

CITATION: *Minister for Lands, Planning and Environment v Risk and others NT LMT 13*

PARTIES: MINISTER FOR LANDS, PLANNING AND ENVIRONMENT  
v  
WILLIAM MAXWELL RISK (ON BEHALF OF THE LARRAKIA PEOPLE)

TITLE OF COURT: Lands and Mining Tribunal

JURISDICTION: Lands and Mining Tribunal Act

FILE NO(s): LMT-13-2000-LA(N) (20015545)

DELIVERED ON: 18 February 2003

DELIVERED AT: Darwin

HEARING DATE(s): Not applicable

JUDGMENT OF: David Loadman

**CATCHWORDS:**

COMPULSORY LAND ACQUISITION – OBJECTION BY REGISTERED NATIVE TITLE CLAIMANT – RECOMMENDATION BY TRIBUNAL

*Native Title Act 1993 (Cth)*  
*Lands Acquisition Act (NT), s 38AA*  
*Lands and Mining Tribunal Act (NT), s 5*

**REPRESENTATION:**

*Counsel:*

Applicant: Sinclair Whitbourne  
Objector: Phillipa Hetheron

*Solicitors:*

Applicant: Ward Keller  
Objector: Northern Land Council

Judgment category classification: B  
Judgment ID number: NTLMT 13  
Number of paragraphs: 46

AT DARWIN IN THE NORTHERN  
TERRITORY OF AUSTRALIA

No. LMT-13-2000-LA(N) (20015545)

BETWEEN:

**MINISTER FOR LANDS, PLANNING  
AND ENVIRONMENT**

Applicant

AND

**WILLIAM MAXWELL RISK (ON  
BEHALF OF THE LARRAKIA  
PEOPLE)**

Objector

DECISION

(Delivered 18 February 2003)

DAVID LOADMAN, CHAIRMAN

**RELEVANT HISTORY**

1. Various procedural steps were the subject of this proceeding before the matter was referred to the Tribunal, including:
  - . Notice of Proposed Acquisition of Land dated 21 June 1999;
  - . Notice of Proposal dated 1 October 1999;
  - . Notice of Objection dated 26 September 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 11 January 2001. 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 on an agreed timetable.

3. On 22 June 2001 the Tribunal listed the matter for hearing to commence 28 August 2001. On 13 August 2001 an application was received from the Respondents that the hearing date be vacated and a new date set. On 13 September 2001 the matter was re-listed for hearing for 3 days commencing 12 February 2002.
4. On 31 October 2001 an order was made by the Tribunal that the matter be heard simultaneously with the application in proceeding LMT-12 (Lot 293 Town of Pine Creek).
5. On 10 January 2002, by consent the hearing dates were vacated and the matter set down for directions on 28 March 2002. The Tribunal convened further for directions on 5 June 2002, 16 July 2002, 29 July 2002 and 23 August 2002. On 23 August 2002 the matter was listed for hearing for 5 days commencing 16 December 2002. The Applicant and the objectors were given leave to file any affidavit material on or before 30 September 2002 and 8 November 2002 respectively. On 8 November 2002 the Applicant was given to 14 November 2002 to file material and a directions hearing fixed for 22 November 2002.
6. On 22 November 2002 the hearing dates 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, with liberty to apply generally to both parties.
7. The Respondent filed Submissions on Jurisdiction on 2 December 2002.
8. 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.

9. The Applicant filed further submissions on 17 December 2002. The Respondents wrote to the Tribunal on 20 January 2003 advising that it was not intended to file any further submissions in this matter.

## **PRELIMINARY MATTERS**

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

*“All interests, including native title rights and interests (if any) , in all those pieces or parcels of land identified as Sections 3491, 3492, 3493, 3494, 3495, 3496 and 3497 Hundred of Strangways., Noonamah locality, and respectively containing areas of 16.18, 16.18, 16.18, 16.85, 15.85, 14.57 and 3.64 hectares or thereabouts...”*

(“the land”) 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.

11. From the Notice of Proposal dated 1 October 1999, the manner in which the Territory proposes to deal with the land if it is acquired is as follows:-

*“Consolidation with Section 4131 Hundred of Strangways and grant of an Estate in Fee Simple, under the provisions of the Crown Lands Act, to Excess Pty Ltd or its nominee.”*

12. The objector has by Notice of Objection dated 26 September 1999 objected to the proposed acquisition of the land. Attachment A of that document reads:-

*“1. All of the land and waters proposed to be acquired is subject to a native title application lodged on behalf of the Larrakia People, which is pending registration before the Registrar of the National Native Title Tribunal.*

*2. The Larrakia People are, traditionally, the owners of the land and waters subject to this application- The registered native title rights and interests of the Larrakia People are set out in the afore-mentioned native title application. These rights and interests may be summarised 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;*

*(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;*

*The native title holders object to the acquisition of the land included in the Notice of Proposal on the following grounds:-*

*3. Effect of the acquisition on native title rights and interests. The acquisition of the land included in the Proposal will affect registered native title rights and interests in the following ways:-*

