1)(b) and 33(3)(b));
 - (ii) the Ah Toy agreement purports to fetter the statutory power of the Minister regarding a future acquisition of land (being the land subject to this proceeding), by unlawfully restricting the Minister regarding the

conduct of consultations under s 37(2) to minimise the impact of the acquisition on registered native title rights and interests;

- (iii) the Ah Toy agreement unlawfully purports to fetter the statutory power of the Minister under s 35(1) to modify or abandon a proposal to acquire land;
 - (iv) the Ah Toy agreement unlawfully purports to authorise or facilitate the acquisition of native title other than in accordance with an indigenous land use agreement as required by s 31A(a).
- (d) The land should not be acquired because:
- (i) Reasonable alternatives exist, other than acquiring native title, whereby Mr Ah Toy may be compensated.
 - (ii) There is no evidence that Mr Ah Toy has any immediate need for the land, other than as a form of compensation.
 - (iii) In a deed and supplementary deed dated 18 September 1998, the Wagiman People (and other Aboriginal groups) executed an agreement with the Territory to facilitate the Alice Springs to Darwin railway (“the railway agreement”) which provided for monetary and non-monetary compensation. No such compensation has been offered in relation to this matter, and apparently will not be so offered until a court determination. The further acquisition of native title merely for the purpose of providing compensation to a third party (rather than, for example, because the corridor had been re-routed) is neither appropriate nor justifiable.
 - (iv) The Minister’s position (as expressed in Ms Blackley’s affidavit dated 23 November 2000) that the land is not enjoyed or used by the Wagiman People and that there will be minimal impact on the life, culture and traditions of the Wagiman People, is not supported by any cogent or direct evidence, and should be rejected.

1.2 The respondents advise that an oral hearing is sought in relation to this matter, and that they seek to cross examine Beverley Joan Griffiths and Noreen Alma Blackley at the hearing.

2. PURPOSE OF THE ACQUISITION

2.1 Section 43(1) states:

- (1) *Subject to this Act, the Minister may acquire land under this Act for any purpose whatsoever –*
 - (aa) *if the acquisition is under an indigenous land use agreement as referred to in section 31A(a) - in accordance with the terms of the agreement and by causing a notice declaring the land to be acquired to be published in the Gazette;*

- (a) *if the acquisition is by agreement with the owner of the land as referred to in section 31A(b) - by causing an instrument of transfer or other document evincing title to the land in the Territory to be registered under the Land Title Act by the Registrar-General; or*
- (b) *if the pre-acquisition procedures in Parts IV and IVA as applicable have been complied with - by compulsory acquisition by causing a notice declaring the land to be acquired to be published in the Gazette.*

2.2 Notwithstanding the use of the phrase “any purpose whatsoever”, the Minister’s power in s 43(1) is subject to significant restraints, including that it may only be exercised “[s]ubject to this Act”. In *Clunies-Ross v Commonwealth* 1984 155 CLR 193 the High Court construed a similar power conferred by the *Lands Acquisition Act 1955* (Cth) to “acquire land for a public purpose” (p 199 per Gibbs CJ, Mason, Wilson, Brennan, Deane and Dawson JJ):

Section 5(1) of the Act defines "public purpose" as meaning "a purpose in respect of which the Parliament has power to make laws, and, in relation to land in a Territory, includes any purpose in relation to that Territory". If the power to acquire for a public purpose which the Act confers is construed as extending to purposes quite unconnected with any need for or future use of the land, the ministerial power thereby created would be surprisingly wide in that, subject only to monetary compensation, it would encompass the subjection of the citizen to the compulsory deprivation of his land, including his home, by executive fiat to achieve or advance any ulterior purpose which was a purpose in respect of which the Parliament has power to make laws or, in the case of land in a Territory, "any purpose in relation to that Territory". It is, in our view, unlikely that the Parliament would have intended to confer such a power other than by the use of clear words to that effect and subject to stringent and specially framed controls or safeguards against its abuse. Neither is to be found in the Act. As has been said, the language used is, prima facie, more appropriate to refer to a conventional power to acquire land because it is needed rather than to confer such an extraordinary power on the Executive. Apart from providing for disallowance by either House of Parliament (s.12), the Act contains no special control or safeguard at all against executive abuse.

2.3 The *Lands Acquisition Act* (NT) is “a conventional power to acquire land because it is needed”, and should be construed on the same basis as explained by the High Court in relation to the Commonwealth legislation. The fact that s 43(1) does not refer to a “public” purpose does not alter this position. The term “public purpose” was broadly defined in the *Lands Acquisition Act 1955* (Cth),¹ but nevertheless the High Court applied a restrictive interpretation to limit executive power and protect private interests. Likewise the executive power of the Minister to acquire land under the *Lands Acquisition Act* (NT) should be similarly construed.

- 2.4 Consistent with this construction ss 33(1)(b) and 33(3)(b) of the Act, which require that the notices of proposal and proposed acquisition contain details of the manner in which it is proposed that the land will be dealt with, are intended to ensure that information is provided as to the specific purpose for which the Minister intends to acquire the land. As Dixon CJ explained in relation to similar provisions in *Jones v Commonwealth* 1963 109 CLR 475 at 483:

Under the law it is necessary that a notice of acquisition should show the public purposes for which the land is acquired. ... An attentive reading of the notice of acquisition set out above will at once show that there must be a question whether it states any "public purpose" at all. I do not quite know what is intended by saying that the land is acquired "for the following public purpose ... The Australian Broadcasting Commission at Ripponlea, Victoria". It appears to me that it is essential under the provisions of the statute which I have stated, to express the public purpose. It is not enough to leave it to inference. There is a number of reasons for this. One is that under the Constitution the power of the Commonwealth is limited to the acquisition of property on just terms for any purpose in respect of which the Parliament has power to make laws: s.51 (xxxi.). Another reason is that the landowner who is compulsorily dispossessed of his land would seem to have a right in point of justice to know precisely for what it was needed as a public purpose. A third reason is that under s.12 of the Lands Acquisition Act 1955-1957 a copy of the notice must be submitted to each House of Parliament and either House may within thirty days by resolution declare it void and of no effect. What exactly was intended by the authors of the notification may no doubt be seen by speculation and deduction and so on but for myself I think that it is intended that the purpose should be expressed and not left to inference.

- 2.5 The notices of proposal and proposed acquisition state that the manner in which the Territory proposes to deal with the land (if acquired) is:

Consolidation with Lot 293 Town of Pine Creek and grant of an Estate in Fee Simple, under the provisions of the Crown Lands Act, to Mr Edward Ah Toy or his nominee.

- 2.6 First, on its face the mere statement that land is to be consolidated with an existing lot (information which, of itself, provides little or no assistance) and granted in fee simple does not provide any information as to the purpose of the acquisition. No information or details are provided as to the manner in which it is proposed that the land will be dealt with or used, whether by the Territory or Mr Ah Toy (or his nominee), or as to the basis whereby the land is now required by Mr Ah Toy. Certainly Dixon CJ's "point of justice" that a landowner is entitled to "know precisely" the purpose of the acquisition is not satisfied. Applying the approach in *Jones v Commonwealth*, the statement does not comply with ss 33(1)(b) and 33(3)(b) of the Act.

- 2.7 Secondly, it is clear from information subsequently provided in the affidavit of Noreen Blackley dated 23 November 2000 that the information contained in the notices of proposal and proposed acquisition is entirely inadequate. Ms Blackley described the proposed acquisition as a "simple exchange of land [which] represents a practical means of dealing with the need to acquire Mr Ah Toy's land for the purposes of the railway corridor." The land is to be provided "by way of compensation" regarding a separate acquisition of Mr Ah Toy's land. Mr Ah Toy has apparently suggested that he

will consider using the land for the purpose of commercial development, such as a mango plantation, but “has not expressed any definite views in that regard.” The use of the word “exchange” shows that the land is to be acquired and transferred pursuant to an agreement between the Minister and Mr Ah Toy, although a copy of the agreement has not been provided. Such an agreement, insofar as it concerns native title, is governed by s 31A of the Act (see below).

- 2.8 In essence, the true purpose of the proposed acquisition is to implement a previous agreement whereby the Minister is required to acquire land to grant to Mr Ah Toy in lieu of monetary compensation regarding a separate acquisition (by agreement) of land owned by Mr Ah Toy. Sections 33(1)(b) and 33(3)(b) require that such details of the manner in which it is proposed that the land be dealt with be included in the notices of proposal and proposed acquisition. The notices do not include that information, and consequently the provisions have not been complied with. In the absence of compliance, the Minister has no power to acquire the land (s 43(1)(b)).

3. THE AH TOY AGREEMENT

- 3.1 Section 31A of the Act states:

The Minister may acquire land under this Act by agreement if the agreement is -

- (a) *in the case of the acquisition of a native title right or interest - in accordance with an indigenous land use agreement; or*
- (b) *in the case of any other interest in land - with the owner of the land.*

- 3.2 It is not clear from Ms Blackley’s affidavit whether the Ah Toy agreement has been made pursuant to s 31A, or under the general law of contract or another law of the Territory.² In any event s 31A provides a statutory power whereby the Minister may resolve a proposed acquisition by agreement, in the present case by agreement with the Respondents (on behalf of the Wagiman People). Indeed s 35A expresses the legislative intention that “the parties concerned are strongly encouraged to resolve objections by agreement and to reach agreement about compensation”, being agreements arising “as a result of discussions held at any time and whether as part of the consultations under section 37 or otherwise than under this Act.” Relevantly such consultations must include ways of minimising the impact of the acquisition on native title (s 37(2)), and may include the modification or abandonment of a proposal to acquire native title (s 35(1)).

- 3.3 The Minister may not, by prior agreement or otherwise, fetter his statutory discretion to resolve objections to the proposed acquisition by agreement under s 31A. The Ah Toy agreement requires that land be compulsorily acquired as compensation for Mr Ah Toy, and thus purports to fetter the Minister’s statutory discretion under s 31A to otherwise resolve the proposed acquisition by agreement with the Respondents. Consequently the Ah Toy agreement is unlawful. It follows, since the true purpose of the proposed acquisition is to implement an unlawful agreement, that to proceed to acquisition would

be in breach of s 43(1): the term “purpose” in that provision cannot include an unlawful purpose.

3.4 Similarly, the Minister may not, by prior agreement or otherwise, fetter his statutory obligation under s 37(1) to consult with a registered native title claimant “about ways of minimising the impact of the acquisition on registered native title rights and interests in relation to the land”, or fetter his statutory discretion under s 35(1) to modify or abandon a proposal to acquire native title. The Ah Toy agreement requires that land be compulsorily acquired as compensation to Mr Ah Toy, and thus purports to fetter the Minister’s statutory obligation under s 37(1) to explore alternative options which minimise the impact on native title, and in particular purports to fetter the Minister’s statutory discretion under s 35(1) to modify or abandon a proposal to acquire native title. Consequently the Ah Toy agreement is unlawful. It follows, since the true purpose of the proposed acquisition is to implement an unlawful agreement, that to proceed to acquisition would be in breach of s 43(1): the term “purpose” in that provision cannot include an unlawful purpose.

3.5 Secondly, the Ah Toy agreement concerns not only the acquisition of land owned by Mr Ah Toy, but also the acquisition of native title rights or interests. The subsequent acquisition of native title is a necessary consequence of the agreement. Section 31A empowers the Minister to acquire native title only “in accordance with an indigenous land use agreement”, being an agreement made pursuant to ss 24BA or 24CA of the *Native Title Act 1993* (Cth). The Ah Toy agreement has not been made pursuant to those provisions and is not an indigenous land use agreement, but however purports to facilitate the acquisition of native title. Consequently the Ah Toy agreement does not comply with s 31A(a) and is unlawful. It follows, since the true purpose of the proposed acquisition is to implement an unlawful agreement, that to proceed to acquisition would be in breach of s 43(1): the term “purpose” in that provision cannot include an unlawful purpose.

4. RELEVANT CONSIDERATIONS

4.1 The proposition that privately held interests be arbitrarily acquired for the purpose of compensating another private person regarding a separate acquisition appears unprecedented. Certainly courts have been reluctant to uphold proposals whereby private property is acquired for the purpose of transferring it to another private person. In *Prentice v Brisbane City Council* 1966 Qd R 394 the Court held that the Council could not acquire private land for the purpose of assisting a company regarding a development project on other land. At p 410 Mansfield CJ observed that a prior agreement “in effect made the Council an agent of the company rather than the inhabitants in general, when it purported to put into operation its powers of resumption of the plaintiff’s land.” At p 406 Mansfield CJ identified the guiding principle where acquisition is concerned:

It is of prime importance that a private individual should not compulsorily, and against his will, be deprived of his property unless the power to do so is clearly conferred and validly exercised.

- 4.2 The legal recognition of native title by the High Court in *Mabo No 2* in 1992³ requires that the previous approach of governments to acquisition must be reconsidered. At least in the Northern Territory, there is a real prospect that substantial areas of land previously considered to be beneficially owned by the Crown are in fact privately owned as native title by Aboriginal people. The success of the Alice Springs native title application supports this view, and indicates that comprehensive agreements to identify the use of land in town areas should be facilitated. Such agreements do not presently exist, and it is not doubted that in certain cases the public interest may justify the exercise of executive power to acquire native title for the benefit of a private person. Such circumstances do not apply here. The Minister proposes that land of significant commercial value be acquired not for the purpose of an identified and proposed development, but in lieu of monetary compensation regarding a separate acquisition. Such an acquisition of property is arbitrary and cannot be justified. It is reasonable that Mr Ah Toy instead be compensated in the usual way, by the provision of monetary compensation to the value of the land acquired.
- 4.3 Secondly, in a deed and supplementary deed dated 18 September 1998, the Wagiman People (and other Aboriginal groups) executed an agreement with the Territory to facilitate the Alice Springs to Darwin railway. The railway agreement provided that the Wagiman People receive monetary compensation and joint management of Umbrawarra National Park. (As a consequence of the settlement of the Upper Daly (Repeat) Land Claim No 128 on 15 November 1999, the National Park will also be granted as Northern Territory freehold to the Wagiman People with a lease-back arrangement to the Park authorities.) At least in spirit, it was anticipated that the railway agreement would resolve all outstanding native title issues regarding the railway. Certainly the Territory never indicated that further native title issues existed. In these circumstances the further acquisition of native title merely for the purpose of providing compensation to a third party (rather than, for example, because the corridor had been re-routed) is neither appropriate nor justifiable.
- 4.4 Thirdly, in contrast to the railway agreement and in contrast to the approach taken regarding Mr Ah Toy, it appears that the Territory will not provide compensation to the Wagiman People until such time as native title is determined by a Court. In these circumstances, and particularly given the operation of the *Racial Discrimination Act 1975* (which requires that both Aboriginal and non-Aboriginal people be treated equally in relation to their property rights), the acquisition of native title merely for the purpose of providing compensation to a third party is neither appropriate nor justifiable.
- 4.5 Fourthly, the Minister's position (as expressed in Ms Blackley's affidavit dated 23 November 2000) that the land is not enjoyed or used by the Wagiman People and that

there will be minimal impact on the life, culture and traditions of the Wagiman People, is not supported by any cogent or direct evidence. Further the position ignores the fact that the lack of legal recognition of native title until 1992 (which is continuing given the Territory's position, notwithstanding the High Court's decision in *Wik*⁴ and the Full Federal Court's decision in *Ward*,⁵ that NT pastoral leases extinguish native title) has substantially restricted the capacity of Aboriginal People to enjoy or use land, including the enjoyment of the economic value of land. In these circumstances, and particularly given the operation of the *Racial Discrimination Act 1975* (which requires that both Aboriginal and non-Aboriginal people be treated equally in relation to their property rights), the acquisition of native title merely for the purpose of providing compensation to a third party is neither appropriate nor justifiable.

DATED 15th day of February 2001.

Ron Levy

Solicitor

¹ Section 5(1) defined "public purpose" as meaning "a purpose in respect of which the Parliament has power to make laws, and, in relation to land in a Territory, includes any purpose in relation to that Territory".

² Should there be doubt, it is apparent from s 89A(1)(a) that the Territory may acquire land by agreement other than under the Act, and from s 89A(1)(b) that compensation may be paid by agreement other than under the Act (in the latter case provided that the agreement specifies that the Act other than s 89A(1)(b) does not apply).

³ *Mabo v Queensland (No 2)* 1992 175 CLR 1.

⁴ *Wik Peoples v Queensland* 187 CLR 129, which held that Queensland pastoral leases do not extinguish native title.

⁵ *Western Australia v Ward* (2000) 170 ALR 159, which held that Northern Territory pastoral leases do not extinguish native title. The High Court will hear an appeal against this decision on 6 March 2001.

133. Subsequent to leave from the Tribunal the Applicant filed submissions ("Applicant's Submissions") dated 4 May 2001, set out below:-

APPLICANT'S SUBMISSIONS

BACKGROUND

1. The Minister for Lands and Planning (herein the Applicant) proposes to acquire, pursuant to his powers under section 43 of the *Lands Acquisition Act* ("the LAA"), all interests including native title rights and interests (if any) in parts of Lots 287 and 297 of the Town of Pine Creek, together with part of a roadway ("the Land").¹

2. The Land is wholly within the boundary of the Town of Pine Creek as proclaimed under the *Crown Lands Act* by Proclamation dated 13 August 1973 published in the Australian Government Gazette No 129 dated 20 September 1973 and extended by Proclamation dated 15 September 1983, published in the Northern Territory Government Gazette No G38 on 23 September 1983 and effective from that date.
3. A search of the Register of Native Title Claims and the National Native Title Register maintained under the *Native Title Act* 1993 (Cth) ("the *NTA*") in relation to the Land, requested on 9 August 1999, resulted in advice from the National Native Title Tribunal ("the NNTT") on 10 August 1999 that no applications for determination of native title had been lodged in relation to the Land at that date; nor had any been lodged by 14 September 1999 as confirmed by the NNTT².
4. A search of the Register maintained by the Registrar-General under the *Real Property Act* in relation to the Land was conducted on 9 August 1999, disclosing that Lots 287 and 297 were vacant Crown land with no registered interests in the land.³
5. A Notice of Proposed Acquisition of Land was published in the Northern Territory News on 13 September 1999⁴ and Notices of Proposal were served by registered post on the Registrar of the NNTT⁵ and the Chief Executive Officer of the Northern Land Council ("the NLC") on 14 September 1999. Served on the NLC, with the Notice of Proposal was a Statement Summarising the Rights of Persons served with a Notice of Proposal ("Statement of Rights") and a Notice of Objection to a Proposed Acquisition⁶ ("Notice of Objection").
6. The NLC is the representative Aboriginal/Torres Strait Islander body in the relation to the Land, having been so recognized by the Commonwealth Minister under section 203AD of the *NTA*.
7. On 21 December 1999, following a telephone request from the NLC on that day, further copies of the Notice of Proposal, the Statement of Rights and a Notice of Objection were provided to the NLC.⁷
8. On 23 December 1999 a Notice of Objection by Paddy Huddleston and others on behalf of the Wagiman people (herein the Respondents) ("the Objection") was lodged.⁸ At that date an application for a determination of native title in relation to the Land (DC99/19 Pine Creek No 2) ("the Determination Application") had been lodged by the Respondents and was pending registration. A copy of the Determination Applicant as registered is provided with these Submissions.
9. The Applicant takes no issue with the apparent non-compliance with section 34(1) of the *LAA*⁹ and is prepared to treat the objection made on 23 December 1999 as if it were lodged by a person who had been served with a Notice of Proposal under section 32 of the *LAA*.