*The acquisition will extinguish all native title rights and interests in the land proposed to be acquired. 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.*

*In particular, the acquisition of the land will affect the following native title rights and interests:*

*(a) Native title holders will not be entitled, in the exercise of native title rights and interests, to have access to the land and therefore will not be able to enjoy any of the following rights and interests:*

- Reside on the land.*
- Maintain a non-sedentary way of life on the land.*
- Obtain sustenance from the land by hunting and gathering food.*
- Conduct ceremonies in relation to, or on, the land.*
- Share, exchange and/or trade resources derived on or from the land.*

*(b) The acquisition of the land described in the Notice of Proposal 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; and*

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

- *prevent native title holders from:-*

- (i) protecting and maintaining sites on or adjacent to the land*
- (ii) caring for the land in keeping with their spiritual obligations*
- (iii) protecting the land from harm by observing and engaging in their customs, laws, practices and usages in relation to the land*
- (iv) visiting and/or camping at special or exclusive places*
- (v) maintaining their knowledge of spiritually important places on the land and passing that knowledge on to their children and other members of their family*

*(c) As native title holders will no longer be entitled, in the exercise of native title rights and interests, to have access to the land. It will not be possible for them to:*

- *hold meetings on the land for secular and spiritual purposes*
- *regulate the access of others to the land*
- *pass on geographical, topographical, environmental and climatic knowledge about the land*

*The development of the land will permanently alter the topography of the land and the spiritual, environmental and ecological character of the landscape.*

*(d) The acquisition and proposed development will alter the physical and spiritual character of the land and prevent the native title holders from having access to the land for either secular or spiritual purposes. This will make it difficult over time for native title holders to maintain and pass on their spiritual knowledge of the land and to retain their knowledge of the connection of individuals or groups to particular parts of the land. In addition, the acquisition and proposed development will or is likely to affect:*

- *the way of life, culture and traditions of the native title holders; and*
- *the development of the social, cultural and economic structures of the native title holders*

*4. Use of the land. The acquisition will deny native title holders, in the exercise of their native title rights and interests (eg, to make decisions about the use of the land and its resources, to regulate the access of others to the land, to share, exchange and/or trade resources derived on or from the land) the right to:*

- *manage, use or control the land*
- *use or develop the land or its resources for their own social, cultural or economic purposes*
- *control the access of, or use by, others of the land.*

*'Registered native title rights and interests' is defined in s 4 of the Lands Acquisition Act.*

*The term 'native title holder' is used in this application to include registered native title claimants."*

13. Pursuant to leave granted by the Tribunal the objectors amended the grounds for opposing the application and the amended grounds, which presumably supplement those set out in paragraph 3 above 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:*

*In response to the Orders made by the Tribunal on 26 October 2000 in this matter the Respondent (also referred to as the Objector) states:*

- 1. The Objector does not dispute that is the Applicant's position that s24MB(1) and s24MD(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 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 other provisions of that Act.*
- 4. The proposed compulsory acquisition would not have been made if the land was subject to freehold title and the proposed compulsory acquisition is therefore invalid by virtue of sections 9-10 of the Racial Discrimination Act 1975 (Cth).*
- 5. The purpose or a substantial purpose of the proposed compulsory acquisition is to extinguish native title rights and interests in the subject land and thus the proposed compulsory acquisition is not for a purpose permitted by the Lands Acquisitions Act (NT).*
- 6. The purpose 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 purpose or a substantial purpose of the proposed compulsory acquisition is to fund or off-set the costs that would otherwise be incurred by the Northern Territory Government in acquiring other land for the purpose of the Darwin to Alice Springs Railway Corridor and thus the proposed compulsory acquisition is not for a purpose permitted by the Lands Acquisition Act (NT).*
- 8. The grounds for the Objector's objection to the proposed compulsory acquisition are otherwise set out in the objection dated 26 September 2000 lodged by the Objector with the Minister in relation to the matter, a copy of which comprises annexure BJK-18 to the affidavit of Beverly Joan Griffiths sworn on 14 December 2000 and filed in this proceeding.*

*Dated: 11 November 2000*

*DATED FILED: 14 November 2000*

*DATE AMENDED: Amended by Order 31 October 2001".*

14. 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 [“NTA”] apply ...**

15. Section 24MD(6A) NTA is part of Subdivision M of NTA.
16. 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.
17. 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.
18. “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.
19. In Subdivision P, NTA, the “Right to Negotiate” provisions are set out in section 25 NTA.
20. Section 26 NTA specifies when the Right to Negotiate provisions apply.
21. By section 26(1)(c)(3) the Right to Negotiate provisions apply to the compulsory acquisition and native title rights and interests unless, amongst other grounds, it is subject to an exclusion set out in sub-section 2(f); namely an act that is the compulsory acquisition of native title rights and interests and that relates solely to land or waters wholly within a town or city (see section 251C)
22. Section 251C NTA defines “towns and cities” and, in relation to the Northern Territory, provides:

**Areas in the Northern Territory –**

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

**(a) 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**

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

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

23. In the Applicant's form 2, the Applicant asserts that pursuant to section 251C(3)(c) NTA the land is a town or city if as at 23 December 1996 it was within a municipality constituted under section 29 of the *Local Government Act* of the Northern Territory.
24. Attachment A to the Applicant's form 2 is a proclamation by the then Acting Administrator of the Northern Territory of Australia, His Honour James Henry Muirhead, given on 6 September 1985 pursuant to section 8(1)(a) of the then *Local Government Act* of the Northern Territory and as published in the Northern Territory of Australia Government Gazette No S54 6 September 1985.
25. The Applicant asserts that the transitional provisions of the current *Local Government Act* of the Northern Territory ("LGA") as set out in section 267 of Part 14 LGA state, amongst other things, that Proclamations such as that set out in the attachment to the said Form 2 shall continue in force as if made under the relevant corresponding provisions of the current LGA. In this case it is asserted that the relevant corresponding provision will be section 20 LGA in its current form.
26. Attachment B to the Applicant's Form 2 is a map prepared by the Department of Lands, Planning and Environment identifying the municipal boundaries including the location of the land being Section 3491 – 3497 Hundred of Strangways in the Northern Territory. The land falls within the

area described in the Proclamation at Attachment A to the said Form 2 and consequently it is asserted sub-division P NTA does not apply.

27. In his Form 3 filed 14 November 2000, the objector asserts:

*“1. The Objector does not dispute the Applicant's position that s24MB(1) and s24MD(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 the Applicant's position that sub-division P of Division 3, Part 2 of the NTA does not apply.*

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

*4. The grounds for the Objector's objection to the proposed compulsory acquisition are set out in the objection dated 26 September 2000 lodged by the Objector with the Minister in relation to this matter.”*

28. 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...”.

29. “Registered native title claimant” in terms of LMT “has the meaning given in section 253 of the *Native Title Act*...” (s3(1)LMT)

30. Section 253 NTA provides that “**registered native title claimant**”, (in terms of section 3(1) LMT) “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.”

31. “Registered native title rights and interests” as defined pursuant to 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*;**

32. 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.
33. Those provisions, in broad compass, deal with compulsory consultation and mediation issues.
34. The parameters of the Tribunal's powers in regard to objections are set out at Division 2, Part 3, LMT at sections 22 and 22A.
35. 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 it affects the registered native title rights and interests of the claimants and bodies).
36. Section 22(1) 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.**

37. Section 22A LMT empowers the Tribunal to dismiss an objection by virtue of subsection (2) on specified grounds. It is common ground that the objection in this matter ought not be dismissed.
38. Section 38AA LAA specifies the criteria which must be considered by the Tribunal in making its recommendation. Subsections (1) and (2) of that section are 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.**

## **EVIDENCE**

39. Noreen Alma Blackley on behalf of the Applicant swore an affidavit on 23 November 2000 (Blackley's affidavit"). Blackley deposes to her position as the Manager, Property Purchasing, Land Administration with the Department of Lands, Planning and Environment.

40. Blackley's affidavit introduces her capacity of involvement of the matter and deposes to her examination of the Department's files in respect of the acquisition of the land.
41. In paragraph 3 of Blackley's affidavit, she identifies the location of the land, more precisely by reference to a locality plan marked "NAB1".
42. In paragraph 4 of Blackley's affidavit, she observes that the land lies within the outer perimeter boundaries of section 4131 Hundred of Strangways which is registered in the name of Excess Pty Ltd, "*a company linked to Mr Clint Walker and his father Neville Walker*". Further, that section 4132 Hundred of Strangways which is contiguous to the first mentioned property, is registered in the name of Mr Clint Walker.
43. In paragraph 5 of Blackley's affidavit, she identifies firstly that section 4132 is the subject of compulsory acquisition for the Alice Springs to Darwin railway corridor. Secondly, that the corridor splits that land "*nearly in half along a diagonal axis from roughly north to south*". She deposes further that in lieu of monetary compensation an agreement has been entered into, the details of which are not currently required to be set.
44. In paragraph 6 of Blackley's affidavit, she states a very cogent matter, namely that there are clear benefits to the Northern Territory in respect of the development of the Alice Springs to Darwin railway line. She deposes to the expectation that such railway line will generate very considerable employment opportunities in respect of the establishment of the infrastructure and thereafter on an ongoing basis. She contends further that there will be extensive future benefits accruing to the Northern Territory which seems inescapably obvious to the Tribunal. More particularly, she contends that the proposed acquisition of the land will facilitate the speedy and smooth progress of acquiring the necessary land for that railway corridor.