10. On 24 December 1999 copies of a Notice of Proposal, Statement of Rights and Notice of Objection were forwarded to the Respondents and served by registered post on 30 December 1999.¹⁰
11. On 21 January 2000 the Determination Application was accepted for registration by the Registrar of the NNTT.¹¹
12. By letter dated 25 January 2000, the Respondents were invited to consult with the Applicant.¹²
13. By letter dated 13 September 2000 the Applicant applied to have the objection to the proposed acquisition heard by the Lands and Mining Tribunal ("the Tribunal").

JURISDICTION OF THE TRIBUNAL

14. Subject to compliance with sections 36, 37 and 38 of the *LAA*, the Tribunal has jurisdiction to hear and make recommendations about objections to the acquisition of land under the *LAA* by persons whose interests in the land will be divested, modified or affected by the acquisition, including objections by registered native title claimants so far as it affects the registered native title rights and interests of the claimants and bodies.¹³
15. A person claiming to have native title rights and interests in land and with a claim for registration pending may lodge an objection, subject to acceptance of the claim for registration, within 4 months of a specified date, here being 23 September 1999¹⁴. The Applicant accepts that the Objection was properly lodged in accordance with the requirements of the *LAA*, the Respondents claim for registration being accepted on 21 January 2000.¹⁵

Application of the *LAA*

16. By section 5A(1)(a), the *LAA* applies to the proposed acquisition because it is in relation to an acquisition of an interest in land that comprises native title rights and interests that is an act to which the consequences in section 24MD(6A) or (6B) of the *Native Title Act* ("the *NTA*") apply.¹⁶
17. The consequences of subsection 24MD(6A) apply because the proposed acquisition is the "compulsory acquisition of native title rights and interests that relates solely to land or waters wholly within a town or city" and Subdivision P of Division 3 of Part 2 of the *NTA* does not apply.¹⁷
18. Subsection 24MD(6B) of the *NTA* applies because of the circumstances in paragraph 17 above and because the compulsory acquisition is for the purpose of conferring rights and interests in relation to the land on a person other than the Territory.¹⁸
19. The application of the *LAA* to the proposed acquisition is not disputed by the Respondents¹⁹.

Compliance with section 36 of the LAA

20. The last day upon which any person was entitled to lodge an objection under section 34 of the LAA was 23 January 2000. In compliance with section 36 of the LAA the Respondents were invited to consult with the Applicant in accordance with section 37²⁰.
21. There is no evidence that the Respondents participated in any consultation with the Applicant.

Compliance with section 37 of the LAA

22. The Respondents' Submissions appear to raise the issue of the Applicant's compliance with section 37 by contending that, by the Territory entering into a Deed with Mr Ah Toy contemplating the grant of the Land in compensation for the acquisition of part of Lot 293 for the purposes of the railway ("the Ah Toy agreement")²¹, the Applicant has fettered his statutory discretion to resolve objections by agreement in respect of the Land²². Reference is made to the statutory obligation of the Applicant to consult under section 37(1) of the LAA (and to his statutory discretion under section 35(1) to modify or abandon a proposal).
23. The only issue relevant to the hearing of an objection made under section 34 of the LAA is the question of the Applicant's compliance with section 37. That requires that:
 - (a) the Applicant must consult with a person who lodged an objection in accordance with section 34 about the acquisition (here the Respondents)²³; and
 - (b) that any consultation with the Respondents include consultation about ways of minimizing the impact of the acquisition on native title rights and interests, and, if relevant, about any access to the land or the way in which anything authorized by the acquisition might be done²⁴.
24. The Respondents were invited to consult with the Applicant but do not appear to have participated in any consultation, accordingly questions of the scope of any consultation do not arise.
25. Non-participation of the Respondents in the consultation process is not a ground for refusal by the Tribunal to hear and make recommendations about the objection²⁵.
26. Issues of "fettering of discretion" are properly a matter for judicial review and are not matters to be determined by the Tribunal. Section 45A of the LAA provides expressly for judicial review of a decision of the Minister to acquire land under Part V, which may include review on the basis that the procedures required by the Act were not complied with or that the purpose of the proposed acquisition was unlawful.
27. In any event, close attention to the Ah Toy agreement reveals that the Respondents' submissions are misconceived. For example, the Ah Toy agreement is said to

"[require] that land be compulsorily acquired as compensation for Mr Ah Toy", subsequent acquisition of native title being a "necessary consequence"²⁶. This is clearly incorrect.

28. As Recitals D and E and clauses 2(a) and 3 make plain, the subsequent acquisition of native title is not a necessary consequence of the Ah Toy agreement²⁷; nor does the agreement purport to facilitate the acquisition of native title. Put simply, in relation to native title, the Ah Toy agreement says: if the Territory can resolve all native title issues in relation to Lots 287 and 297 to its satisfaction, then the Territory will grant that land to Mr Ah Toy as freehold title land, otherwise the Territory and Mr Ah Toy will consider alternative compensation, including monetary compensation.
29. There is no inconsistency between the consultation and mediation process contemplated in section 37 of the *LAA*, including consultation with registered native title claimants as to ways of minimizing the impact of the compulsory acquisition on registered native title rights and interests in the Land. Indeed, it is true to say that the Ah Toy agreement, as far as it relates to the grant to Mr Ah Toy of Lots 287 and 297, depends upon the resolution of native title issues in respect of those lots. If those issues cannot be resolved then there is an alternative basis contemplated for compensation.

Compliance with section 38 of the *LAA*

30. The consultation period provided for in section 37(3)(b) of the *LAA* expired on 7 June 2000²⁸.
31. By letter dated 13 September 2000 the Applicant applied to the Tribunal, in accordance with section 38 of the *LAA*, to have the Objection heard.
32. The application is validly before the Tribunal and it has jurisdiction to hear the objection and make a recommendation in relation to the acquisition of the Land so far as it affects the registered native title rights and interests of the Respondents²⁹.
33. The Respondents challenge to the proposed acquisition proceeding on the bases that:
 - (a) the notice of proposal does not comply with section 33(1)(b) of the *LAA*;
 - (b) the notice of proposed acquisition does not comply with section 33(3)(b) of the *LAA*; and
 - (c) the purpose of the proposed acquisition is unlawful, being to implement an agreement between the Territory and Mr Ah Toy for compensation and is not a "purpose" contemplated by section 43(1) of the *LAA*;is not within the jurisdiction of the Tribunal, and the Tribunal should not take into account the submissions made by the Respondents on those issues: see also paragraph 52 below.

CRITERIA TO BE CONSIDERED

34. Section 38AA of the *LAA* specifies the criteria which the Tribunal must consider in making a recommendation in relation to the acquisition of land. Where registered native title rights and interests will be or may be affected by the acquisition, those matters are³⁰:
- (a) objections and submissions as to the effect of the acquisition on any of the following:
 - (i) the enjoyment by the claim group of the registered native title rights and interests;
 - (ii) The way of life, culture and traditions of the claim group;
 - (iii) the development of the social, cultural and economic structures of the claim group;
 - (iv) the freedom of access by the claim group to the land concerned and their freedom to carry out rites, ceremonies or other activities of cultural significance on the land in accordance with their traditions;
 - (v) any area or site on the land concerned of particular significance to the claim group in accordance with their traditions;
 - (b) ways of minimising the impact of the acquisition on registered native title rights and interests, including in relation to access to the land;
 - (c) the economic or other significance of the acquisition to the Territory and to the region; and
 - (d) the public interest in the acquisition.
35. The Applicant proposes to deal with the Land by consolidating it with Lot 293 Town of Pine Creek and granting it in fee simple, under the provisions of the *Crown Lands Act*, to Mr Edward Ah Toy or his nominee. As a matter of form, the "purpose" for which Mr Ah Toy may later use the Land is not required to be stated in the Notice Proposed Acquisition or the Notice of Proposal³¹.
36. The jurisdiction of the Tribunal will be attracted in the event that the compulsory acquisition is for the "purpose of conferring rights and interests in relation to the land" on third persons: see section 5A(1)(a), *LAA* and section 24MD(6B), *NTA*. That "purpose" is clearly disclosed.

The effect of the acquisition on native title³²

37. As to the direct effect of the proposed acquisition, if it proceeds, there will be no native title rights and interests in relation to the Land, a grant of fee simple extinguishing

permanently all native title rights and interests in the Land over which it is granted³³. The inquiry of the Tribunal must be on that basis. Paragraphs 3(a) and (b) of the Objection are correct as a matter of law.

38. As to paragraph 3(c) of the Objection, the Applicant notes that Schedule G of the Determination Application lists a number of activities of traditional usage, only some of which are said to relate to the area claimed. There is no evidence before the Tribunal as to which activities there listed are carried out on the Land, except in Schedule M where it is asserted that the applicant, has, throughout his life, used the Land by entering and travelling across it: see also paragraph 10.1.1 of the affidavit of Noreen Alma Blackley sworn 23 November 2000 ("the Blackley affidavit").
39. As at 22 November 2000 there were no registered sacred sites recorded in respect of the Land³⁴. There is no evidence before the Tribunal as to the possible existence of any unregistered sacred sites³⁵.
40. If any part of the Land is a sacred site, the proposed acquisition will have no effect in relation to the matters set out in paragraph 3(c) of the Objection, insofar as those matters depend upon the Respondents having access to the Land³⁶.
41. So too will any proposed future development of the Land will be subject to the *Sacred Sites Act* which makes it an offence to carry out work on or use a sacred site without a Certificate under that Act, requiring consultation with traditional owners³⁷.
42. As to paragraph 3(d) of the Objection, the only evidence as to the "topography" or natural features of the Land is to the effect that it does not have "any creeks or other natural feature which would make it attractive for use by any native title claim group³⁸". Certainly the grant of the Land in freehold will not alter the topography; nor is there any suggestion that any future use of the Land for commercial development (perhaps as a mango plantation) will have any effect on the topography.
43. Nor is there any evidence as to the spiritual, environmental and ecological nature of the Land which would enable the Tribunal to form any view as to the effect the proposed acquisition will have in that regard.
44. Similarly, there is no material which would enable the Tribunal to form a view as to paragraph 3(e) of the Objection.
45. As to paragraph 3(f), there is likewise no evidence of any of the matters set out therein, other than the "understanding" expressed in paragraph 10.1.1 of the Blackley affidavit that the land has not been the subject of use by Aboriginal people for at least some 30-35 years.
46. The Tribunal should not recommend against the compulsory acquisition, unless the evidence is sufficient for it to form the view that the any adverse effect of the acquisition of registered native title rights and interests outweighs the economic

advantage or other significance the acquisition proceeding and the public interest in the acquisition.

Economic and other significance of the acquisition³⁹

47. Paragraphs 5 and 6 of the affidavit of the Blackley affidavit depose to a proposed exchange of land as a "practical means of dealing with the need to acquire Mr Ah Toy's land for the purposes of the railway corridor". Thus the Land is to be acquired to assist in the process of enabling a major infrastructure development to succeed, which has the potential to provide extensive economic and other benefits to the Northern Territory⁴⁰.
48. The Applicant accepts that there is presently no (certain) proposed use of the Land by Mr Ah Toy, except that Mr Ah Toy would consider using the Land for commercial development⁴¹. If such development did occur, then there would be economic benefits to the Pine Creek region, including for Aboriginal people living in the region.

Public interest⁴²

49. In the absence of any evidence about proposed use of the Land, the Applicant accepts that any public interest in the acquisition is in respect of facilitation of the railway project, and not in respect of development on the Land itself. Nonetheless, the public interest in the smooth progression of the railway project is a relevant consideration for the Tribunal in making a recommendation in relation to the proposed acquisition.
50. In the circumstances where:
- (a) the acquisition will facilitate the smooth progression of a major infrastructure development;
 - (b) there is no evidence of the Land being used by the Respondents (perhaps) to enter and travel across; and
 - (c) where the protection of the *Sacred Sites Act* applies in any event to allow access to any areas of particular significance (of which there is no evidence),
- the Tribunal should not make a recommendation upholding the Objection.
51. Nor, in the above circumstances, should the Tribunal make a recommendation imposing conditions on the proposed acquisition.

OTHER MATTERS

52. The Tribunal should exercise its power under section 22A of the *LMT Act* and dismiss any part of the Objection (as expressed in the Respondents' Submissions) which is not on the ground that the compulsory acquisition would be likely to affect native title rights and interests, being grounds 1.1(a), (b) and (c).

53. As to ground 1.1(d), that there are alternative methods of compensating Mr Ah Toy, and that Mr Ah Toy does not have an immediate need for the land, would be factors which the Tribunal would take into account in the event that it was able to find that there was a likely to be a significant impact on the native title rights and interests of the Respondents if the acquisition went ahead. In those circumstances (ie severe adverse impact on native title) it would be open for the Tribunal to find that the adverse impact on native title outweighs the economic advantage and the benefits of the acquisition, and to recommend against the proposed acquisition. There is no evidence of severe impact here.
54. The railway agreement relates to the acquisition of native title over other Land and is not relevant here, unless (possibly) the effect of the railway agreement was to acquire native title over all other land with which the Respondents have a connection. In that case, the effect of acquiring native title over the Land would be enhanced. No such suggestion is made; nor could it be.
55. As to ground 1.1(d)(iv), it is not for the Applicant to show "by cogent or direct evidence" that there will be "a minimal impact on the life, culture and traditions" of the Respondents. The starting point is for the Respondents to show that there will be any effect at all, which they have not done.
56. Instead the Respondents appear to proceed on the presumption that a compulsory acquisition of native title in the Land will significantly impact on their life, culture and traditions. No such presumption exists.
57. The Respondents Submissions assert discrimination under the *Racial Discrimination Act* ("*RDA*") by the compulsory acquisition. Questions of discrimination should not be raised in the abstract, without a finding that native title exists and evidence as to the discriminatory effect of an acquisition under the *LAA* on native title holders compared with the effect on non-native title holders. The Respondents appear to proceed on the basis that the acquisition must be necessarily discriminatory. It is not.
58. It is not the role of the Tribunal to determine whether the proposed acquisition is contrary to the *RDA* and thereby unlawful, nor could it do so in the absence of factual findings as to the existence of native title.
59. However, it could, in an appropriate case, recommend against a proposed compulsory acquisition on the basis of likely disadvantage to the economic, social and cultural rights of the native title claim group if the acquisition goes ahead. There is no evidence in the present case which would support such a conclusion.

Dated: 4 May 2001

Raelene Webb

Counsel for the Applicant

1. A site plan of the Land is at annexure BJJ1 to the Affidavit of Beverley Joan Griffiths sworn 12 December 2000 ("the Griffiths affidavit").
2. Griffiths affidavit, para 4, annexure BJJ2.
3. Griffiths affidavit, para 5, annexures BJJ3 and BJJ4.
4. Griffiths affidavit, para 7, annexure BJJ6.
5. Griffiths affidavit, para 9, annexure BJJ9.
6. Griffiths affidavit, para 9, annexure BJJ8.
7. Griffiths affidavit, paras 10 to 12, annexures BJJ10, BJJ11 and BJJ12.
8. Griffiths affidavit, para 13, annexure BJJ13.
9. No Notice of Proposal having previously been served on the Wagiman people.
10. Griffiths affidavit, paras 15 and 16, annexures BJJ15 and BJJ16.
11. Griffiths affidavit, para 17, annexure BJJ17.
12. Griffiths affidavit, para 18, annexure BJJ18.
13. Section 5(1)(a), *Lands and Mining Tribunal Act* ("the *LMT Act*").
14. Section 34(1)(a) and (1B), *LAA*; as to the specified date, see Griffiths affidavit para 7 and also the "objection period" referred to annexure BJJ7.
15. Griffiths affidavit para 17.
16. The consequences of s24MD(6A) & (6B), *NTA* apply to the proposed acquisition because: it passes the freehold test set in s24MB(1); it is valid under s24MD(2); and none of s24MD(6)(a) to (d) apply. See also Applicant's Form 2.
17. See sections 24MD(6)(a) and 26(2)(f), *NTA*. See also Applicant's Form 2 and attached Gazettals as to the land being solely within the Town of Pine Creek.
18. Section 24MD(6B)(a), *NTA*.
19. See Respondents' Form 3.
20. Griffiths affidavit para 18, annexure BJJ18.
21. Although not strictly relevant to this hearing, the Applicants have provided the Ah Toy agreement to the Tribunal for the purpose of answering the Respondents' Submissions as far as they relate to jurisdiction. See Respondents' Submissions paras 1.1(c)(ii), 3.2 and 3.4.
22. Section 37(1), *LAA*.
23. Section 37(2), *LAA*.
24. Section 5(3), *LMT Act*.
25. Respondents' submissions, para 3.3; see also paras 2.8, 3.4 and 3.5.
26. Cf Respondents' Submissions, para 3.5.
27. The area of land being approximately 8 hectares: see Griffiths affidavit, annexure BJJ12.
28. Section 5(1)(a), *LMT Act*.
29. Section 38AA(2), *LAA*.
30. See sections 33(1)(b) and 33(3)(b), *LAA*.
31. Section 38AA(2), *LAA*.
32. See *Fejo v Northern Territory* (1998) 195 CLR 96.
33. Blackley affidavit para 10.4, annexure NAB2.
34. Land which is sacred, or otherwise of significance according to the Aboriginal tradition is a "sacred site" as defined in s3, *Northern Territory Aboriginal Sacred Sites Act* ("the *Sacred Sites Act*") referring to the definition in s3 of the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth).
35. Sections 46 and 47, *Sacred Sites Act*.
36. See generally Parts III and IV of the *Sacred Sites Act*. See also Blackley affidavit annexure NAB2.
37. Blackley affidavit para 10.1.2.
38. Section 38AA(1)(c), *LAA*.
39. Blackley affidavit para 12.
40. Blackley affidavit para 7.
41. Section 38AA(1)(d), *LAA*.
- 42.