45. Blackley's affidavit in paragraph 7 refers to an aerial photograph, marked "NAB2", which depicts the location of the land itself and the surrounding properties. Further, she contends the photograph shows that the land is "*surrounded by other freehold land*". She states that the whole area is the subject of "*continuing rural and rural/residential development*", which she observes will continue as the population and Darwin area itself expand. As a specific example, she refers to the area depicted in the vicinity of the junction of Middle Arm Road and Cox Peninsula road and the area adjacent to the Stuart Highway between Keleson Road and Goode Road.
46. In paragraph 8 of Blackley's affidavit, she refers to the consolidated whole being suitable for the continuation of running livestock. She further contends that the livestock industry provides economic benefit to the Northern Territory by way of export and local marketing.
47. In paragraph 9 of Blackley's affidavit, she contends an absence of any native title rights and interests. This is met, as it has been consistently, with the Tribunal's response that the Tribunal makes no finding or comment in respect of the allegation and proceeds on a completely contrary basis.
48. In paragraph 10 of Blackley's affidavit, in the Tribunal's perception correctly, she propounds the law as to the effect of the compulsory acquisition of the land:-

*"Pursuant to s24MD(2)(c) of the Native Title Act (Cth) the effect of the compulsory acquisition is to extinguish all the registered native title rights and interests claimed. Pursuant to s24MD(2)(c) of the Native title Act (Cth) and s59 of the Lands Acquisition Act (NT) the further effect of the compulsory acquisition is to provide to the holders of any native title rights and interests a right to compensation".*

49. In paragraph 11 of Blackley's affidavit, in respect of any native title rights and interests which may exist, she submits on behalf of the Minister:-

*"11.1 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:*

*11.1.1 the Land is surrounded by Section 4131 Hundred of Strangways which is freehold Title. A representative of the registered proprietor has told me, and I verily believe, that the proprietor is not aware of Section 4131 Hundred of Strangways being subject to entry or use by the native title group. There is no point of access or entry onto the Land except via Section 4131 Hundred of Strangways. Section 4131 Hundred of Strangways which surrounds the land is fenced off. The lack of access to and apparent non-use of the Land by the native title group all suggest that there is unlikely to be any significant effect on native title holders as a result of the extinguishment of any native title rights and interest in respect of the Land; and*

*11.1.2 in terms of the development of the social, cultural and economic structures of the native title claim group, the land appears to offer little or no opportunity for the development of economic, social or cultural structures. The Land is surrounded by a freehold parcel (Section 4131 Hundred of Strangways) and there is no access to it other than via Section 4131 Hundred of Strangways. Section 4131 Hundred of Strangways which surrounds the land is fenced off. The Land is therefore relatively isolated.*

*11.2 In terms of the development of the social, cultural and economic structures of the native title claim group the relative difficulty of access and isolated nature (in terms of surrounding tenure) of the Land are such that:*

*11.2.1 there is no real prospect for the development of any economic structure for the benefit of native title holders; and*

*11.2.2 The Land would appear to offer no real basis for social or cultural maintenance or development.*

*11.3 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:*

*11.3.1 There is no present access available to the Land other than via Section 4131 Hundred of Strangways, which is freehold. Further, Section 4131 Hundred of Strangways is fenced along all of its boundaries which restricts access. There are no registered or recorded sacred sites on the Land. The proposed acquisition would therefore appear to do little or nothing to alter the present situation whereby there is effectively no access to the Land.*

*11.4 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 25 November 1999 did not disclose any sacred sites, a true copy of the advice is annexed to this my Affidavit and marked with the letters 'NAB3'".*

50. In paragraph 12 of Blackley's affidavit, she recites that the Minister does not consider there is any method practicable to minimise the impact of the acquisition on any native title holders.
51. In further support of the application Beverly Joan Griffiths, a Senior Project Officer with the Departments of Lands, Planning & Environment, swore an affidavit on 14 December 2000 ("Griffiths' December affidavit").

52. Pursuant to the allegations contained in paragraph 2 of Griffiths' December affidavit, it is alleged that on 21 June 1999 the Applicant approved the commencement of the process to acquire the land. Annexed to Griffiths' December affidavit and marked BJJ1 is a site plan in relation to the land.
53. It is alleged in paragraph 3 of Griffiths' December affidavit that as at 19 April 1999 and following upon a search request by Griffith, the Registrar of Native Title Claims advised that no application or determination of native title over the land had been lodged. Further that that position was duly confirmed by that body on 23 June 1999.
54. In paragraph 4 of Griffiths' December affidavit, there is reference to searches carried out of the Register maintained by the Registrar-General under the *Real Property Act*, the result of which was a revelation that the land was vacant Crown land with no current title issued.
55. In paragraph 5 of Griffiths' December affidavit, reference is made to a formal Notice of Proposed Acquisition of Land, a true copy of which is annexed to Griffiths' December affidavit and marked BJJ10.
56. In paragraphs 6 to 11 inclusive of Griffiths' December affidavit, there are set out allegations relating to the formal advertising of the proposed acquisition of the land and details concerning service of Notices of Proposal, served on amongst other bodies the NLC and the NNTT.
57. On 26 September 1999, the Notice of Objection referred to in paragraph 3 of this decision was, according to allegations set out in paragraph 12 of Griffiths' December affidavit, duly filed with the Department of Lands, Planning and Environment.
58. In paragraph 13 of Griffiths' December affidavit, it is alleged that one John Gronow signed a further Notice of Proposal under delegation and pursuant to allegations set out in paragraph 14 and 15 of Griffiths' December affidavit, details of formal service of same are recorded.

59. In paragraph 17 of Griffiths' December affidavit, it is alleged that an invitation to consult was delivered to the objector and in paragraphs 19 to 22 of Griffiths' December affidavit there are details set out of communications concerning consultation in relation to the proposed acquisition of the land.
60. In paragraph 18 of Griffiths' December affidavit, it is alleged that following on a request from Griffith, the Aboriginal Areas Protection Authority advised that there were no registered or recorded sites on the land and annexed and marked BJG24 is a true copy of the letter under cover of which the advice was communicated.
61. In paragraphs 23 and 24 of Griffiths' December affidavit the formal referral of the proposal to this Tribunal is recorded.
62. The Applicant asserts in the Form 2 filed in the proceeding that there has been compliance with the above provisions. The objector takes issue with this assertion in the Form 3 filed in response to the Form 2 above.
63. On 11 May 2001 Beverly Joan Griffiths swore a further affidavit in the proceeding ("Griffiths' May affidavit"). Relevantly, this affidavit places before the Tribunal a copy of an agreement entered into between the Northern Territory of Australia and Clint Walker and Excess Pty Ltd (ACN 009 608 217) "*contemplating a grant of land in compensation of the acquisition of part of Section 4132 Hundred of Strangways for the purposes of the Darwin to Alice Springs railway corridor*".
64. The objectors filed an affidavit by Penelope Alice Creswell affirmed 16 February 2001 ("Creswell's February 2001 affidavit"). The affidavit serves only to put before the Tribunal a Deed and Supplementary Deed whereby the Larrakia people and others executed an agreement with the Territory to facilitate the Alice Springs to Darwin Railway. That affidavit was filed with submissions dated 16 February 2001.

65. Keith Risk affirmed an affidavit on 16 August 2002 (“Risk’s affidavit”) in support of the objector. He introduces his and his family history and in paragraph 12 of Risk’s affidavit he identifies the land as being located in Larrakia country stating “*I always knew that was Larrakia country*”.
66. He refers to riding motor bikes: camping on Bees Creek Road: crabbing around the bottom of Elizabeth River asserting that there are “*nice big crabs in there*” and “*this time of year you find brim in the shallows there*”.
67. In paragraph 16 of Risk’s affidavit he identifies the alleged parameters of Larrakia country. In paragraph 17 he cites his objection to asking permission to go onto his own country. Quite what the status is of any claim under either the Aboriginal Land Rights Act 1976 or the Native Title Act in respect of the land he refers to, the Tribunal is unable to say. It is difficult to try and discern the relevance of many of the succeeding allegations and for that reason the Tribunal does not descend into further detailed analysis of what is set out in the ensuing paragraphs of Risk’s affidavit that have not been referred to.
68. He refers to various sacred or important sites: he refers to a mosquito dreaming place and to a kangaroo dreaming place: he refers to teaching his children about the land and how to use it and get food and recites the fact of his own learning is from his mother and other Larrakia people: he refers to “*Granpa Billy an important ceremony man*” on the Cox Peninsula side. The Tribunal is unable to fix many of the points referred to as being located on the land. Specifically for instance he refers in paragraph 33 to Dinah Beach. He also refers to Shoal Bay in paragraph 34. The remainder of the affidavit refers essentially to his wishes to have exclusive domain to vast areas of land or to utilizing specific locations to fish or perform like activity on. The probative value of these myriad allegations is to say the least obscure to the Tribunal.

69. Pursuant to leave from the Tribunal the Applicant filed further affidavit material, the first affidavit being that of Herbert Thomas Hassall sworn 07 November 2002 (“Hassall’s affidavit”). Hassall introduces himself and sets out his work history prior to arriving in the Northern Territory in or about it seems May of 1972. He refers to managing a property referred to as “*Neville Walker’s property at Noonamah*” and annexes marked ‘A’ a locality plan which in part depicts the land.
70. Paragraph 4 of Hassall’s affidavit alleges that the land historically formed part of a larger property, the whole property having been used for running cattle. Because of the bad condition of the fences he recites that new fences were established on all boundaries in 1972 as was also the case with the interior paddocks. The fences included locked gates he states .
71. Hassall’s affidavit descends to his having seen Risk’s affidavit. He records his agreement with the allegations contained in paragraph 13 of Risk’s affidavit concerning the existence of fences.
72. In paragraph 7 of Hassall’s affidavit he asserts that he does not recall anyone taking motor bikes onto or across the property or people coming onto the property other than workers authorised to work under his control. He further asserts that generally trail bikes didn’t really commence usage until the late 1970’s. He points out that the allegations in paragraph 14 and 15 of Risk’s affidavit refer to activities that have no bearing on the land itself.
73. In paragraph 9 of Hassall’s affidavit, he refers to the time during his 10 years as Manager when sand was taken from areas specified in that paragraph.
74. In paragraph 10 of Hassall’s affidavit he deposes to the fact that the only time he can ever recall people coming onto the property without authority occurred after Cyclone Tracy, when people were avoiding road blocks and

consequently travelling across the property he Managed without permission. The inference to be drawn from the remainder of that paragraph is that nobody between 1972 and 1975 other than the people trying to avoid the road blocks referred to, came onto the property to his knowledge, nor did he ever see evidence that they had done so, which, he asserts he would have done had such an event occurred.