134. On 22 November 2002 leave was given and dates fixed for the filing of submissions which were subsequently departed from. Upon which departure nothing turns. One aspect however of the Order made by consent on that day is in the following terms:

5 "By consent the parties request the Tribunal to formulate its decisions on the material filed with the Tribunal each waiving any right to cross examine or make oral submissions as a consequence".

135. There follows a portion of Order 5 which should have been numbered as the last part of the Order and relates to liberty to apply. The point to be made as a consequence of quoting from the Order is to highlight the fact

that both parties sought that the Tribunal had to formulate its decision on the material which had been filed. That, as will become apparent, is contrary to a submission contained in some submissions which will be referred to next; in particular paragraph 5 requesting the hearing of the proceeding be adjourned to some date after 24 March 2003.

136. On 2 December 2002, the Respondent filed the Respondents' Submissions on Jurisdiction ("Respondents' Submissions on Jurisdiction") set out below:-

RESPONDENTS' SUBMISSIONS ON JURISDICTION

Introduction

1. The jurisdiction of the Tribunal to hear an application under s.38 of the *Lands Acquisition Act* (NT) (the Act) depends on compliance with Divisions 1A, 1 and 2 of Part IV of the Act.
2. The amended grounds of opposition to the proposed acquisition challenge the jurisdiction or authority of the Tribunal and as a consequence the Tribunal must satisfy itself that it has jurisdiction on the application of the applicant (the Minister) to hear the objections¹. In particular, the Tribunal must be satisfied that the notice of proposal and the notice of proposed acquisition are valid and within power. Whilst the Tribunal, as an administrative body, cannot give a definitive and binding answer to that question, it is bound not to exceed the authority conferred on it and in discharging its functions it is proper for it to form an opinion on whether it has that authority².
3. The amended grounds of opposition in this matter are in terms similar to the grounds of opposition raised in *Minister for Lands, Planning and Environment v Griffiths* that concerned three compulsory acquisitions of land in the Town of Timber Creek, upon which the Tribunal published its decisions on 22 March 2002³. The Tribunal's decisions in those matters are the subject of review proceedings in the Supreme Court⁴, which are fixed for hearing on 24 March 2003. By way of interim relief in that case, on 11 June 2002 Bailey J granted an injunction restraining the Minister from publishing any notice of acquisition in relation to those lands and on 14 June 2002 the Minister gave the Supreme Court an undertaking to that effect until further order of the Court.
4. The grounds of review in *Griffiths v Minister for Lands, Planning and Environment* include that the Tribunal lacked jurisdiction in those matters because the Act does not permit the acquisition of native title rights and interests for the purposes identified in

the relevant notices of proposal and of proposed acquisition, and that the amendments made to the Act since July 1993 are inconsistent with s.24MA of the *Native Title Act* 1993 (Cth) (the NTA) and are to that extent invalid. The identified purposes of the acquisitions in those matters are in terms similar to the purpose of the proposed acquisition in this matter, that is, the acquisition of Crown land where the only interests affecting the land are native title interests for the purpose of granting a private interest in the land under the *Crown Lands Act* to a third party once the acquisition is effected.

5. In these circumstances, the respondents submit that it is appropriate that the hearing of this proceeding be adjourned to some date after 24 March 2003 with a direction that at the return date the respondents, if so advised, make application for the hearing to be further adjourned pending a decision by the Supreme Court in *Griffiths v Minister for Lands, Planning and Environment* and the granting of any final relief in that case. The respondents in this proceeding submit that adoption of that course of action is appropriate for the same reasons the respondents in *Minister for Lands, Planning and Environment v Huddleston & Others* (LMT-38-2001-LA(N)(20108444)) put forward in the application made in that proceeding for an adjournment⁵.
6. The submissions that follow are made on the basis that the Tribunal does not accede to the submission made at 5 above. The submissions address only the question of whether the Tribunal has jurisdiction to hear the proceeding, and are filed pursuant to the directions made by the Tribunal on 22 November 2002. Separate submissions on the application of s.38AA of the Act will be filed on 16 December 2002 pursuant to the directions of the Tribunal, but which need only be considered if the Tribunal holds that it has jurisdiction.
7. Because the amended grounds of opposition in this proceeding raise the same issues as that which had been raised in *Minister for Lands, Planning and Environment v Griffiths*, the respondents in this proceeding adopt Parts 1 to 5 and 12 of the written submissions filed by the respondents in that proceeding in November 2001⁶, but seek to supplement those submissions by reference to the effect of ss.46 and 48 of the Act on the proposed acquisition in this proceeding and by reference to what the High Court has said more recently in *Western Australia v Ward*⁷ in respect to the *Racial Discrimination Act* 1975 (Cth) (the RDA)⁸; the latter affecting what was put in Part 12 of those written submissions. Further, the circumstances of the proposed acquisition in this proceeding raise an additional jurisdictional issue. That concerns the effect of a deed between the Territory and the proponent of the interest in the land, Mr Ah Toy. The respondents also rely on the written submissions filed with the Tribunal on 16 February 2001 in this proceeding.

The Act and Crown Land

8. Section 32(1) of the Act provides that the Minister may compulsorily acquire land in relation to which Part IV applies if the Minister has undertaken the steps set out in pars (a) to (f), which include the service of a notice of proposal (par (b)) and the publication of a notice of proposed acquisition (par (e)). If the pre-acquisition procedures in Part IV of the Act are complied with, s. 43(1)(c) provides that subject to the Act the Minister may acquire land under the Act for any purpose whatsoever by causing a notice declaring the land to be acquired to be published in the Gazette.

9. The purpose of an acquisition is to be found in the statement in a notice of proposal and a notice of proposed acquisition of the manner in which the Territory proposes to deal with land if it is acquired under the Act that is required by ss.33(1)(b) and (3)(b), by which such a notice is to be in the approved form and is to contain:

details of the manner in which it is proposed that the land, if acquired, will be dealt with.

The notice of proposal and the notice of proposed acquisition of the land (Lots 287 and 297) state the manner in which the Territory proposes to deal with the land if it is acquired to be⁹:

Consolidation with Lot 293 Town of Pine Creek and grant of an estate in fee simple, under the provisions of the Crown Lands Act, to Mr Edward Ah Toy or his nominee.

10. Section 46(1) provides that the effect of the publication of a notice of acquisition under s.43(1)(c) is to vest the land in the Territory freed and discharged from all interests and to divest any interest that a person had in the acquired land to the extent necessary to give effect to that vesting. By s.59(1) that interest is, at the date of the acquisition, converted into a claim for compensation against the Territory. Section 48 of the Act provides:

(1) The Minister may, at any time while no person (other than Crown) has an estate or interest in the land, by notice published in the Gazette, declare that any land acquired under this Act is no longer required for the purpose for which it was acquired.

(2) Land referred to in a notice under sub-s. (1) may be dealt with as unalienated Crown land under a law in force in the Territory.

Section 4(1) of *Crown Lands Act* (NT)¹⁰ provides that Crown land shall not be alienated from the Crown otherwise than in pursuance of that Act. Sections 9-10 and 12-18 make provision for the Territory to grant an estate in fee simple and leases in Crown land. Under s. 11 land becomes unalienated Crown land when the Territory is the owner of the land and no other person other than the Crown has a registered interest, the Minister has directed the Registrar-General to cancel the entry in the land register in respect of the land, and the Registrar-General has made that cancellation¹¹.

11. By the notice of proposed acquisition the Territory proposes to acquire “all interests, including native title rights and interests (if any)” in the land. “Interest” is defined in s.4(1) of the Act to include a legal estate or interest in the land or a right, power or privilege in or over or affecting or in connection with land. On its face, the definition would extend to the right, title or interest that the Territory has in Crown land like Lots 287 and 297 by force of the vesting made by s.69(2) of the *Northern Territory (Self-Government) Act 1978* (Cth) (the Self-Government Act)¹². However, a proper reading of the Act supports the view that the Act does not authorise the compulsory acquisition of Crown land, that is, land in the Territory that has not been alienated by the Crown, and that the notice of proposed acquisition should be read accordingly. The question in this case is whether the Act authorises the acquisition of Crown land where the only interest affecting the land is a native title interest.

12. The respondents submit that the Act authorises the acquisition of land affected by native title interests only where the land to be acquired is also affected by non-native title interests and the notice of acquisition seeks to acquire both sets of interests, that is, land that has been alienated and is not Crown land. Subject to the operation of specific provisions dealing with certain leasehold interests in Crown land mentioned at 21 below, plainly the Act authorises the acquisition of land that has been alienated by the Crown and is no longer Crown land. What the Act does not authorise is the acquisition of Crown land either unaffected by any interest or the acquisition of Crown land that is affected only by native title interests. This construction rests on the objects and scope of the Act’s provisions, being an Act “relating to the acquisition of land by the Territory” (long title) that makes provision for the Minister to authorise entry onto land to investigate its suitability for the relevant proposal (s.30), that is, the manner in which the Territory proposes to deal with land once it has acquired the land (ss.4(1), definition of proposal, and 32-33 re notices of proposal), for land to be divested of existing interests on acquisition (ss.43 and 46), and for land that has been acquired to be dealt with as Crown land if it is no longer required for the purpose for which it was acquired (s.48). This construction is also supported on the basis that it avoids a finding that the Act or its operation is invalid for being inconsistent with s.10(1) of the RDA or that the exercise of the power of acquisition for the purpose of granting a private interest in Crown land exceeds the Commonwealth grant of executive power under self-government¹³.

13. The effect of s.48 of the Act is that land acquired under the Act cannot be dealt with as unalienated Crown land under the *Crown Lands Act* until three conditions are met: first, where it is acquired compulsorily under s.43 of the Act; secondly, where circumstances arise whereby the land is no longer required for the purpose for which it was so acquired; and thirdly, where the Minister makes a declaration accordingly. The

proposed acquisition of the land for the purpose stated in the notice of proposed acquisition in this case is therefore not an acquisition for a purpose within the terms of Part IV of the Act. Such a purpose cannot be what is authorised by s.48 in Part V because that section contemplates that acquired land be treated as alienated Crown land under the *Crown Lands Act* only if those three conditions are met, and the authority in s.48 applies only where the purpose of the acquisition no longer has application. Because s.43(1) is expressed to operate subject to the Act, it follows that the purpose of an acquisition under the Act cannot be a dealing in the land as unalienated Crown land as authorised by s.48. To so hold would make s.48 meaningless.

14. What the proposed acquisition seeks to achieve is for the land to be divested of existing interests (in this case directed to the respondents' native title rights and interests) so that it may be dealt with as unalienated Crown land to enable a grant of an estate in fee simple to be made to Mr Ah Toy under s.10 of the *Crown Lands Act*. When the notice of proposed acquisition is understood in the context of ss.43, 46 and 48 of the Act and ss.4, 9 and 11 of the *Crown Lands Act*, three things are apparent.
15. First, the notices of proposal and proposed acquisition do not contain, as required by s.33(1)(b) and (3)(b) of the Act, details of the manner in which it is proposed that the land, if acquired, will be dealt with by the Territory because the purpose stated in the notices cannot be a purpose of an acquisition under ss. 32(1) and 43(1). There must necessarily be some other and valid purpose apart from the purpose to deal with the land as unalienated Crown land because of the terms of s.48.
16. Secondly, the extinguishment of the respondents' native title rights and interests is not a consequence of the acquisition, but rather it is the purpose or at least a substantial purpose of the acquisition, because that extinguishment is to be done so that the land can be dealt with as unalienated Crown land for the grant to be made. To use the power of acquisition to deprive someone of ownership of land is to use the power for an impermissible purpose¹⁴. The existence of native title and the operation of the NTA precludes the Territory from granting valid interests under the *Crown Lands Act* and from treating Crown land affected by native title as if it were unalienated Crown land unaffected by any interest unless, as the Territory seeks to achieve here, native title is acquired and extinguished in conformity with the NTA. If the acquisition of native title is being done so as to validate what would otherwise be an invalid a grant of an interest under the *Crown Lands Act*, then that is the purpose rather than the consequence of the acquisition, and the Act should not be construed as intending to permit the taking away of land from one citizen for the purposes of giving or selling it to another citizen.

17. Thirdly, subject to what has been said at 11 above, what the proposed acquisition seeks to achieve seems to be misconceived because on the face of things the terms of the notice are such that the Territory's interest in the land would also be acquired. Although that might be accidental or unintended, there is nothing in the Act to allow for a severance of the terms of the notice¹⁵. Because there is nothing in the Act that contemplates the Minister, on behalf of the Territory, acquiring an interest of the Territory in land, the notice would, to that extent, be a nullity, and absent power to sever the void part of the notice, the notice as a whole would be void.
18. However, the third point would arise only if the Act was construed as authorising the compulsory acquisition of Crown land, whether it be Crown land unaffected by any interests, or Crown land that is affected only by a native title interest, and the notice of proposed acquisition were read as seeking to acquire the Crown's interest in the land. The short answer is that the Act contemplates, by the terms of s.48, that the power of acquisition in the Act not be used for acquiring Crown land, including Crown land affected only by native title interests.
19. The point of s.43 of the Act, both as originally enacted and as amended¹⁶, is not to confer a power on the Minister, but to ensure that any such a power is exercised in accordance with the Act, because the Act is procedural in nature. As the materials on the amendment to the Act in 1982 by the omission of the phrase "for public purposes" in ss.32 and 43 and of the definition of "public purposes" demonstrate, the relevant power is found in and confined by the executive authority of Ministers of the Territory under s.35 of the Self-Government Act, which by the Self Government Regulations includes power to administer enactments of the Northern Territory¹⁷. Thus, the relevant power of acquisition is to be found in ss.32 and 43 of the Act in combination with other legislation that delineates both the purpose for which the power can be exercised and the executive authority of the Territory that an exercise of the power may further. Examples of the legislation are given in the attached schedule
20. Although there is some overlap, the legislation referred to in the attached schedule falls into the following categories:
 - (1) Legislation that establishes a statutory corporation and confers on it a power to acquire property in order to perform its statutory functions¹⁸: items 1-6, 10, 12-14, 18, 21-26, 28-29, 31, 33-34, 37-40.
 - (2) Legislation that contains a power of acquisition or contains limits on such a power or incorporates provisions of the *Lands Acquisition Act* on the exercise of a power of acquisition: items 5, 7-9, 16-17, 19, 27, 30, 32, 35-36.

Legislation in the first category will specify the purposes for which the powers in ss.32 and 43 of the Act may be exercised and the Act will be engaged on the exercise of those powers, whilst some of the legislation in the second category will engage certain provisions of the Act on the exercise of a power contained in that other legislation.

21. If the land had been subject to a grant of an interest from the Crown the Minister would be unable to use the power under s.9 of the *Crown Lands Act* to grant an estate in fee simple to Mr Ah Toy because to do so would derogate from the first mentioned grant. The Minister could only do that if the earlier interest contained a reservation for resumption or was a lease caught by the power of resumption in s.76(1)(a) of the *Crown Lands Act*¹⁹, and the power of resumption was first exercised validly. Because the power of resumption conferred by the *Crown Lands Act* is a specific power of acquisition for certain Crown land, the operation of which is saved by s.89A(2) of the Act, its specific provisions are to be construed as applying to that type of Crown land to the exclusion of the more general provisions of the Act. The power of resumption in s.76(1)(a) can be used only for the purposes specified in s.76(1)(a)(i)-(xiv), which do not extend to the purpose of resuming a lease held by A so as to grant another lease to B. A like position pertains to Crown land leased under the *Special Purposes Leases Act* (NT) in respect to the power of resumption contained in s.28 of that Act for the purposes specified in s.28(a)(i)-(vii).
22. The significance of these observations lies in ascertaining the purpose of the proposed acquisition and whether that is a purpose permitted by the Act because s.31B of the Act requires a proposed acquisition to pass the freehold test provided for by s.24MB of the NTA. The land in question is Crown land, albeit subject to native title rights and interests. Section 76 of the *Crown Lands Act* provides a power of resumption of Crown lands subject to a lease for the purposes specified in section 76(1)(a) or for the reservation of unalienated Crown land for such a purpose, as too does s.28 of the *Special Purposes Leases Act* in the case of leases of Crown land granted under that Act. The protection granted to a freeholder cannot be less than that to which a lessee of Crown land is entitled. Accordingly, the power of the Minister to acquire land compulsorily under the Acts should not be construed as extending to the acquisition of the freehold title of A in order to confer it upon B.
23. The construction of the Act advanced so far means that no question arises as to any inconsistency between the Act and the use of the power of acquisition and the RDA. That question arises only if the Act is construed as authorising the compulsory acquisition first, of Crown land, and secondly, Crown land affected only by native title interests.

Racial Discrimination Act

24. In *Western Australia v Ward* the majority noted that the effect of s.7(3) of the NTA was that notwithstanding the continued paramountcy of the RDA stated in sub-ss.7(1) and (2), the effect of the validation achieved by the NTA referred to in s.7(3) is to displace the invalidity which otherwise flowed from the operation of the RDA²⁰. That, however, concerns only the validation of past acts or intermediate period acts under Part 2 Divisions 2-2B of the NTA, and by s.7(2)(a) of the NTA the RDA continues to apply to the performance of functions and the exercise of powers conferred or authorised by the NTA, including that found in Part 3 Division 3 for the performance of future acts. This means that the RDA has application to the use by the Territory of the power of compulsory acquisition authorised by Sub-division M of Division 3, particularly, s.24MD. So much is expected by the terms of the NTA, an example of which is reflected in the conditions for non-discriminatory treatment contained in pars (b) and (ba) of s.24MD(2) that for the extinguishment of native title to occur on a compulsory acquisition there must be an accompanying acquisition of non-native title interests and the practices adopted for acquiring the native title interests must not cause disadvantage to native title holders.
25. In *Ward's Case* the majority explained that where a law authorises an act having a discriminatory effect, s.9(1) of the RDA does not invalidate the act and the appropriate provision is s.10(1),²¹ but where “the power conferred by the legislation is exercised in a manner that, as a matter of fact, is discriminatory”, s.10(1) is engaged.²² Section 9(1) will apply in cases where the act having a discriminatory effect is done in performance of and in conformity with the authorising law. Where, however, the law applies equally to native title holders and the holders of interests derived from the Crown (for example, by not providing compensation rights to either class), but the powers conferred by the law are used to discriminate against native title holders, s.10(1) will be engaged. When s.10(1) is engaged it will either confer a benefit where the law or exercise of power omits to make enjoyment of the right universal (ie: top up or complement) or it will render the law or exercise of power inoperative where it imposes a discriminatory burden by removing that burden (ie. strike down or invalidate).²³
26. As Peter Hanks explains in an article cited by the majority in *Ward's Case*, the powers of the Crown to deal with land is specific in that the powers will be exercised in respect to an identifiable parcel of land. Where the parcel of land concerned is affected only by native title and a power of alienation or appropriation is exercised only in respect to that title with no accompanying affect on a non-native title interest in the land, this results in the power being exercised in a discriminatory way.²⁴ The exercise of power in this way would “impair the human rights [of native title holders] while leaving

unimpaired the corresponding human rights of those whose rights in or over land did not take their origin from [indigenous] laws and customs.”²⁵ The exercise of the power in such a discriminatory way engages s.10(1) of the RDA and comes within the second category of case identified in *Ward’s Case* so that the exercise of power is rendered inoperative. That achieves the universal and non discriminatory treatment required by s.10(1) to put native title holders in the same position as the holder of an interest from the Crown who is protected by the inability of the Crown to derogate from the grant and whose rights remain unaffected by the exercise of the power.

The Deed

27. The evidence before the Tribunal shows that the acquisition is proposed because of the terms of an agreement recorded in a deed between the Territory and Mr Ah Toy dated 25 November 1999.²⁶ The deed recites that the Territory and Mr Ah Toy reached agreement for the acquisition by the Territory of part of Lot 293 in Pine Creek and that the agreed compensation in respect of that acquisition is the grant of Lots 287 and 297, subject to resolution of any native title issues. Pursuant to clause 1 Mr Ah Toy is to transfer part of Lot 293 to the Territory. Pursuant to clause 2 of the deed the Territory made four covenants; the first (clause 2(a)), to consider and resolve any native title issues, and the fourth (clause 2(d)), to grant Lots 287 and 297 to Mr Ah Toy as freehold title land. In the event that the Territory is able to grant Lots 287 and 297, that grant satisfies any claims of Mr Ah Toy in respect of the acquisition of Lot 293 (clause 3(a)). If not, the Territory and Mr Ah Toy are to agree on the exchange of alternative land as compensation or agree upon monetary compensation (clause 3(b)-(c)).
28. The relevant sequence of events in respect to the deed are:²⁷
- On 30 April 1997 the Minister signed a notice of proposal for the acquisition of part of Lot 293 that was sent to Mr Ah Toy by the Department under cover of a letter dated 2 May 1997.²⁸
 - In May 1997 the Minister met with Mr Ah Toy and at that meeting Mr Ah Toy advised that he was prepared to surrender part of his land in exchange for Lot 287.²⁹ That followed a letter from Mr Ah Toy to the Department to that effect dated 23 April 1997, received on 12 May 1997.³⁰
 - On 12 December 1997 the Department gave the Minister a briefing on the native title risk assessment for the exchange, concluding that there was a “medium to high risk in terms of native title continuing to exist.”³¹
 - On 29 December 1997 the Department recommended to the Minister that he “approve in principle” the exchange subject to the terms of an attached letter, which the Minister did on 11 January 1998.³²

- The deed was provided to Mr Ah Toy by the Department under cover of a letter dated 11 August 1999 for his execution and return.³³
- On 1 September 1999 the Department, after referring the Minister to the agreement reached with Mr Ah Toy, recommended to the Minister that he sign a notice of proposed acquisition for Lots 287 and 297, which the Minister did on 6 September 1999.³⁴
- On 22 December 1999 the solicitor for the Northern Territory provided the Department with an executed, dated and stamped deed, the deed being dated 25 November 1999.³⁵
- By letter dated 6 January 2000 the Department provided Mr Ah Toy with a transfer form for Lot 293 and confirmed advice that the Department was “still trying to resolve any native title issues” and advised Mr Ah Toy of the steps taken in respect to the acquisition of Lots 287 and 297.³⁷
- On 25 January 2000 Mr Ah Toy signed a transfer of Lot 293, which noted the value of the interest transferred to be \$17,000, and which was countersigned for the Territory on 11 February 2000.³⁸
- On 8 September 2000 the Department recommended to the Minister that he refer the respondents’ objection to the proposed acquisition of Lots 287 and 297 to the Tribunal for hearing.

29. Two points may be made about the deed. First, the effect of the covenants in the deed is to bind the Minister to perform the discretions conferred by ss.32(1), 38 and 43(1) of the Act at a future time in a particular way.³⁹ Secondly, the acquisition of the respondents’ interests in Lots 287 and 297 funds or off-sets the costs incurred by the Territory in acquiring part of Lot 293.⁴⁰ The second mentioned point may be viewed in one of two ways. First, that is the purpose or a substantial purpose of the proposed acquisition of Lots 287 and 297, but it is not the purpose stated in the notice of proposed acquisition. Therefore, the notice of proposed acquisition fails to state in fact the manner in which the Territory proposes to deal with the land if it is acquired. Secondly, the Act does not authorise the acquisition of land for such a purpose.

30. A public authority cannot preclude itself from exercising discretionary powers or performing public duties by incompatible contractual or other undertakings. As Mason J explained in *Ansett Transport Industries v Commonwealth*, whilst it might be detrimental to the public interest to deny to a public authority power to enter a valid contract merely because the contract affects the public welfare, the public interest requires that a public authority not by contract disable itself from exercising a discretionary power conferred by statute by binding itself to exercise the discretion in a particular way in the future.⁴¹ Where there is statutory approval for the contract that approval might render the undertaking and the subsequent exercise of a power in

accordance with the undertaking valid where the statute imposes on the repository of the power a duty to exercise it conformity with the undertaking so approved.⁴² An example of that can be found in the *McArthur River Project Agreement Ratification Act* (NT) referred to at item 17 in the attached schedule.

31. In the present case, the only legislative authority for the deed appears to be that found in s.31A(b) of the Act.⁴³ That section authorises the Minister to acquire land under the Act by agreement with the owner of the land, and it has the further effect that by s.89 the provisions of the Act relating to compensation are engaged, to the extent that the deed does not make provision on that matter or is not inconsistent with those provisions. Section 31A, however, does not give the Minister or the Territory power to bind the Minister to exercise the discretions given to him in ss.32(1), 38 and 43(1) of the Act in a particular way at a future time. That this has occurred is evident from the terms of the deed because, for the reasons already advanced, there could not be a grant of Lots 287 and 297 (clause 2(d)) without the acquisition and extinguishment of native title, being the manner in which the Territory under or in performance of the deed has agreed to “seek to consider and resolve any native title issues ... in respect of the proposed grant of Lots 287 and 297” (clause 2(a)). The effect of the deed is that the Minister has been made the agent for the promotion of the private interests of Mr Ah Toy⁴⁴ and it has precluded the Minister from considering the exercise of the discretions given to him by ss.32, 38 and 43 of the Act according to law.
32. In *Minister for Public Works v Duggan Dixon, Williams and Kitto JJ* asked whether the *Local Government Act* (NSW) authorised a council to acquire land with a view to re-sale so as to recoup itself for the expenditure on authorised work. They held that the powers of resumption and the powers for carrying out works in the Act did not and that there was nothing in the Act to indicate that Parliament intended that local governing bodies should be authorised to acquire land for purely financial reasons.⁴⁵
33. The effect of the deed when read in the light of the Act is that the Minister has purported to attempt to acquire Lots 287 and 297 for a purpose not permitted by the Act. The power of acquisition cannot be used to acquire Lots 287 and 297 to compensate Mr Ah Toy for the acquisition of Lot 293 where, apart from the reasons already advanced, first, the Act itself makes provision for the transfer or exchange of land for compensation in cases where an acquisition has been effected compulsorily, and secondly, the powers given by ss.50(1)(b), (2), (3) and 63 in that regard operate where the Territory has title and power to transfer the land, that is, an existing title and power; not a title and power to be acquired in the future by use of the power of compulsory acquisition. To acquire the land of A to compensate B is inconsistent with

these provisions of the Act, and that inconsistency suggests that to so use the power of acquisition is not for a purpose permitted by the Act.

Other Matters

34. Finally, and for completeness, it has been suggested by the Minister that the acquisition of Lots 287 and 297 will assist in the acquisition of the railway corridor.⁴⁶ Whilst the acquisition of Lot 293 might be characterised as having that purpose, the same cannot be said for the acquisition of Lots 287 and 297, and so much is acknowledged by the terms of the deed that contemplate the making of monetary compensation if the land exchange does not proceed.
35. The deed provides (clause 3(b)) that in the event that the Territory is unable to resolve any native title issues in respect of Lots 287 and 297 within 18 months of the date of the deed (25 November 1999) to the Territory's satisfaction, the Territory and Mr Ah Toy are to consider the exchange of alternative land as compensation or agreement upon monetary compensation. In these circumstances, the 18 month period having expired, that is the appropriate way for the Territory to now proceed.

Conclusion

36. In these circumstances, the Tribunal should refuse to hear the Minister's application on the basis that it has no authority to so do because the proposed acquisition is not valid.

2 December 2002

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1. *Mineralogy v National Native Title Tribunal* (1997) 150 ALR 467 at 473 and *Re Adams and the Tax Agents' Board* (1976) 12 ALR 239 at 242.
2. *Re Adams and the Tax Agents Board* (1976) 12 ALR 239 at 241-242.
3. LMT – 26 – 2001 – LA(N), LMT – 20 – 2001 – LA(N) and LMT – 37 – 2001 – LA(N).
4. No. 74 of 2002 (20207368).
5. On 6 August 2002 the Tribunal published its decision refusing the adjournment application in that proceeding and on 9 August 2002 the Tribunal published its decision recommending that the Minister acquire the land compulsorily.
6. For ease of reference authorities and legislation referred to in these submissions that were contained in the copy bundles provided to the Tribunal in those proceedings are identified here by the prefix "TC".
7. (2002) 191 ALR 1.
8. TC legislation, item 4.
9. Annexures BJJ-5 and BJJ-6 to the affidavit of Beverley Joan Griffiths sworn 12 December 2000.
10. See TC legislation, item 10.
11. This has occurred in respect to part of Lot 293 formerly owned by Mr Ah Toy: bundle, pages 95-96 and 104, in relation to what is now designated as Lot 308.
12. See TC legislation, item 5. Although a notice of proposed acquisition might be framed in such a way so as to acquire only a particular interest of a particular person in the land, and to leave unaffected the interest of the Territory in the land, that has not been done in the present case.
13. As to which, see pars 4.5 – 4.17 of the written submissions in the Timber Creek proceedings.
14. *Clunies-Ross v Commonwealth* (1984) 155 CLR 193 at 194 and 199: TC authorities, item 9.
15. Compare s.35 re modification or abandonment of a proposal.
16. See TC Legislation, items 7-9.

17. See second reading speech on Lands Acquisition Amendment Bill (TC legislation, item 8) and *Northern Territory (Self-Government) Regulations* 1978 (Cth), reg. 4(5) (TC legislation, item 6).
18. Item 20 may be included in this category on the basis that the Minister under that Act may be treated as a body corporate sole.
19. Section 76(1)(a) exempts a lease under the *Mining Act* or the *Pastoral Land Act*. Section 178 of the *Mining Act* makes limited provision for the reservation of land from occupation under a mining tenement, and s.111 of the *Pastoral Land Act* contemplates the acquisition of part of an area of land subject to a pastoral lease as an Aboriginal community living area.
20. 191 ALR 1 at 41 [99].
21. 191 ALR 1 at 42-43 [101]-[103].
22. 191 ALR 1 at 50 [126].
23. 191 ALR 1 at 43-44 [106]-[108].
24. Hanks, "Can States Rewrite Mabo (No. 2)? Aboriginal Land Rights and the Racial Discrimination Act" (1993) 15 *Sydney Law Review* 247 at 251.
25. *Ibid*, p 252, fn 28, quoting from *Mabo v Queensland [No 1]* (1988) 166 CLR 186 at 218 per Brennan, Toohey and Gaudron JJ.
26. Exhibit BJJ-1 to the affidavit of Beverley Joan Griffiths sworn 11 May 2001.
27. The references that follow are based on the bundle of documents discovered by the applicant that the respondents seek to have tendered in this proceeding.
28. Bundle, pages 39-41.
29. Bundle, page 47.
30. Bundle, pages 49-52.
31. Bundle, pages 56-57.
32. Bundle, pages 58-61. The Department's briefing paper referred to a similar approval being given for Henry & Walker Limited "where there are also potential native title problems", which is found in the bundle in LMT13-2000-LA(N) at 8-9.
33. Bundle, pages 65-60.
34. Bundle, pages 67-74.
35. Bundle, pages 75-82.
36. Bundle, pages 88-89.
37. Bundle, page 83.
38. Bundle, pages 105-107.
39. See *Ansett Transport Industries v Commonwealth* (1977) 139 CLR 54 at 74-75.
40. See *Minister for Public Works v Duggan* (1951) 83 CLR 424 at 445-451 [TC authorities, item 6].
41. (1977) 139 CLR 54 at 74-75.
42. 139 CLR 77.
43. Section 35A can have no application because that applies only to cases where objections have been lodged and Mr Ah Toy did not lodge any objections to the proposed acquisition of Lot 293. Section 89A(1)(a) provides no authority for the making of such an agreement. It simply provides that nothing in the Act prevents the making of an agreement.
44. See *Bartrum v Manurewa Borough* [1962] NZLR 21 at 23 and 27: TC authorities, item 7.
45. 1951 83 CLR 424 at 448 and 451.
46. Affidavit of Noreen Alma Blackley sworn 23 November 2000, pars 6 and 11.

137. The Applicant filed further submissions" on 17 December 2002 ("Applicant's Further Submissions"), as set out:-.

APPLICANT'S FURTHER SUBMISSIONS

1. The Applicant has previously filed and served written submissions dated 4 May 2001 in this matter and relies upon those submissions.
2. The Applicant also adopts and relies upon paragraphs 26 to 107 of the Applicant's Submissions on Jurisdiction and Propositions concerning the Hearing of the Objections dated 5 December 2001 and filed in *Minister for Lands, Planning and Environment v Griffiths* and its oral submissions as to jurisdiction made in that matter.
3. The Applicant also adopts and relies upon the reasoning of the Tribunal in its decision¹ on that matter as to the validity of the proposed acquisitions (paragraphs 312 to 408).

JURISDICTION

The Lands Acquisition Act ("LAA")

4. The Long Title of the *LAA* reads as follows:

“An Act relating to the acquisition of land by the Territory.”
5. Amendments made to the *LAA* in 1998 extended the definition of “land” to include “an interest in land”² which in turn is defined to include “native title rights and interests”.
6. Section 5A of the *LAA* applies that Act to an acquisition if it is relation to an acquisition of an interest in land that comprises native title rights and interests in certain circumstances where the *NTA* applies, including, as here, if the act (of acquisition) is one to which the consequences in section 24MD(6A) or (6B) of the *NTA* apply.
7. On its face, the *LAA* clearly authorises the acquisition of native title rights and interests as an interest in land, being an acquisition of “land” as defined. That is so, whether or not the land is “Crown land” and the only interest affecting the land is a native title interest³.
8. The Respondents’ construction set out in paragraph 12 of the Respondents’ Submissions on Jurisdiction is not sustainable. The *LAA* authorises the acquisition of any “land” as defined in the *LAA* which includes “Crown land” as defined in section 3 of the *Crown Lands Act*. Note that there is no definition of “Crown land” in the *LAA*, the expression being used only in section 48, together with “unalienated Crown land”.
9. If “Crown land” is unaffected by any interest, there may be no utility in its “acquisition”. If “Crown land” is affected only by native title rights and interests the *LAA* authorises the acquisition of those interests as “land” defined for the purposes of the *LAA*.
10. The Respondents’ interpretation of section 48(1) of the *LAA* is untenable⁴. That section operates to enable the Minister to declare that land acquired for a particular purpose is no longer required for that purpose. For example, land acquired for an industrial subdivision may no longer be required to that purpose. If the Minister so declares, the effect of the notice is that the land may then be dealt with as “unalienated Crown land” under a law in force in the Northern Territory⁵. It does not have application in respect of every acquisition, but only in the limited circumstances set out.
11. That there has been no declaration under section 48(1) of the *LAA* does not prevent the carrying out of the purpose of the acquisition; indeed section 48 expressly has application only when that purpose is not to be carried out.
12. The *Crown Lands Act* does not refer generally to dealings with “unalienated Crown land”: see sections 4(1), 9-10, 12-18 of the *Crown Lands Act* referred to in paragraph 10 of the Respondents’ Submissions on Jurisdiction⁶. Section 11 of the *Crown Lands Act* is relevant only to Crown lands where the Crown has a registered interest and enables that interest to be removed from the register so that the land can be dealt with as “unalienated Crown land”. It is not a prerequisite to the disposal of Crown lands.
13. Nor is section 48 of the *LAA* to be read as an “invitation” for the Minister to convert alienated Crown land to unalienated Crown land. It merely gives the land status as “unalienated Crown land” in

particular circumstances. For example, if the land is “unalienated Crown land”, a traditional land claim application could be made under section 50 of the *Aboriginal Land Rights (Northern Territory) Act 1976* (“ALRA”)⁷. See also the effect of section 47B of the *NTA* which is to “undo” extinguishment if an application for native title is made over vacant Crown land occupied by a member of the claim group.