75. Phillipa Jane Hetherington affirmed an affidavit in support of the objector on 21 November 2002 (“Hetherington’s affidavit”). Hetherington’s affidavit refers to a Native Title Act Application pending in the Federal Court in Proceeding D6008/1999.
76. She also refers to the fact that on 4 November 1999 Native Title Application bearing the same name was registered by the Registrar of Native Title Claims.

## **SUBMISSIONS**

77. On 19 February 2001 the Respondent filed Submissions dated 16 February 2001 (“the Respondent’s Submissions”) under cover of Cresswell’s February 2001 affidavit. On 14 May 2001 the Applicant filed submissions which bear the date 8 May 2001 (“the Applicant’s Submissions”). These submissions were never the subject of any resolution of the purpose in respect of which they were filed and the use to which they would be put. The Tribunal will however have regard to the entirety of these submissions.
78. The Respondent’s Submissions are 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 (Clint Walker) in relation to the Alice Springs to Darwin railway (“the Walker agreement”), whereby land is provided to Excess Pty Ltd (in lieu of monetary compensation), a company linked with Clint Walker and his father Neville Walker, for the separate acquisition by agreement of part of section 4132 (being land owned by Clint Walker 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 Walker 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 Walker 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 Walker 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 Clint Walker may be compensated.
- (ii) There is no evidence that Clint Walker (or Excess Pty Ltd) 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 Larrakia 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 Larrakia People and that there will be minimal impact on the life, culture and traditions of the Larrakia 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),<sup>1</sup> 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 Excess 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 Excess Pty Ltd (or its nominee), or as to the basis whereby the land is now required by Excess Pty Ltd. 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, effective and comparatively inexpensive method of creating the Railway corridor and compensating the registered Title holder to Section 4132 [ie Clint Walker]”. The land is to be provided “[i]n lieu of monetary compensation”, and both Clint Walker and Excess Pty Ltd have “indicated agreement” to the proposal.

2.8 It is clear that the land is to be acquired and granted pursuant to an agreement between the Minister and Mr Walker, 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).

2.9 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 Excess Pty Ltd in lieu of monetary compensation regarding a separate acquisition (by agreement) of land owned by Clint Walker. 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 WALKER 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 Walker agreement has been made pursuant to s 31A, or under the general law of contract or another law of the Territory.<sup>2</sup> 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 Larrakia 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 Walker agreement requires that land be compulsorily acquired as compensation for Clint Walker (by grant to an associated company), 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 Walker 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 Walker agreement requires that land be compulsorily acquired as compensation to Clint Walker (by grant to an associated company), 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 Walker 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 Walker agreement concerns not only the acquisition of land owned by Clint Walker, 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 Walker 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 Walker 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 1992<sup>3</sup> 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 Clint Walker 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 Larrakia 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 Larrakia People be granted a perpetual lease for the purpose of the establishment of a cultural centre. 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 Walker, it appears that the Territory will not provide compensation to the Larrakia 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 Larrakia People and that there will be minimal impact on the life, culture and traditions of the Larrakia 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*<sup>4</sup> and the Full Federal Court's decision in *Ward*,<sup>5</sup> 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 the 16th 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.

79. The Applicant's Submissions are 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 Sections 3491 to 3497 Hundred of Strangways in the Noonamah locality ("the Land")<sup>1</sup>.

2. The Land is wholly within the boundary of the Municipality of Litchfield constituted under the *Local Government Act* by notice given on 6 September 1985 and published in the Northern Territory Government Gazette No S54 on 6 September 1985.
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 17 April 1999, resulted in advice from the National Native Title Tribunal ("the NNTT") on 19 April 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 23 June 1999 as confirmed by the NNTT<sup>2</sup>.
4. A search of the Register maintained by the Registrar-General under the *Real Property Act* in relation to the Land was conducted on 7 May 1999, disclosing that the Land was vacant Crown land with no registered interests<sup>3</sup>.
5. A Notice of Proposed Acquisition of Land was published in the Northern Territory News on 25 June 1999<sup>4</sup> and Notices of Proposal were served by registered post on the Registrar of the NNTT<sup>5</sup> and the Chief Executive Officer of the Northern Land Council ("the NLC") on 23 June 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 Acquisition<sup>6</sup> ("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 20 July 1999, following a written request from the NLC dated 16 July 1999, further copies of the Notice of Proposal, the Statement of Rights and a Notice of Objection were provided to the NLC<sup>7</sup>.
8. On 26 September 1999 a Notice of Objection by Maxwell William Risk on behalf of the Larrakia people (herein the Respondents) ("the Objection") was lodged<sup>8</sup>. At that date an application for a determination of native title in relation to the Land (DC99/7 Noonamah - Risk) ("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*<sup>9</sup> and is prepared to treat the objection made on 26 September 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 1 October 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 that day<sup>10</sup>.