14. Paragraph 19 of the Respondents’ Submissions on Jurisdiction appears to contemplate that the acquisition power in the *LAA* is to be limited in some way by other Territory legislation which also confers a power to acquire, albeit more limited. Whilst the extent of the acquisition powers are to be read subject to limitations in the statute conferring, there is no warrant for limiting the power by reference to other legislation enacted for other purposes. Where there are no limitations in the statute, none should be inferred.

Racial Discrimination Act (“RDA”)

15. The Respondent relies upon the decision of the majority High Court in *Western Australia v Ward*⁸ to say that the effect of section 7 of the *RDA* as being limited only to validation of past acts and intermediate period acts. The majority did not so limit the effect of section 7. For the purposes of that case it was “unnecessary to consider whether section 7 may have some other operation”⁹. The Applicant relies on its earlier submissions on the operation of the *NTA* and the *RDA*.
16. Relevantly section 11 of the *NTA* provides for extinguishment of native title in accordance with Division 3 of Part 2 (future acts etc). By section 5A of the *LAA*, that Act applies to an acquisition if certain provisions of Division 3 of Part 2 are complied with.
17. Thus the relevant question is whether the act complies with the *NTA*; not whether there is inconsistency with the *RDA*. If the acquisition is in accordance with Division 3 then it is valid by the operation of the *NTA*, whether or not it would otherwise have been invalid because of the operation of the *RDA*.
18. Nothing in the Respondents’ Submissions on Jurisdiction would lead the Tribunal to reach a conclusion other than that it does have jurisdiction and is competent to adjudicate upon the application to acquire parts of Lots 287, 297 and a road in the Town of Pine Creek.

The Deed

19. The Respondents contend that the Minister cannot, by entering into the Deed with Mr Ah Toy, fetter his discretionary powers given to him under section 32, 38 and 43 of the *LAA*. In substance, the argument is no different to that made previously in the Respondents’ Submissions at paragraphs 1.1(c)(ii), 3.2 and 3.4. The Applicant repeats its submissions made on 4 May 2001 at paragraphs 26 to 29 with appropriate modifications.
20. The only issue relevant to the hearing of an objection made under section 34 of the *LAA* is the question of the Minister’s compliance with section 37. Otherwise issues of “fettering discretion” are properly a matter for judicial review by the Supreme Court of the Minister’s decision to acquire.

21. Close attention to the Deed reveals that the Respondents' submissions as to any fetter on the discretion, are misguided in any event. Nor does the Deed require that Lots 287 and 297 be compulsorily acquired as compensation for Mr Ah Toy.
22. Recitals D and E are in the following terms:
- "D. The agreed compensation in respect of the acquisition is the grant of Lots 287 and 297 to the Landowner, subject to resolution of any native title issues of Lots 287 and 297.
- E. In the event that native title issues are not able to be resolved to the satisfaction of the Territory within eighteen (18) months after the date of this Agreement, or there is some other impediment to the grant of Lots 287 and 297, the Territory will consider the provision of alternative land, and in the event that no suitable alternative land can be found, the Territory and the Landowner shall seek to agree on monetary compensation for the acquisition." (underlining added)
23. The obligations of the Territory include to:
- "2.(a) seek to consider and resolve native title issues that may arise in respect of the proposed grant of Lots 287 and 197 to the Landowner, provided that nothing in this Deed shall require the Territory to enter into any arrangements or undertake any action in respect of any native title that may exist unless the proposed action or arrangement is to the Territory's satisfaction." (underlining added)
24. As determination of compensation, the agreement provides as follows:
- "3. ...
- (b) in the event the Territory is unable to resolve any native title issues in respect of Lots 287 and 297 within eighteen (18) months of the date hereof to the Territory's satisfaction, the Territory shall meet with the Landowner to consider the exchange of alternative land as compensation, and, in the event that no suitable alternative land can be found, the Territory and the Landowner shall meet to agree upon monetary compensation for the acquisition of the land..." (underlining added)
25. It is true to say that the Deed, insofar as it relates to the grant to Mr Ah Toy of Lots 287 and 297, depends upon the resolution of native title issues. If those issues cannot be resolved then there is an alternative basis contemplated for compensation. Whether or not those issues can be resolved will depend on the outcome of the hearing of the objection and the recommendation of the Tribunal.

26. Nor does the Deed in any way preclude the Minister from modifying or abandoning the proposal to acquire native title rights and interests¹⁰
27. The subsequent acquisition of native title is not a necessary consequence of the Deed, nor does the agreement purport to facilitate the acquisition of native title over Lots 287 and 297. Put simply, the Deed says: if the Territory can resolve all native title issues in Lots 287 and 297 to its satisfaction then the Territory will grant that land to you, as freehold title land, otherwise the Territory and the landowner will consider alternative compensation.
28. In any event, there can be no complaint in respect of the compulsory acquisition of native title for the purpose of granting land to third parties in light of section 24MD(6B)(a) of the *NTA*. Nor is such an acquisition inconsistent with any of the provisions of the *LAA*.
29. That native title issues have not yet been resolved within the 18 month period contemplated, is of no consequence in the event that neither party to the agreement seeks to enforce Clause 3.

THE OBJECTIONS

30. These submissions are additional to and are to be read with the Applicant's Submissions dated 4 May 2001.

Registered native title rights and interests

31. The Respondents are the native title claimants in a native title claim over part Lots 287, 297 and road in the Town of Pine Creek¹¹.
32. The native title rights and interests claimed are¹²:
 - (a) to possess, occupy, use and enjoy the application area to the exclusion of all others.
 - (b) to speak for and to make decisions about the use and enjoyment of the application area;
 - (c) to reside upon and otherwise have access to and within the application area;
 - (d) to control the access of others to the application area;
 - (e) to use and enjoy the resources of the application area;
 - (f) to control the use and enjoyment of others of the resources of the application area;
 - (g) to share, exchange and/or trade resources derived on and from the application area;
 - (h) to maintain and protect places of importance under traditional laws, customs and practices in the application area;
 - (i) to maintain, protect, prevent the misuse of and transmit to others their cultural knowledge, customs and practices associated with the application area¹³;

- (j) The right to determine and regulate membership of, and recruitment to, a landholding group¹⁴.

Evidence of claimed incidents of native title which could be affected

33. Although it is not appropriate for the Tribunal to embark on a full inquiry into whether native title exists and, if so, in what form, it must look for evidence of the existence and exercise of registered native title rights in respect of the subject land and the effect of the proposed acquisition/s on the enjoyment of those rights. For present purposes, it is appropriate to proceed by reference to the rights claimed, but excepting 31(i) & (j).
34. The Respondents have filed the following affidavits in support of their objections to the compulsory acquisitions:
- (a) Affidavit of Maureen Smith affirmed 17 July 2002
 - (b) Affidavit of George Huddleston (Snr) affirmed 17 July 2002
 - (c) Affidavit of Paddy Huddleston affirmed 17 July 2002
 - (d) Affidavit of Christopher James Healey affirmed 28 May 2001 [anthropologist]
35. The Aboriginal evidence as to the present exercise of the claimed native title rights on the Lots under consideration is as follows:
- (a) Kids come to that place and run around there¹⁵.
 - (b) We walk around there and walk through there on the way to town when staying at the camp¹⁶.
 - (c) We look after that place¹⁷.
 - (d) We take the kids there and show them bush tucker and hunting goanna¹⁸ and hunt ourselves¹⁹.
 - (e) We fish in the creek when it is flood time²⁰.
 - (f) We find ochre there (although it is unclear where “there” is)²¹.
36. There is some reference to a ceremony held “last year”²² however the description of the “ceremony place”²³ appears to refer to a location off the Lots under consideration.
37. There are no registered or recorded sacred sites located on any of the Lots under consideration, although annexure H to the Healey affidavit refers to two isolated burials that may be located within the Town of Pine Creek. Neither of them are on the Lots under consideration: see annexure I.
38. It is suggested in para 12 of the Healey affidavit that the Aboriginal Town Camp adjoins the proposed acquisition area. This is clearly incorrect, as can be seen from maps of the area attached to the Healey affidavit.

39. Eddie Ah Toy, who was born in Pine Creek and has lived there most of his life attests to the location of the town camp being north of the “paddock”²⁴ and about ½ km away from it, with no need to pass through the paddock on the way from the camp to town²⁵: cf para 34(b).
40. There are a number of other inconsistencies referred to in the Ah Toy affidavit which indicate, at the very least, that there is considerable confusion as to the location of the acquisition area, at least in the evidence of the Aboriginal witnesses and perhaps also their anthropologist. Further examples include the following:
- (a) There is no creek on the paddock²⁶ although there is an open unlined drain which can take storm water during the wet season but is not easily “played in”²⁷: cf 34(e).
 - (b) The paddock is fenced on all sides and has been so for many years²⁸: cf Maureen Smith para 10.
 - (c) There has not been a camp on the paddock for 60 years²⁹: cf Maureen Smith para 5.
 - (d) The place referred to in para 4 of Paddy Huddleston’s affidavit is not on the paddock; it is on the block adjacent to it³⁰: see also Healey affidavit at 14 apparently also referring to the adjacent block
 - (e) The country behind the “old railway shed” does not refer to the paddock³¹: cf Paddy Huddleston at para 6.
41. As to present activity on the paddock, the fact that it is completely fenced and is overgrown, as described by Mr Ah Toy, and that Mr Ah Toy has not seen Aboriginals using or crossing the paddock since he has lived in the area, tends to the conclusion that the evidence of Aboriginal witnesses as to activities undertaken may well be in respect of areas close too, but not on, the paddock.
42. That the respondent witnesses may have been under a misapprehension as to the location of the block gains some force when considerations is given to the following:
- (a) The town camp is not adjacent to the Lots to be acquired but is likely to be adjacent to the adjoining block.
 - (b) Pine Creek is to the west of the paddock and between the town camp and the paddock. It is probable that Pine Creek is on the adjoining block and is the creek referred to in the witness statements. Note also para 10.1.2 of the affidavit of Noreen Blackley sworn 23 November 2000 as to Pine Creek running through the westerly part of the Lots 287 and 297 which part is not proposed to be acquired.
 - (c) The reference to the land not being fenced may be consistent with consideration being given to the block next door and not the paddock.

Section 38AA criteria

[The effect of the proposed compulsory acquisition on the enjoyment by the claim group of the claimed native title rights and interests](#)

43. The effect of the compulsory acquisition is to extinguish any native title rights and interests over the land – this results from the operation of section 24MD(2)(c) of the *NTA*. However, in circumstances where there is little (or no) evidence of present use of the relevant area and there are no known sites on the land, the effect of the proposed acquisition is minimal. In any event access to any site of significance is ensured under section 46 of the *Sacred Sites Act*: see also sections 33-35.

The effect of the proposed compulsory acquisition on the way of life, culture and traditions of the claim group

44. On the basis of the evidence given, the acquisition would appear to have no impact at all on the way of life, culture and traditions.
45. No relocation from present residence is required, nor will there be cessation of any present use. The acquisition will not cause any ceremonies to cease, nor, on the evidence, will it prevent the present “exercise” of culture.

The effect of the proposed compulsory acquisition on the development of the social, cultural and economic structures of the claim group

46. There is no evidence of any effect on the development of the social, cultural and economic structures of the claim group.

The effect of the proposed compulsory acquisition on the freedom of access by the claim group to the land concerned and their freedom to carry out rites, ceremonies or other activities of cultural significance on the land in accordance with their traditions

47. Even if the acquisitions proceed, access to sacred sites is ensured. However, there is no evidence of present access for any other purpose and no evidence of ceremonies or other activities of cultural significance being carried out on the land.

The effect of the proposed compulsory acquisition on any area or site on the land concerned of particular significance to the claim group in accordance with their traditions

48. There is no evidence of sites of particular significance on the land; those sites are protected by *Sacred Sites Act* in any event.

Ways of minimising the impact of the acquisition on registered native title rights and interests, including in relation to access to the land

49. As the impact of the acquisitions on registered native title rights and interests is likely to be minimal, this criteria has little relevance in the present inquiry.
50. In any event, minimising impact of the acquisition does not mean that the decision should not proceed. As the principal effect of the acquisitions is to extinguish native title over the subject land (if indeed it still continues to exist), the inquiry is directed to any practical effect of that extinguishment on registered native title rights. For example, if the claimants had been residing on the land, but the

impact of the acquisition was to require relocation, then ways of minimising that effect are to be investigated; ie alternate residential locations, allocation of some land in a land development for residential/cultural purposes etc.

The economic or other significance of the acquisition to the Territory and to the region

51. The evidence of the proposed use of the paddock is for commercial use, possibly for a mango plantation³². The Applicant does not say that the proposed use of the land has the potential to bring significant economic benefit to the Territory or the region but, in the words of Mr Ah Toy, “it will play its own small part” in the commercial life of Pine Creek.
52. The proposed exchange of the land is a “practical means of dealing with the need to acquire Mr Ah Toy’s land for the purposes of the railway corridor”³³. Thus the proposed acquisition may also play its part in the railway development with the potential to provide economic and other benefits to the Northern Territory.

The public interest in the acquisitions

53. Again the Applicant does not assert any significant public interest in the proposed use of the land, other than that which attaches to having any additional commercial development within a small town like Pine Creek.
54. As previously submitted, there is public interest in the smooth progression of the railway project. Whilst not necessarily a matter of public interest, the resolution of compensation issues to the satisfaction of both parties is also a relevant consideration for the Tribunal.
55. However, even if significant economic benefits or public interest cannot be shown they are only relevant factors to be taken into account and are not mandatory requirements.

Dated: 16 December 2002

Raelene Webb
Counsel for the Applicant

1. *Minister for Lands, Planning and Environment v Griffiths* (LMT, 2 March 2002).
2. See s 18(e), *Lands and Mining (Miscellaneous Amendments) Act 1998* (No 93/98).
3. See question posed in last sentence of paragraph 11 of the Respondents’ Submissions on Jurisdiction.
4. See paragraph 13 of the Respondents’ Submissions on Jurisdiction.
5. Section 48(2), *LAA*.
6. The expression “unalienated Crown lands” appears only in sections 11 and 76 of the *Crown Lands Act*.
7. Prior to 5 June 1997: see section 50(2A), *ALRA*.
8. (2002) 76 ALJR 1098 at [99].
9. *Ibid*.
10. Section 35, *LAA*.
11. Affidavit of Christopher James Healey affirmed 28 May 2001 (“Healey 28/5/01”), para 4. The evidence before the Tribunal does not indicate whether the claim has been registered.
12. Healey 28/5/01, annexure B.
13. Without physical presence on the land, this “right” is not capable of recognition as a native title right: see *Yarmirr v Northern Territory* (1998) 82 FCR 533 per Olney J at 589-590; *Western Australia v Ward* (2000) 99 FCR 316 at [104], [666] and [877] omitting the claimed right. See now *Western Australia v Ward* (2002) 76 ALJR 1098 at [59].
14. Similarly, this is not a right in relation to land or waters, and is not capable of recognition as native title; see footnote 13.
15. Maureen Smith at para 4; Paddy Huddleston at para 5.

16. Maureen Smith at para 7; also George Huddleston at para 2..
17. George Huddleston at para 3.
18. George Huddleston at para 4.
19. George Huddleston at para 7.
20. George Huddleston at para 6; Paddy Huddleston at para 7.
21. Paddy Huddleston at para 12.
22. Paddy Huddleston at para 11.
23. George Huddleston at para 11.
24. Lots 287, 297 and road in the Town of Pine Creek.
25. Affidavit of Eddie Ah Toy sworn 20 November 2002.
26. Ah Toy 20/11/02 at para 15.
27. Ah Toy 20/11/02 at paras 11, 15 & 20.
28. Ah Toy 20/11/02 at paras 10, 16 & 17.
29. Ah Toy 20/11/02 at para 17
30. Ah Toy 20/11/02 at para 19.
31. Ah Toy 20/11/02 at para 21.
32. Ah Toy 20/12/02, paras 11 & 22.
33. Blackley affidavit, paras 5 & 6; see para 47-48 of the Applicant's Submissions dated 4 May 2001.

138. The final submissions were those filed pursuant to the Minute of Consent Orders by the Objector on 13 January 2003.

139. The Respondent filed Submissions on 16 January 2003:-

RESPONDENTS' FURTHER SUBMISSIONS

1. The Objectors rely on their submissions filed on 2 December 2002 and 16 February 2001. **The effect of the proposed compulsory acquisition on the registered native title rights and interests referred to the Tribunal**
2. In making a recommendation in relation to the acquisition of native title rights and interests the Lands and Mining Tribunal (the 'Tribunal') must take into account the matters listed in section 38AA(2) of the *Lands Acquisition Act* (the 'LAA'). In particular the Tribunal must take into account '... the effect that the acquisition will have or is likely to have on registered native title rights and interests that were referred to the Tribunal...' [s 38AA(2)(a)]
3. The registered native title rights and interests that were referred to the Tribunal include entitlements, under traditional laws acknowledged and customs observed, to exercise native title rights and interests in relation to the area claimed which include as follows:
 - (a) to possess, occupy, use and enjoy the area claimed to the exclusion of all others;
 - (b) to speak for and to make decisions about the use and enjoyment of the application area;
 - (c) to reside upon and otherwise to have access to and within the application area;
 - (d) to control the access of others to the application area;
 - (e) to use and enjoy the resources of the application area;

- (f) to control the use and enjoyment of others of the resources of the application area;
 - (h) to maintain and protect places of importance under traditional laws, customs and practices in the application area;
 - (i) to maintain, protect, prevent the misuse of and transmit to others their cultural knowledge, customs and practices associated with the application area;
 - (j) to determine and regulate membership of, and recruitment to, a landholding group.
4. The Applicant's submissions filed on 17 December 2002 state at paragraph 33 that 'Although it is not appropriate for the Tribunal to embark on a full inquiry into whether native title exists and, if so, in what form, it must look for evidence of the existence and exercise of registered native title rights in respect of the subject land and the effect of the proposed acquisition/s on the enjoyment of those rights.'
 5. It is submitted that the Applicants have attributed to the Tribunal greater powers than are permitted by the *Lands Acquisition Act* [the 'LAA']. The Tribunal is not required by the LAA to 'look for evidence of the existence and exercise of registered native title rights'. The Tribunal is not permitted to make a curial determination of the existence or otherwise of native title. What the LAA requires the Tribunal to take into account is 'the effect that the acquisition will have or is likely to have on *registered* native title rights and interests' [s38AA(2)(a)]. It is the fact of registration that enlivens the Tribunal's jurisdiction and it is regarding the *registered* native title rights and interests that the Tribunal must ascertain the effect of the proposed compulsory acquisition. There is no further requirement on the Objectors to prove the *exercise* of the native title rights and interests. Once registered, the Tribunal is required to assume that such rights and interests exist and must assess the effect of the proposed compulsory acquisition on them on that basis.
 6. While the Objectors are not required to prove the existence of their native title rights and interests, evidence of native title rights and interests in and around the claimed area provides the context in which the Tribunal's assessment of the effect of the proposed the compulsory acquisition on the registered native title rights and interests referred to it, must be made.
 7. The relevance of evidence of native title rights in areas surrounding the proposed acquisition area is demonstrated by the decision of the Delegate of the Registrar of the National Native Title to register the objectors' native title claim (21 January 2001). In his reasons for decision, the Delegate, quoting the decision of Registrar Christopher Doepel in application VC98/20, *Dja Dja Warung #13*, stated that "the requirements of s 190B(7) could be satisfied by a demonstration of traditional physical connection with the broader Dja Dja Warung country and did not require the specific demonstration of such connection in relation to each small parcel of land and waters within that larger country area." That is, where the native title claim is over a small area of land, such as areas that are subject to applications for mining tenures or proposed compulsory acquisition areas, then the prima facie proof of native title required for registration of the claim, including proof of physical

connection, may be met by prima facie proof of physical connection to the larger area. It is the connection to the wider country area that is relevant.