11. On 4 November 1999 the Determination Application was accepted for registration by the Registrar of the NNTT<sup>11</sup>.
12. By letter dated 18 November 1999, the Respondents were invited to consult with the Applicant<sup>12</sup>.
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<sup>13</sup>.
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 5 November 1999<sup>14</sup>. 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 4 November 1999<sup>15</sup>.

#### 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<sup>16</sup>.
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<sup>17</sup>.
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<sup>18</sup>.
19. The application of the *LAA* to the proposed acquisition is not disputed by the Respondents<sup>19</sup>.

#### 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 5 November 1999. On 18 November 1999, in compliance with

section 36 of the *LAA*, the Respondents were invited to consult with the Applicant in accordance with section 37<sup>20</sup>.

21. By letter dated 17 February 2000 the NLC advised that the native title holders wished to consult in relation to the proposed acquisition<sup>21</sup>. After advice on 22 February 2000 that the NLC was "not in a position to commence consultation for 2 to 3 weeks", a letter dated 25 February 2000 attaching a proposed Agenda and draft Protocol for consultation and suggesting a possible venue was sent to the NLC.
22. There is no evidence that the Respondents participated in any consultation with the Applicant.

#### Compliance with section 37 of the *LAA*

23. 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 Clint Walker and Excess Pty Ltd (ACN 009608217) ("Excess") contemplating the grant of the Land to Excess in compensation for the acquisition of part of Section 4132 Hundred of Strngways for the purposes of the railway ("the Walker agreement")<sup>22</sup>, the Applicant has fettered his statutory discretion to resolve objections by agreement in respect of the Land<sup>23</sup>. 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).
24. 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)<sup>24</sup>; 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 done<sup>25</sup>.
25. 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.
26. 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 objection<sup>26</sup>.
27. 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.

28. In any event, close attention to the Walker agreement reveals that the Respondents' submissions are misconceived. For example, the Walker agreement is said to "[require] that land be compulsorily acquired as compensation for Mr Walker", subsequent acquisition of native title being a "necessary consequence"<sup>27</sup>. This is clearly incorrect.
29. As Recitals D and E and clauses 3(a) and 4 make plain, the subsequent acquisition of native title is not a necessary consequence of the Walker agreement<sup>28</sup>; nor does the agreement purport to facilitate the acquisition of native title. Put simply, in relation to native title, the Walker agreement says: if the Territory can resolve all native title issues in relation to Sections 3491 to 3497 to its satisfaction, then the Territory will grant that land to Excess as freehold title land, otherwise the Territory, Mr Walker and Excess will consider alternative compensation, including monetary compensation.
30. 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 Walker agreement, as far as it relates to the grant to Walker/Excess of Sections 3491 to 3497, 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*

31. The consultation period provided for in section 37(3)(b) of the *LAA* expired on 20 March 2000<sup>29</sup>.
32. 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.
33. 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 Respondents<sup>30</sup>.
34. 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 Walker/Excess 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 53 below.

## CRITERIA TO BE CONSIDERED

35. 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 are<sup>31</sup>:
- (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.
36. The Applicant proposes to deal with the Land by consolidating it with Section 4131 Hundred of Strangways and granting it in fee simple, under the provisions of the *Crown Lands Act*, to Excess Pty Ltd or its nominee. As a matter of form, the "purpose" for which the Land may later be used is not required to be stated in the Notice Proposed Acquisition or the Notice of Proposal<sup>32</sup>.
37. 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 title<sup>33</sup>

38. 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 granted<sup>34</sup>. The inquiry of the Tribunal must be on that basis.

39. As to paragraphs 3(a) to (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 11.1.1 of the affidavit of Noreen Alma Blackley sworn 23 November 2000 ("the Blackley affidavit").
40. As at 29 November 2000 there were no registered or recorded sacred in respect of the Land<sup>35</sup>. There is no evidence before the Tribunal as to the possible existence of any unregistered sacred sites<sup>36</sup>.
41. 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(a) to (c) of the Objection, insofar as those matters depend upon the Respondents having access to the Land<sup>37</sup>.
42. 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 owners<sup>38</sup>.
43. As to paragraph 3(d) of the Objection, there is no evidence as to the physical nature of the Land other than that it is surrounded by freehold land<sup>39</sup>. Certainly the grant of the Land in freehold will not alter the physical character of the Land; nor would the (possible) use of the Land for running Livestock<sup>40</sup>.
44. Nor is there any evidence as to the spiritual 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.
45. Similarly, there is no evidence as to the "way of life, culture and tradition" or "social, cultural and economic structures" of the Respondents material which would enable the Tribunal to form a view as to the effect of the proposed acquisition on those matters.
46. As to paragraph 4, there is likewise no evidence of any of the matters set out therein, other than the lack of entry onto, and apparent non-use of the Land deposed to in paragraph 11.1.1 of the Blackley affidavit.
47. 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 acquisition<sup>41</sup>

48. Paragraphs 4 and 5 of the affidavit of the Blackley affidavit depose to a proposed exchange of land as a "simple, effective and comparatively inexpensive method of

creating the Railway corridor and compensating Mr Walker. 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 Territory<sup>42</sup>.