8. As the Tribunal is required to consider the registered native title rights and interests, it should not place a burden of proof higher than that required for registration of those rights. In considering the effect of the proposed compulsory acquisition on the registered native title rights and interests, the Tribunal must consider the impact of the acquisition on the native title rights and interests in the acquisition area itself and the native title rights and interests considered as part of a wider whole, including rights and interests outside, but in the vicinity of the proposed acquisition area. That is, evidence of native title in the area surrounding the proposed acquisition area is relevant – not to the existence of native title, but to the question of the impact of the acquisition on the registered native title.
9. The registered native title rights and interests in the proposed acquisition area are and are understood by the claimants as a part of the claimants' broader native title rights and interests in and around the lands surrounding the proposed acquisition area. The exercise of those rights and interests must be considered in the context of the rest of the claimants' claimed native title lands. To properly assess the effect of the proposed the compulsory acquisition on the native title claimant group, the Tribunal must assess the effect of the extinguishment of native title in the proposed acquisition area in diminishing the native title claim group's land base, and the effect of this on the matters listed in s 38AA of the LAA.
10. Further evidence of the registered native title rights and interests in and around the proposed acquisition area can be found in the affidavits of Ms Penelope Creswell, filed on 21 November 2001 and Mr Christopher Healy, filed on 29 May 2001.
11. Both Mr Healy and Ms Creswell describe the Wagiman people's successful claims to land near the Town of Pine Creek under the *Aboriginal Land Rights (Northern Territory) Act 1976*. As Mr Healy states in paragraph 5 of his affidavit

The land Commissioner's report is replete with references to the spiritual responsibility of the Wagiman people for sites and land in or near the area claimed..."

Ms Creswell notes the Aboriginal Land Commissioner, Justice Kearney's findings that "the traditional Aboriginal owners.. are each entitled by Aboriginal tradition to the use or occupation of the whole of the lands" and in particular that Paddy Huddleston and George Huddleston, named applicants in the registered native title application, are listed as Aboriginal traditional owners [paragraph 6]. Ms Creswell further notes the evidence of sites in and in the vicinity of the Town of Pine Creek as noted in the Land Commissioner's report and on the map at Appendix 10 [paragraph 7].
12. The Tribunal has before it a copy of the report of the Aboriginal Land Commissioner regarding the Upper Daly Land Claim, which summarises the evidence before him concerning the way of life, culture and traditions of the native title claimants (then Aboriginal Land claimants). That report is Annexure PAC-1 to the Affidavit of Penelope Alice Creswell affirmed 21 November 2001). It details:

- *the history of the then Aboriginal land claimants connection to the wider areas of their traditional country (pp63-72).*
- *evidence of the then Aboriginal land claimants general concern for the protection of sacred sites (which the Aboriginal Land Commissioner notes was “shown by the fact that they had sought to protect certain sites near Pine Creek, by utilizing the legislation relating to sacred sites”(at p 83).*
- *evidence that the then Aboriginal land claimants active care for their country, described as being evidenced by “visiting it constantly.” (at p. 83), “worry”and “burning of country” (sometimes described as cleaning it).*
- *evidence of the residential connection to the areas in the town of Pine Creek.*
- *evidence of the ongoing maintenance of traditional cultural practices and beliefs.*

13. Both Mr Healy and Ms Creswell give evidence of the involvement of the Wagiman people in consultations regarding the Alice Springs to Darwin railway corridor negotiations.

14. Further evidence of the registered native title rights and interests is found in the Affidavit of Ms Maureen Smith filed on 29 July 2002. Ms Smith’s affidavit attests to the occupation, use and enjoyment of the area claimed by the native title claimant group [paragraphs 3, 4, 5 and 7] and attests to the ongoing access to the proposed acquisition area by the claimant group [paragraphs 4 and 7]. Ms Smith further asserts her right as a native title holder to speak for and make decisions about the use and enjoyment of the area [paragraphs 9 and 10] and to control the use and enjoyment of others of the resources of the proposed acquisition area [paragraph 10]. She attests to the ongoing observance of traditional laws in relation to restricted areas in the close vicinity of the proposed acquisition area [paragraph 8]. Ms Smith further asserts her right to use and enjoy the resources of the proposed acquisition area and to transmit to others the cultural knowledge associated with the area [paragraphs 6].

15. Further evidence of the registered native title rights and interests is found in the Affidavit of Mr George Huddleston, filed 29 July 2002. Mr Huddleston’s affidavit attests to the occupation, use and enjoyment of the area claimed by the native title claimant group and to the ongoing access to the proposed acquisition area by the claimant group [paragraphs 2, 3, 4 and 12]. He asserts a right to use and enjoy the resources of the proposed acquisition area and attests to hunting and looking for bush tucker in the proposed acquisition area [paragraphs 4, 5] and in the vicinity of the proposed acquisition area [paragraphs 6, 7, 8, 9 and 12] and teaching his children and grandchildren to hunt and find bush tucker there [paragraphs 4, 7 and 12]. Mr Huddleston attests to the ongoing maintenance and protection of the proposed acquisition area and of other places of significance in the close vicinity of the proposed acquisition area by the native title claimant group [paragraphs 3, 9]. Mr Huddleston asserts a right to maintain and protect places of importance under traditional law in the vicinity of the proposed acquisition area

[paragraphs 10 and 11] and to transmit cultural knowledge customs and practices associated with the proposed acquisition area and places in the vicinity of the proposed acquisition area [paragraphs 10 and 11]. At paragraph 10 he describes a negotiation to avoid a road being made near a significant site in the vicinity of the proposed acquisition area. Such a negotiation indicates the ongoing right of the native title claimants to speak for and to make decisions about the use and enjoyment of the area. At paragraph 11 he describes a ceremony place close to the proposed acquisition area and the ongoing observance of traditional funeral ceremony there.

16. Further evidence of the registered native title rights and interests is found in the Affidavit of Mr Paddy Huddleston, filed 29 July 2002. Mr Huddleston's affidavit attests to the possession, occupation, use and enjoyment of the area claimed by the native title claimant group [paragraphs 2, 3, 4] and attests to the ongoing access to the proposed acquisition area by the claimant group [paragraphs 5 and 6]. He asserts a right to use and enjoy the resources of the proposed acquisition area and attests to hunting and looking for bush tucker in the proposed acquisition area [paragraphs 5 and 6] and in the vicinity of the proposed acquisition area [paragraphs 7 and 8]. Mr Paddy Huddleston further asserts his right as a native title holder to speak for and make decisions about the use and enjoyment of the area [paragraph 10].

Affidavit of Edward Cheong Ah Toy

17. The applicant relies upon the affidavit of Mr Edward Cheong Ah Toy. Mr Ah Toy's affidavit attests to purported inaccuracies in the affidavits of the Objectors and infers that the Objectors do not use the proposed acquisition area. However, in a case such as this, where Mr Ah Toy stands to gain substantially from the acquisition of the Objectors' native title rights and interests, his statement cannot be treated as free from any inference of bias. In a case where private citizens' property rights are to be compulsorily acquired for the advantage of another private citizen natural justice requires that the evidence of those whose rights are to be lost must be preferred over the evidence of those who serve to gain from that acquisition.
18. Furthermore, there are a number of statements in Mr Ah Toy's affidavit that are speculative and / or demonstrably inaccurate. For instance, on a number of occasions Mr Ah Toy exaggerates the distance of places mentioned in the Objectors' affidavits from the proposed acquisition area. At paragraph 12 Mr Ah Toy states that the town camp is 'half one kilometre' away from the paddock, yet a map of Pine Creek¹ reveals that at one point the proposed acquisition area is only 250 metres from town camp. At paragraph 15 Mr Ah Toy states that "Pine Creek at its closest is about half a kilometre from the paddock". However Pine Creek, while not in the proposed acquisition area, is in places only 125 metres from the area. While not very significant in themselves, these inaccuracies paint a picture that the place of residence of some of the Objectors (that live at town camp) is much further removed from the proposed acquisition area than it is.

19. Mr Ah Toy's evidence to the effect that that the claimants do not use the proposed acquisition area is vague and speculative. Mr Ah Toy states in paragraphs 12 and 18 that he has not seen Aboriginals in the paddock, yet he does not state whether he would normally be able to see the proposed acquisition area from his place of residence or usual place of business. Indeed, Mr Ah Toy does not state whether he himself ever visits or has cause to visit the proposed acquisition area. Furthermore, the fact that Mr Ah Toy has not seen any of the Objectors in the proposed acquisition area simply does not mean they were not there.
20. Mr Ah Toy further states that "Aboriginals have known for a long time to respect fences especially in town areas". This statement is highly speculative. It says nothing in relation to the particular claimants or the circumstances of this case. Mr Ah Toy advances no information upon which he bases this conclusion.
21. Mr Ah Toy attempts to discredit the evidence of the Objectors by saying that their affidavits are 'misleading' because not all of the places referred to are places within the proposed acquisition area. It is however, clear from the affidavits that some of the areas referred to are within the acquisition area while other places are close to the proposed acquisition area.
22. Mr Ah Toy says that some of the areas mentioned in George Huddleston's affidavit are not in the proposed acquisition area. This is clear from the affidavit itself. These places are however, in the close vicinity of the proposed acquisition area.
23. Mr Ah Toy says [at paragraph 15] that all of the areas mentioned in Paddy Huddleston's affidavit appear not to be in the proposed acquisition area. As is clear from the affidavit however, some of the areas mentioned are within the proposed acquisition area and some are in vicinity of the area. Mr Ah Toy states at paragraph 21 that the country behind the old railway shed 'is not a reference to the paddock'. However the proposed acquisition area is in places only 25 to 50 metres from the railway shed. Mr Ah Toy states at paragraph 19 that the camps mentioned by Mr Paddy Huddleston are not particularly close to the paddock. However, to the contrary Mr Huddleston refers to a camp at the place 'where Freddy Frith lived' [paragraph 4], which is in the block immediately adjacent to the proposed acquisition area (Lot 293)². Other camps are also close to the proposed acquisition area. The camp 'behind Ah Toy's store' is around 400 metres away and 'where that old bakery is' is around 550 metres away. The clinic is up the hill along Pine Creek on the western side of the highway.
24. As has been discussed above, the impact of the acquisition on the Objectors native title rights and interests affects both their interests in the acquisition area and their native title rights and interests in the surrounding areas. Evidence of native title in areas adjacent or close to the acquisition area is relevant to any assessment of the impact of the acquisition and inclusion of such evidence is no basis upon which to discredit the Objectors' evidence. What the Objectors' evidence establishes is a pattern of occupation and use

over a long period within various parts of the town of Pine Creek, on and in close proximity to the proposed acquisition area.

Applicants Further Submissions

25. The applicant states that inconsistencies between the Objectors' affidavits and that of Mr Ah Toy indicate confusion as to the location of the acquisition area. However, all three applicants state that they went to the site of the proposed acquisition. They further explain that they drove around the sides of the block on the Stuart Highway and on the northern side of the block and then walked into the block from Main Street. This description of going around the area and then into the area is consistent with the actual placement of the acquisition area and indicates, on the contrary that the three Objectors witnesses were aware of the actual placement of the proposed acquisition area.

Section 38AA Lands Acquisition Act criteria

26. In making its recommendation the Tribunal must take into account the effect of the proposed compulsory acquisition on registered native title rights and interests referred to the Tribunal and in particular, the effect of the proposed compulsory acquisition on the matters listed in section 38AA(2) of the LAA.

(a)(i) the enjoyment by the native title claim group of the registered native title rights and interests;

27. The Applicants state at paragraph 43 of their further submissions that '... in circumstances where there is little (or no) evidence of present use of the relevant areas and there are no known sites on the land, the effect of the proposed acquisition is minimal'. It is submitted that this is not such a case. As discussed above, there is substantial evidence of present use by the Objectors of the proposed acquisition area and of areas adjacent to and close to the acquisition area. As stated by Mr Chris Healy "The native title holders associated with Pine Creek and other Aboriginal residents of the Aboriginal Town Camp make extensive use of the country for hunting and gathering activities" [paragraph 13]. Mr George Huddleston says "we go into that area all the time. We look after that place...." And "We take the kids there and show them bush tucker... we go when they knock off from school... sometimes we go on Sundays" and "It's a good spot there for hunting..." Mr Paddy Huddleston says "all the kids come to the place all the time... We go there some weekends" and "There's good hunting in that country behind the old railway shed there. We go hunting to get food and show the kids how to hunt." The effect of the acquisition of the area and grant as freehold title to Mr Ah Toy would prevent any further use of the area by the Objectors in these ways.

28. The Applicant's concentration on physical use of the area appears to imply that the Objectors' native title rights and interests in the area are limited to usufructuary rights. However, enjoyment of native title rights and interests is not limited to present use or

activity on the land. The quantum of native title is better measured by reference to the registered rights and interests, which include (among others) the right to 'possess, occupy, use and enjoy the area claimed to the exclusion of all others'. In the absence of other interests in the land it is probable that any native title determination could thus amount to exclusive ownership of the land. Accordingly, the effect of the compulsory acquisition, and therefore extinguishment, of all native title rights and interests is to remove all future capacity to exercise a substantial property right in the area. Furthermore, once lost, native title does not revive. The effect of the acquisition is to permanently remove from the native title claim group, the right to enjoy any of the registered native title rights and interests.

(a)(ii) the way of life, culture and traditions of the native title claim group;

29. The Applicants state at paragraph 44 of their submissions that 'On the basis of the evidence given, the acquisition would appear to have no impact at all on the way of life, culture and traditions'.
30. It is difficult to see how the Applicant could substantiate this assertion in light of the evidence of the Objectors. As stated above, the Objectors make extensive use of the country for hunting and gathering activities. Furthermore, the area is used to teach the next generation how to hunt and find bush foods. It is also a significant recreation area for the Objectors. In particular, the proximity of the proposed acquisition area to the Town Camp, where some of the Objectors reside, makes it a significant cultural resource in their daily lives.
31. The loss of their native title rights and interests in the proposed acquisition area will prevent the claimants, in particular the residents of town camp, from continuing to practise a major element of their current way of life in proximity to their place of residence. The loss of the proposed acquisition area will prevent them from accessing the area, using the area for traditional foraging and teaching of children and prevent them from exercising any control over the area. The acquisition of native title in the area will mean the loss of a major amenity for the town camp that enables the ongoing practice of culture and traditions, such as those described above.
32. In addition, the extinguishment of native title rights and interests in the proposed acquisition area further diminishes the native title claimant group's traditional lands within the town. The loss of rights and interests in the proposed acquisition area, when taken together with past (and future) losses of land, will have a progressively detrimental impact on the capacity of the native title claim group to maintain its' way of life, culture and traditions.

(a)(iii) the development of the social, cultural and economic structures of the native title claim group;

33. The Applicants state at paragraph 46 of their further submissions that ‘there is no evidence of any effect on the development of the social cultural and economic structures of the claim group’. However, the acquisition of the proposed area would further diminish the chances of the native title claim group of ever being able to assert their native title rights and interests over any area within the town centre. As one of the only sizeable areas of Crown land within close proximity of both town camp and the town centre that has not been developed as park or recreational areas, the Objectors’ native title rights and interests in the proposed acquisition area could represent a significant opportunity for economic development of the native title claim group. The removal of the opportunity for the native title claim group to use and develop the area (and the gradual reduction of the native title claim group’s land base within the town) is detrimental to its future economic, social and cultural development because it removes the opportunity and the capacity of the native title claim group to choose regarding the development of their future social, cultural and economic structures.

(a)(iv) the freedom of access by the native title claim group to the land or waters concerned and their freedom to carry out rites, ceremonies or other activities of cultural significance on the land and waters in accordance with their traditions;

34. The acquisition of the proposed area would prevent the Objectors from accessing the area. Activities of cultural significance that continue to be enjoyed on the land include hunting and gathering bush tucker and teaching the younger generation about these practices. The acquisition of the area would prevent these practices from being continued on the area.

(b) ways of minimising the impact of the acquisition on registered native title rights and interests, including in relation to access to the land the subject of the acquisition;

35. The stated purpose of the proposed acquisition is “Consolidation with Lot 293 Town of Pine Creek and grant of a Estate in Fee Simple, under provisions of the *Crown Lands Act*, to Mr Edward Ah Toy or his nominee”.³

36. It submitted that in proposing to acquire the native title in order to grant an interest in fee simple to a third party, the Applicant has had no regard to attempting to minimise the impact of the acquisition on registered native title rights and interests. The fact that the Applicant has not required of the proposed grantee any commitment to a particular use or development of the proposed acquisition area demonstrates that no consideration has been given to ways to minimise the impact on native title. Rather than displaying a concern to minimise the impact on native title, the Applicant’s conduct evinces a general

lack of concern to protect native title and a general preference for replacing native title tenure with other forms of tenure.

37. The impression that no attempt has been made to minimise the effect on native title is deepened by the inconsistency between the departmental records and the evidence of the Applicant. The affidavit of Noreen Alma Blackley states that it is the position of the Minister that native title rights and interests do not exist (but gives no factual or legal reason as to why native title might have been extinguished)⁴. This is despite the fact that the departmental risk assessment dated 12 December 1997 states:

“It is considered that former grants... **have not extinguished native title**. It is therefore continued **medium to high risk** in terms of native title continuing to exist.”⁵

38. The Applicant's submissions further imply that acquisition only impacts on native title claimants if it requires relocation of the claimants from their place of residence⁶. This is a highly reductive reading of the section. If the proposed acquisition is to proceed, it will have the effect of terminating the all the registered native title rights and interests in the acquisition area:

(c) the economic or other significance of the acquisition to the Territory and to the region in which the land the subject of the acquisition is located, including the Aboriginal peoples who live in the region;

39. By the Applicant's own admission the proposed use of the land will not bring significant economic benefit to the Territory⁷. Indeed, it is very difficult to assess what, if any, economic benefit could arise from the acquisition when the use to which the land will be put is not established. As stated in the Affidavit of Ms Noreen Alma Blackley, Mr Ah Toy has considered using the land for the purposes of commercial development but he ‘has not expressed any definite views in this regard’⁸. In these circumstances, the spectre raised of any potential public benefit can be speculative only.

40. The reference to the economic benefit to the Territory arising from the railway development⁹ is specious. The proposed acquisition of the area is not a necessary consequence of the building of the railway and its resolution will have no impact on the railway construction. Rather, the acquisition is an unusual response to the ancillary issue of compensation to a private person who has had land acquired for the purpose of the railway. The economic significance of the proposed acquisition in this case must be measured according to the effect of the acquisition of the proposed area itself, which as discussed above, is entirely speculative.

41. The terms of section 38AA(2) are mandatory; the Tribunal must take into account “the economic or other significance of the acquisition to the Territory and to the region in which the land the subject of the acquisition is located, including the Aboriginal peoples who live in the region”. As the proposal is made by the Applicant it is incumbent upon the Applicant

to show some economic or other benefit of the proposed acquisition to the region, including the Aboriginal peoples who live in the region. Where the extinguishment of native title rights and interests is proposed for the purpose of granting interests to a third party the requirement to show an element of public benefit arising from the acquisition should be even more onerous. In this case there is no evidence before the Tribunal that the acquisition will provide any economic benefit to the Territory. The evidence is entirely speculative in this regard. The Tribunal cannot conclude on the evidence before it that the acquisition would provide any economic or other benefit to the Territory.

(d) the public interest in the acquisition.

42. It is submitted that the acquisition of native title rights and interests for the purpose of granting interests in land to a private party to be used in an unspecified way cannot be in the 'public interest'. It is notable that the Applicant itself does not assert "... any significant public interest in the proposed use of the land".
43. The Applicant does however submit that "there is a public interest in the smooth progression of the railway project". As stated above, the proposed acquisition in this case is an ancillary issue only. There is no necessary connection between the smooth progression of the railway project and the resolution of this case. There can be no public interest satisfied in the acquisition of one private party's interests in land for the purpose of granting interests in that land to another private party in a case where other means exist (such as the payment of money) to satisfy the necessity of compensating Mr Ah Toy for the loss of his land to the railway corridor.
44. The Applicant further submits that "the resolution of compensation issues to the satisfaction of both parties is also a relevant consideration for the Tribunal." This is a rather confusing submission. It is not clear who the two parties referred to are. Acquiring the native title in the proposed acquisition area will not assist in the resolution to the satisfaction of the native title parties.

Further Considerations: Over-Compensation

45. A further consideration that the Tribunal should take into account is that the land proposed to be acquired and granted as compensation to Mr Ah Toy is significantly more valuable than the land acquired from Mr Ah Toy (for which the proposed acquisition is intended as compensation).
46. In a valuation report dated 2 September 1996¹⁰ Mr Ross Copland of the Australian Valuation Office gave a valuation of that portion of Mr Ah Toy's land to be acquired for the purposes of a rail corridor (being part of Lot 293). The total value was held to be \$11,200 with a "range for negotiation up to" \$15,000. In a valuation report dated 12 September 2002¹¹ Mr John Saxelby of the Australian Valuation Office gave a valuation of those

portions of land the subject of the proposed compulsory acquisition, which are proposed to be granted to Mr Ah Toy as compensation for the acquisition of his land (being part of Lot 287, Lot 297 and a road reserve). The market value as an unencumbered freehold parcel was held to be \$20,000.

47. In a valuation report dated 25 July 2002¹² Mr P D Doyle of Darwin Land Services Pty. Ltd. gave a valuation of that portion of Mr Ah Toy's land acquired for the purposes of a rail corridor (being the newly created Lots 308 and 313) and of those portions of land the subject of the proposed compulsory acquisition, which are proposed to be granted to Mr Ah Toy as compensation for the acquisition of his land (being part of Lot 287, Lot 297 and a road reserve). The market value of the former was held to be \$18,000, while the market value of the latter was held to be \$36,000.
48. Obviously there is some variation between the valuations reports. However, what does not vary is the fact that the valuation of the land proposed to be granted to Mr Ah Toy is significantly greater than the value of the land for which he is to be compensated. According to the valuation by Darwin Land Services, the value of the land proposed to be granted to Mr Ah Toy is twice that of the value of the land for which he is to be compensated. According to the valuation by the Australian Valuation Office the value of the land proposed to be granted to Mr Ah Toy is around 1.7 times that of the value of the land for which he is to be compensated.
49. Yet, it is clear that the proposed grant of the acquisition area was intended as direct compensation for land acquired from Mr Ah Toy for the Alice Springs to Darwin Railway corridor. As stated in the affidavit of Noreen Alma Blackley the grant of the acquisition area to Mr Ah Toy was intended as "a simple exchange of land".¹³
50. It is inappropriate for the applicant to grant as compensation to a private party land that is so much more valuable than the land the acquisition of which is to serve as the compensation. This excessive favouring of one party at the expense of another, where there is no public interest or reason for the conduct giving rise to the disproportionate treatment, gives rise to an apprehension of bias on the part of the decision-maker and consequently is an abuse of natural justice.
51. The 'fundamental principle followed by the courts in determining compensation for compulsory acquisition' is 'the principle of equivalence'¹⁴. This principle has been enunciated in a number of cases. In *Director of Buildings & Lands* it was stated that "... built into the concept of fair compensation, is the corollary that a claimant is not entitled to receive more than fair compensation; a person is entitled to compensation for losses fairly attributable to the taking of his land, but not to any greater amount."¹⁵ In the English case of *Horn v Sunderland Corp*¹⁶ Scott LJ stated that the resumed owner "gains the right to receive a money payment not less than the loss imposed on him in the public interest, but on the other hand, no greater". It is notable that the case of *Horn v Sunderland Corp* concerned a compulsory acquisition that was held to be in the public interest. By contrast, the proposed compulsory acquisition in this case, by admission of the Applicant, is not to

advance any significant public interest. Rather the purpose of the proposed compulsory acquisition in this case is in favour of one private interest and to the detriment of another private interest. In a case such as this the principle of equivalence should be even more strictly upheld. It is contrary to precedent and entirely inappropriate for the Applicant to acquire the Objectors native title interests in order to *over-compensate* a third party for an unrelated acquisition of land.

Dated: 16 January 2003

Phillipa Hetherton

Solicitor for the Objectors

1. a scale map of Pine Creek created by the Department of Lands, Planning and Environment was used to ascertain these distances.
2. See Affidavit of Phillipa Jane Hetherton, affirmed 14th August 2002, Annexure PJH-5, "Pine Creek ; Planning concepts and land use objectives" Figure 4 – a map of heritage sites in the townsite area.
3. See Notices of Proposal annexed to the affidavit of Beverley Joan Griffiths dated 14 December 2000
4. sworn 23 November 2000 at paragraph 8
5. See bundle of discovered documents filed 16 August 2002 – Item 20 – emphasis in the original
6. Applicant's further Submissions at paragraph 50
7. Applicant's further Submissions at paragraph 51
8. sworn 23 November 2000 at paragraph 7
9. Applicant's further Submissions at paragraph 52
10. See the Bundle of discovered documents filed by the Respondents on 16 August 2002. The valuation report is item 3.
11. See Valuation report served by the Applicant on the Respondents on 11 November 2002
12. See Attachment PJH-4 to the Affidavit of Phillipa Jane Hetherton dated 16 August 2002.
13. sworn 23 November 2000 at paragraph 6
14. see Jacobs, Marcus, *The Law of Resumption and Compensation in Australia*, LBC Information Services 1998, at p.219
15. [1995] 2 AC 111 at 125C-D
16. [1941] 2 KB 26 at 42

FINDINGS

Stay

140. This Tribunal in its interim decision and discreetly on the issue of whether it should stay its recommendations handed a decision down in the matter of the Minister for Lands, Planning and Environment V Paddy Huddleston and Others on Behalf of the Wagiman People LMT – 38-2001-LA (N) (20108444) ("LMT 38"). Although it is not succinctly stated by the Respondents, as it was in LMT 38;
- (a) that there is an application in this matter for a stay; or
- (b) the grounds upon which such application are based;
- from paragraph 5 of Respondents' Submission on Jurisdiction the Tribunal infers that is what in essence the Respondents are submitting or

contending. Out of an abundance of caution therefore it will assume that in fact the Respondents are seeking a formal stay and because of what is stated in paragraph 5 of the Respondents' Submissions on Jurisdiction, that such an application is based fairly and squarely on the premises and submissions set out in the Objectors' May Submissions in LMT 38, which the Tribunal will regard as being incorporated by reference into its decision, since to recite either the submissions or its decision which it will also incorporate by reference would simply add to the prolixity of what will be a lengthy decision in any event.

141. Crisply and *mutatis mutandis* the grounds for refusing the Stay application in LMT 38 are adopted as the grounds for this Tribunal refusing to Stay the delivery of its recommendation in respect of the current proceeding.

Jurisdiction

142. The Respondents' Submissions in paragraphs 1.1 (a, b, and c) self-evidently raise issues and comprise an allegation that the Notice of Proposal on its face does not comply with section 33(1)(b) LAA. This is alleged to constitute a fatality concerning acquisition because of non-compliance with section 43(1) (b) LAA [1.1 (a)].
143. Further that the Notice of Proposed Acquisition on its face does not comply with section 33(3)(b) LAA in that it "does not contain details of the manner in which it is proposed that the land, if acquired will be dealt with". This is said to vitiate the application also for non compliance with section 43(1)(b) LAA [1.1 (b)].
144. Further it is contended that the intended grant of land to Mr Edward Cheong Ah Toy in lieu of monetary compensation for the government acquiring freehold land owned by Mr Ah Toy is for an unlawful purpose [1.1(c)].
145. Firstly in this Tribunal's finding those specified submissions are not directed to whether or not the Tribunal has jurisdiction to deal with the application. These issues are in the Tribunal's finding issues which could

validly be raised in the event that any recommendation to acquire the land was the subject of judicial review in terms of section 45A LAA. Such is in accordance with the Applicant's Submissions.

146. Secondly the Tribunal upholds the submission made at paragraph 52 of the Applicant's Submissions, but in each specified case the basis of the objection is (section 22A(2) LMT) "If...the objection is not on the ground that ...the compulsory acquisition would affect the person's interest in the land proposed to be acquired (Native Title Rights and Interests)".
147. In relation to paragraph 1.1(d) the Tribunal upholds the submissions at 53, 54 and 55 of the Applicant's Submissions.
148. Issues raised in the Respondents' Submissions relating to the Deed with Ah Toy otherwise will be dealt with at a later stage when considering basically similar or identical submissions emanating from the Respondents' Submissions on Jurisdiction.
149. In respect of the submissions contained in paragraph 2 of the Respondents' Submissions, firstly in relation to alleged non-compliance of sections 33 1(b) and 33 3(b) LAA concerning alleged defects in the relevant Notices, the Tribunal reiterates its finding set out above.
150. Otherwise in relation to the 'purpose argument' the Tribunal refers to and adopts its decision in relation to these aspects of the submissions contained in Minister for Lands, Planning and Environment v Griffiths LMT-26-2001-LA (N) (and two other applications) ("LMT 26").
151. The section 38AA LAA issues and the like; the issues relating to the 'Ah Toy' agreement; the issues relating to the alleged Over-Compensation; and finally the argument that the failure to pay compensation to the Wagiman People until such time as Native Title is determined by a Court amounts to a contravention of the Racial Discrimination Act 1975 comprise issues to which the Tribunal will return in examining coincidental or supplementary submissions relating to those matters in the Respondents' Submissions on Jurisdiction and/or submissions on the application of

section 38AA LAA in the Respondents' Further Submissions. No further discreet attention is focused at this time on the balance of the submissions comprising the Respondents' Submissions or the Applicant's submission filed in the proceeding.

LMT-26

152. Insofar as the Objectors by reference in paragraph 7 of the Respondents' Submissions on Jurisdiction reiterate the submissions filed and referred to in the said paragraph 7, the Tribunal *brevitas causa* simply refers in respect of those submissions to its decision in proceeding LMT-26 which it likewise refers and adopts by way of response.

Does LAA authorise the acquisition of Crown Land "that is affected only by native title interests"

153. In paragraph 12 of the Respondents' Submissions on Jurisdiction it can be seen that it is submitted the power of acquisition vested in the Minister under LAA authorises the acquisition of land that has been alienated by the Crown. So much is trite. It is, however, further contended that LAA does not authorise the acquisition of "Crown land ... that is affected only by the acquisition of native title interests".
154. In response to the submissions, the Applicant's Further Submissions contend that LAA authorises the acquisition of any "land". The definition of "land" in LAA is in the following terms:

"land" means land (including the seabed) within the limits of the Territory and includes an interest in land; [Tribunal underlining]

155. As long as what is sought to acquire is "land", there is no exclusion from such a classification of a species of land namely "Crown land" which as pointed out in the Applicant's Further Submissions (paragraph 8) is not defined in LAA.
156. The relevant portion of section 24 MD of the *Native Title Act* which is focused upon is sub-section 2(b). Sub-section 2 in essence provides that there is extinction of native title providing there is compliance with the

section and sub-sections, but, relevantly, that as one aspect of the exercise requires a simultaneous acquisition of non-native title rights and interests. The Respondents seem to be asserting that there is nothing else other than the native title rights which are in fact being acquired in this matter.

157. Section 9 of the *Crown Lands Act* provides:-

9. Power to alienate land

(1) Subject to this Act, the Minister may, in the name of the Territory by instrument in the appropriate form ... grant an estate in fee simple”

Section 9(2) of the *Crown Lands Act* provides:-

(2) A power to grant under subsection (1) an estate in fee simple includes a power to grant an estate in fee simple to the Territory and, subject to section 11, an estate in fee simple so granted or otherwise obtained by the Territory shall not merge with the radical title to the land. [Tribunal’s underlining]

158. It is in this Tribunal’s finding the case that the land comprises unalienated Crown land. What the Minister is seeking to acquire is the fee simple estate in the land, so that upon acquisition it will initially be the exercise of granting an estate in fee simple to the Territory.

159. As was explained by Brennan J in *Mabo and Others v Queensland (No. 2)* (1992) 175 CLR 1 FC 92/014 at page 242:-

“Recognition of the radical title of the Crown is quite consistent with recognition of native title to land, for the radical title, without more, is merely a logical postulate required to support the doctrine of tenure (when the Crown has exercised its sovereign power to grant an interest in land) and to support the plenary title of the Crown (when the Crown has exercised its sovereign power to appropriate to itself ownership of parcels of land within the Crown’s territory)’

160. In *Land Law*, 4th Edition, Law Book Co, by Peter Butt, the learned author explains at paragraph 450 certain legal propositions after the heading **Tenure and Customary Native Title**. The learned author’s quote is set out hereunder:

“We conclude this chapter by considering how the received doctrine of tenures co-exists with the concept of native title established by the High Court in *Mabo v Queensland (No 2)*, (usually shortened to *Mabo (No 2)*). In *Mabo (No 2)*, the High Court held that the British Crown’s acquisition of sovereignty, over New:

South Wales did not of itself extinguish customary native title. The common law of England which the colonists brought with them to the new land could, and did, accommodate native customary title. The Crown's sovereignty gave it the "radical," (or "ultimate" or "final") title; and this radical title empowered the Crown to appropriate land to itself or alienate it to others. But until the Crown – or later, a competent legislature - so acted, any traditional native interests in the land that existed under native law or custom at the time the colony was established, survived colonisation (though it may have been extinguished later).

Land can only be held "of the Crown" when it has been granted or otherwise alienated by the Crown. As we have seen, in England the doctrine of tenure stems from the premise – perhaps a fiction – that after 1066 William the Conqueror granted all the land in England to his various tenants-in-chief. But in Australia the premise of Crown grant is only partly true: some land remains unalienated by the Crown. And so the doctrine of tenure – fundamental as it is to Australian land law – applied only to land that has been granted or alienated by the Crown: only such land is held "of the Crown". The doctrine does not preclude the existence of interests in or over land --such as native customary interests – that owe their existence to something other than a Crown grant or alienation."

Sub-section 48 LAA

161. Leaving aside the provisions of section 47B NTA, land acquired subsequent to any recommendation of this Tribunal, involves upon its acquisition an extinguishment of native title. That title is not revived by the embracement of section 48 LAA and indeed in relation to circumstances covered by section 47B NTA, it is by virtue of NTA that the extinction of native title is reversed, but only in those circumstances and not because of any intrinsic operation of section 48 LAA.
162. It is this Tribunal's finding that the argument based on the premise that the provisions of section 48 have any validity in relation to the acquisition of the land is simply a *non sequitur*.

Limitation on power of acquisition LAA by analogous or similar Territory legislation.

163. The submission is totally invalid. Powers vested in the Minister under LAA are to be found exclusively within the parameters of LAA. Insofar as it is contended that LAA is invalid in conferring an unconstrained power to acquire land, the matter is adequately dealt with in the proceeding LMT-26, Further exposition of the same principles there set out is futile and, in any event, will be determined by the Supreme Court in the outcome of the

proceedings of judicial review currently before that Court in relation to LMT-26. Failing the said review proceeding, the Tribunal's decision in LMT-26 will stand and be determinative of the issues between the parties.

The Racial Discrimination Act (“RDA”)

164. The Respondents' Submissions on Jurisdiction at paragraph 24 address section 7(3) NTA and to its displacement of the invalidity which otherwise allegedly flowed from the operation of the RDA. Then, however, the submission continues *“That, however, concerns only the validation of past acts or intermediate period acts ...”*. That as contended by the Applicant in the Applicant's Further Submissions as paragraph 15 is not in accordance with the facts.

165. Significantly in *Western Australia v Ward*, the majority judgment propounds:-

“The significance of s.7(3) is to make it clear that, notwithstanding the continued paramountcy of the RDA stated in the earlier sub-sections, the effect of the validation achieved by the NTA is to displace the invalidity which otherwise flowed from the operation of the RDA. It is unnecessary to consider whether s.7 may have other operations.” [Tribunal underlining]

166. The above dictum, it seems to this Tribunal, makes it abundantly clear that the contention made in the said paragraph 24 of the Respondents' Submissions on Jurisdiction is simply not correct. Thus the remainder of that paragraph is predicated on the validity of that which is not valid. It ought not to be considered further.

167. The Tribunal adopts the submission at paragraph 17 of the Applicant's Submissions and highlights the following:

If the acquisition is in accordance with Division 3 then it is valid by the operation of the NTA, whether or not it would otherwise have been invalid because of the operation of the RDA.

168. The Tribunal agrees with the contention made in paragraph 15 of the Applicant's Further Submissions, namely that yet again the proposition on behalf of the Respondents amounts to a *non sequitur*. In *Ward*, the High Court was concerned with making commentary on specified acts, namely

“past acts and intermediate period acts”. There was no limitation such as is contended for by the Respondents on section 7 NTA.

169. In paragraph 25 of the Respondents’ Submissions on Jurisdiction, presumably flowing on from what is mentioned in paragraph 25 of the said Submissions, it seems the Respondents are submitting that because “the interest in land”, the subject of the compulsory acquisition, is alone or only “native title rights and interests” the proposed acquisition is discriminatory and therefore section 10(1) RDA is engaged. This issue has in any event been discretely dealt with by the Tribunal under the heading **Does LAA authorise the acquisition of Crown Land that is affected only by native title interests.**
170. In the Applicant’s Further Submissions there is no direct addressing of the submissions referred to in paragraph 25 and 26 of the Respondents’ Submissions on Jurisdiction. In *Ward* (at paragraph 101) the observance of Mason J as cited is in the following terms:-
- "[t]he operation of s 9 is confined to making unlawful the acts which it describes. It is s 10 that is directed to the operation of laws, whether Commonwealth, State or Territory laws, which discriminate by reference to race, colour or national or ethnic origin." [Tribunal underlining]
- The observation concludes at 102 that section 9(1) does not extend to actions taken in accordance with statutory authority.
171. To the extent that the Submissions of the Respondent to the contrary, they are consequently rejected
172. Section 10(1) RDA according to in the above judgment, the designated section having application, merely elevates rights which are diminished or impugned so that the affected right is elevated to enjoy the same status as *“a right that is enjoyed by persons of another race ...”*.
173. The Tribunal upholds the Submission set out at paragraph 9 of the Applicant’s Further Submissions, namely, as is the case with the land, the subject of these proceedings:-

If “Crown land” is affected only by native title rights and interests the LAA authorises the acquisition of those interests as “land” defined for the purposes of the LAA.

174. Further, as has already been remarked upon in LMT-26, the rights and consequences of an acquisition of an interest in land comprising only native title is, if anything, accorded more notice and greater expansion of rights than those rights which would attach to the owner of a fee simple absolute in possession sought to be acquired under LAA and the contentions advanced in paragraphs 25 and 26 of the Respondents’ Submissions on Jurisdiction are rejected as being untenable.

Over-compensation

175. At paragraph 45 to 51 inclusive of the Respondents’ Further Submissions there are submissions which flow from the alleged granting of the land representing over-compensation given the alleged lesser value of the land taken from Mr Ah Toy for the railway corridor.
176. Firstly to resolve what the true factual state of affairs is concerning the valuation of the land and the land acquired for the railway corridor from Ah Toy would involve a need to make a decision as to which valuation was more reliable or was to be relied upon. For the purposes of that exercise it would be quite improper to make a decision otherwise than after the proper examination of the competing authors of valuations as to their findings. This Tribunal declines to attempt to embark upon an exercise of deciding which valuer is to be believed and as a consequence, the premise for any conclusion cannot be said to be in existence.
177. However, in the hope that it may dispose of the issue in any event, the essence of the submission is to be found in paragraph 50 of the Respondent’s Further Submissions. Firstly it is alleged that it is *“inappropriate for the applicant to grant as compensation to a private party land that is much more valuable than the land the acquisition of which is to serve as the compensation”*. As is abundantly clear from LMT-26, acquisition “for any purpose whatsoever” means no more or no less than

what the words convey. Ultimately the compensation, if native title is established, to be awarded to the Respondents would have to comprise full and proper compensation so that the Respondents can expect to receive compensation which is commensurate with the highest and best use of their rights and or the land. In that sense the Respondents can do no better.

178. The next submission made in the same paragraph is founded upon the genesis of an allegation in essence that “*excessive favouring*” is only justified where there is “*public interest*” (or other reason for disproportionate treatment). There is, in this Tribunal’s finding, no “favouring” of Mr Ah Toy at the expense of the Respondents at all. They will receive full and proper and adequate compensation for the value of their rights of the land. In any event, insofar as it matters, there is huge public interest in this Tribunal’s perception and was at the relevant time to a railway line from Darwin to Adelaide being constructed for the benefit and public interest of both the Applicant, Mr Ah Toy and the Respondents.
179. It is further contended that the exchange, if it ever takes place, “*gives rise to an apprehension of bias on the part of the decision maker*”. This Tribunal is the decision maker and insofar as it is being submitted that sanction of the proposal engenders an apprehension of bias, the Tribunal rejects it out of hand.
180. Finally, even it were not so rejected, to contend that there exists as a consequence “*an abuse of natural justice*” is without a shred of validity.

Delay in compensation to the Respondents

181. This matter is addressed at paragraph 4.4 of the Respondents’ Submissions. It is by no means certain that the Respondents will establish that native title reposes in them in respect of the land. For the submission to have a scintilla of validity the Tribunal finds that it would first for its validity at its very least have to be a fact that native title was “a certainty”. In the event, the statement is not technically correct as it stands. Not only will the Territory not by curial direction provide compensation (as opposed

to by agreement) to the Respondents but it will not do so when, if it be the case, "*native title is determined by a Court*". In fact there can be no consideration of compensation until after the determination of native title if that were to occur.

182. In the circumstances the submission that unequal treatment is demonstrated by the process such that a contravention of the RDA is established is rejected by the Tribunal.

The Deed

183. Essentially the factual matters set out in section 27 and 28 of the Respondents' Submissions on Jurisdiction are correct.
184. However, in relation to the submissions made at paragraph 29, the Applicant responds to the allegations in paragraph 19 of the Applicant's Further Submissions.
185. The Tribunal upholds the contention in paragraph 20 of those submissions. On one perspective that is an end of the matter. However, for the purposes of resolving all issues if that is possible the Tribunal will go on to consider the position as alleged as by the Respondent in any event.
186. The Tribunal rejects the contention in paragraph 29 of the Respondents' Submissions on Jurisdiction that the effect of the covenant is to bind the Minister and thus to fetter his power.
187. Insofar as the second contention is concerned, if there is any validity in the concluding sentence at paragraph 29 of the Respondents' Submissions on Jurisdiction, it is not a matter which goes to the jurisdiction of this Tribunal.
188. In relation to the so-called "fetter" proposition, the Tribunal adopts and upholds as its findings the matters recited in the Applicant's Further Submissions at paragraph 22 to 27 inclusive.
189. The Tribunal specifically upholds the submissions of the Applicant set out at paragraph 28 and 29 of the Applicant's Further Submissions and as a

necessary consequence it is not necessary to canvass or traverse the remaining allegations made in the Respondents' Submissions on Jurisdiction in respect of that issue.

190. This Tribunal otherwise crisply repeats its findings in LMT-26 in relation to the exercise of a power and repeats in short compass that the power is to acquire land "for any purpose whatsoever". That permits the intended acquisition of the land in this matter together with all registered native title interests.

Other matters

191. In paragraphs 34 and 35 of the Respondents' Submissions on Jurisdiction (not discretely addressed in the Applicant's Further Submissions", the Respondent again attacks the concept of "purpose". The Tribunal reiterates that it is not in its finding and in its previous findings the case that there has to be some beneficial defined or authorised purpose. The land can be acquired for any purpose whatsoever. The contention advanced in paragraph 34 is for that reason rejected.
192. The Respondent then concludes that by virtue of "the 18 month period" (set out in the Deed referred to under that heading), the appropriate way for the Territory is not to proceed in the manner allowed upon in the Deed for the parties to contractually deal with one another in the matter prescribed. Such a course it seems suggests that the Tribunal ought not to make a recommendation in respect of the acquisition of the land. That proposition is ill-founded in the finding of the Tribunal. There is no compunction for the Tribunal to do anything at the expiration of 18 months from the date of the Deed. All that is required is an exercise in consideration and that consideration does not and cannot preclude the continuation of the efforts which are still on foot to acquire native title to the land.

Finding in relation to the issue of Jurisdiction

193. The Tribunal finds that the land comprises an unalienated Crown land. For the reasons set out in the Tribunal's decision, it formally finds that it is

vested with jurisdiction to make a recommendation in relation to the acquisition of the land.

The merits of the matter.

194. There is no contention that the sections which govern the formal procedure allowing the Tribunal to deal with the matter in sections 36, 37 and 38 LAA have not been complied with. Insofar as it is necessary to do so, the Tribunal formally finds that there has been compliance with each one of those sections.

Compliance with section 38 LAA

195. As a preliminary matter in respect of the claimed native title rights and interests set out conveniently at paragraph 32 of the Applicant's further submissions, the Tribunal upholds the contentions made in relation to those rights lettered (i) and (j).
196. Further the Tribunal, as it has consistently, declines to inquire into or find whether native title exists. The Tribunal holds that its function is properly defined in *Strickland*.
197. The Tribunal does not propose to traverse the relevant allegations that are set out in the Respondents' Further Submissions. It confines itself to the description of the function reposing in it as defined in *Strickland*.
198. As the Tribunal must then look for the evidence of existing and exercise of registered native title rights and the effect of the proposed acquisition/s of the enjoyment of those rights, the Tribunal will examine the registered rights other than (i) and (j). This exercise is, in the Tribunal's perception, necessary and required in order to gauge whether or not compensation if assessed in due course is sufficient recompense to recommending acquisition of the land and the extinction of all the valid registered native title rights.

199. In paragraph 35 of the Applicant's Further Submissions, the "factual allegations" are conveniently and in the perception of the Tribunal, correctly summarised.
200. The issue of sacred sites is not a matter with which the Tribunal proposes to concern itself. The appropriate legislation governing any rights, the protection of such rights, or the infringement of such rights, is adequately covered by the provisions of the *Sacred Sites Act*.
201. The Tribunal finds the observation in paragraph 38 of the Applicant's Further Submissions is correct:-

"It is suggested in para 12 of the Healey affidavit that the Aboriginal Town Camp adjoins the proposed acquisition area. This is clearly incorrect, as can be seen from maps of the area attached to the Healey affidavit."

202. At paragraph 17 to 24 inclusive of the Respondents' Further Submissions there are various attacks and contentions made attacking the allegations and observations in Ah Toy's affidavit. The Tribunal rejects the validity of the contention set out in paragraph 17 of the Respondents' Further Submissions as to the existence of the alleged tenet of the philosophy of natural justice. The remaining attack on the allegations in Ah Toy's affidavit is, in the Tribunal's perception, properly classified as 'nitpicking'. As to whether or not native title exists to other land, close to or contiguous to the land the subject of this application, the fact of its proximity is of little or no consequence.
203. The Tribunal states that in relation to the evidence set out in Ah Toy's affidavit, it is impressed with the specificity and recollections and comments of Mr Ah Toy. Whilst there are bases upon which some of his estimates to distance are demonstrably erroneous in minor respects, nothing detracts from the substance of his observations and particularly of those observations which are made controverting evidence adduced on behalf of the Respondent.
204. Further, the Applicant's Further Submissions, conveniently set out at paragraph 40, demonstrate examples of inconsistency between the

specified evidence. The Tribunal adopts the examples as valid and compelling:-

40. There are a number of other inconsistencies referred to in the Ah Toy affidavit which indicate, at the very least, that there is considerable confusion as to the location of the acquisition area, at least in the evidence of the Aboriginal witnesses and perhaps also their anthropologist. Further examples include the following:

- (a) There is no creek on the paddock although there is an open unlined drain which can take storm water during the wet season but is not easily "played in" cf 34(e).
- (b) The paddock is fenced on all sides and has been so for many years cf Maureen Smith para 10.
- (c) There has not been a camp on the paddock for 60 years cf Maureen Smith para 5.
- (d) The place referred to in para 4 of Paddy Huddleston's affidavit is not on the paddock; it is on the block adjacent to it see also Healey affidavit at 14 apparently also referring to the adjacent block
- (e) The country behind the "old railway shed" does not refer to the paddock cf Paddy Huddleston at para 6.

205. Furthermore, in the Tribunal's finding, the most beneficial construction that can be placed upon this conflict of evidence is that set out at paragraph 41 of the Applicant's Further Submissions and amplified at paragraph 42:-

41. As to present activity on the paddock, the fact that it is completely fenced and is overgrown, as described by Mr Ah Toy, and that Mr Ah Toy has not seen Aboriginals using or crossing the paddock since he has lived in the area, tends to the conclusion that the evidence of Aboriginal witnesses as to activities undertaken may well be in respect of areas close too, but not on, the paddock.

42. That the respondent witnesses may have been under a misapprehension as to the location of the block gains some force when considerations is given to the following:

- (a) The town camp is not adjacent to the Lots to be acquired but is likely to be adjacent to the adjoining block.
- (b) Pine Creek is to the west of the paddock and between the town camp and the paddock. It is probable that Pine Creek is on the adjoining block and is the creek referred to in the witness statements. Note also para 10.1.2 of the affidavit of Noreen Blackley sworn 23 November 2000 as to Pine Creek running through the westerly part of the Lots 287 and 297 which part is not proposed to be acquired.
- (c) The reference to the land not being fenced may be consistent with consideration being given to the block next door and not the paddock.

Section 38AA LAA criteria

206. Where it is appropriate to do so and rather than repeat what has already been stated in the Applicant's Further Submissions, the Tribunal will adopt what is set out by the Applicant in such submissions.

207. By way of a general overview the Tribunal finds that in all the circumstances monetary compensation consequent on the extinction of native title is sufficient compensation in light of the factual circumstances pertaining to the native title rights claimed in relation to this matter.

208. To save cross-referencing to section 38AA LAA, the Tribunal will deal with the issues in the same manner as are set out in the Applicant's Further Submissions.

209. **First Criterion:**

In paragraph 27 of the Respondent's Further Submissions matters are set out that have already been traversed by the Tribunal.

The Tribunal upholds the contentions set out in paragraph 43 of the Applicant's Further Submissions.

210. **Second Criterion:**

Insofar as the contention is made in paragraphs 29 to 32 of the Respondents' Further Submissions that activities on proximate land are to be construed as significant for the purposes of this exercise, the Tribunal rejects that contention.

The Tribunal upholds the submissions set out in paragraph 44 and 45 of the Applicant's Further Submissions.

211. **Third Criterion:**

The Respondents in paragraph 33 of the Respondents' Further Submissions attack the matters set out in paragraph 46 of the Applicant's Further Submissions. The Respondent's submissions are not upheld by the Tribunal.

The Tribunal upholds the submissions set out in paragraph 46 of the Applicant's Further Submissions.

212. **Fourth Criterion:**

In paragraph 34 of the Respondents' Further Submissions again an allegation is made that "*hunting and gathering bush tucker*" amongst other matters comprise an enjoyment "*on the land*". That is not established by the evidence in this Tribunal's finding.

In light of the legal position in relation to sacred sites, particularly in the actual situation of there being no identified sites, access to those sites if they eventuate is ensured.

The submission in the Applicant's Further Submissions at paragraph 47 are otherwise upheld.

213. **Fifth Criterion:**

The submissions contained in paragraphs 35 to 38 of the Respondents' Further Submissions have no validity in the light of the Tribunal's finding.

The submissions advanced in the Applicant's Further Submissions at paragraph 48 are upheld.

214. **Sixth Criterion:**

In paragraphs 39 to 41 of the Respondents' Further Submissions, the issue of economic benefit is addressed. Ms Blackley's speculation is not relevant in the light of Mr Ah Toy's statements. Surely the point made by the Applicant in relation to the railway was that the "price" of requiring the land for the railway should be the grant of a Fee Simple Estate in respect of the land the subject of this application is a price which on economic considerations is beneficial to the Territory. The obligation of the Tribunal is that it "must take into account" certain matters which are of course in any event inclusive. There is no requirement that an Applicant is required to prove the existence of any economic benefit accruing to the Territory as a consequence of the land acquisition. The premise upon which the Respondents' submission is made is indeed specious.

The submissions in the Applicant's Further Submissions at paragraph 49 and 50 are adopted and upheld.

215. **Seventh Criterion:**

In respect of the submissions in paragraphs 42 to 44 inclusive set out in the Respondents' Further Submissions, apart from drawing attention to the comment made in respect to the Sixth Criterion above, no further comment is made by the Tribunal.

The allegation set out in paragraphs 51 and 52 of the Applicant's Further Submissions are upheld.

216. **Eighth Criterion:**

The submissions set out in paragraph 53, 54 and 55 of the Applicant's Further Submissions are adopted by the Tribunal as its own findings.

RECOMMENDATION OF THE TRIBUNAL

217. In all the circumstances and in accordance with section 5(1)(a) LMT, the Tribunal recommends that the Minister unconditionally acquire the land by way of compulsory acquisition.

Dated: 18 February 2003

DAVID LOADMAN
CHAIRMAN