49. As consolidation with Section 4131 Hundred of Strangways is proposed, it is suggested that the likely use of the Land will be consistent with the use of that Section for the running of livestock<sup>43</sup>. If such use did occur, then there would be economic benefits through the livestock industry, to the Territory, including the Noonamah region.

#### Public interest<sup>44</sup>

50. In light of the uncertain evidence about the proposed use of the Land , the Applicant accepts that any public interest in the acquisition is largely 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.
51. 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; 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.
52. Nor, in the above circumstances, should the Tribunal make a recommendation imposing conditions on the proposed acquisition.

#### **OTHER MATTERS**

53. 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).
54. As to ground 1.1(d), that there are alternative methods of compensating Mr Walker, and that there is may be no 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.

55. 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.
56. 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.
57. 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.
58. 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.
59. 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.
60. 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: 8 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 14 December 2000 ("the Griffiths affidavit").
2. Griffiths affidavit, para 3, annexure BJJ2.
3. Griffiths affidavit, para 4, annexures BJJ3 to BJJ9.
4. Griffiths affidavit, para 6, annexure BJJ11.
5. Griffiths affidavit, para 8, annexure BJJ14.
6. Griffiths affidavit, para 8, annexure BJJ14.
7. Griffiths affidavit, paras 9 to 11, annexures BJJ15 to BJJ17.
8. Griffiths affidavit, para 12, annexure BJJ18.
9. No Notice of Proposal having previously been served on the Larrakia people.
10. Griffiths affidavit, paras 14 and 15, annexures BJJ25 and BJJ26.

11. Griffiths affidavit, para 16, annexure BJG22. Application DC99/10 by Mr Quall on behalf of the Danggalab clan over the same and was accepted on the same day.
12. Griffiths affidavit, para 17, annexure BJG23.
13. Section 5(1)(a), *Lands and Mining Tribunal Act* ("the *LMT Act*").
14. Section 34(1)(a) and (1B), *LAA*.
15. Griffiths affidavit para 16.
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 Municipality of Litchfield.
18. Section 24MD(6B)(a), *NTA*.
19. See Respondents' Form 3.
20. Griffiths affidavit para 18, annexure BJG18.
21. Griffiths affidavit para 19 annexure BJG25.
22. Although not strictly relevant to this hearing, the Applicants have provided the Walker agreement to the Tribunal for the purpose of answering the Respondents' Submissions as far as they relate to jurisdiction.
23. See Respondents' Submissions paras 1.1(c)(ii), 3.2 and 3.4.
24. Section 37(1), *LAA*.
25. Section 37(2), *LAA*.
26. Section 5(3), *LMT Act*.
27. Respondents' submissions, para 3.3; see also paras 2.8, 3.4 and 3.5.
28. Cf Respondents' Submissions, para 3.5.
29. The area of land being in excess of 5 hectares.
30. Section 5(1)(a), *LMT Act*.
31. Section 38AA(2), *LAA*.
32. See sections 33(1)(b) and 33(3)(b), *LAA*.
33. Section 38AA(2), *LAA*.
34. See *Fejo v Northern Territory* (1998) 195 CLR 96.
35. Griffiths affidavit para 18, annexure BJG24; also Blackley affidavit para 11 annexure NAB3..
36. 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).
37. Sections 46 and 47, *Sacred Sites Act*.
38. See generally Parts III and IV of the *Sacred Sites Act*. See also Blackley affidavit annexure NAB2.
39. Blackley affidavit paras 11.1.1, 11.3.
40. Blackley affidavit para 8.
41. Section 38AA(1)(c), *LAA*.
42. Blackley affidavit para 6.
43. Blackley affidavit para 8.
44. Section 38AA(1)(d), *LAA*.

80. Ultimately and after the intended hearing scheduled for 16 December 2002 had been vacated and procedural Orders made obviating oral ventilation of issues the Objectors filed Respondents' Submissions on Jurisdiction dated 2 December 2002 ("Respondent's Submissions on Jurisdiction") as set out below:-

### **RESPONDENTS' SUBMISSIONS ON JURISDICTION**

1. For the reasons that follow, these submissions are to be read in conjunction with the submissions filed by the Respondents in *Minister for Lands, Planning and Environment v Huddleston* (No. 20015537 LMT12-2000-LA(N)) concerning the proposed acquisition of land in the Town of Pine Creek. The amended grounds of opposition to the proposed acquisition in this matter are in similar terms to the amended grounds of opposition in the Pine Creek matter.
2. In this matter the manner in which the Territory proposes to deal with the land (Sections 3491-3497 Hundred of Strangways) if it is acquired is stated to be:<sup>1</sup>

Consolidation with section 4131 Hundred of Strangways and grant of an estate in fee simple, under the provisions of the Crown Lands Act, to Excess Pty Ltd or its nominee.

Thus, the proposal is in the same terms as the proposal in the Pine Creek matter.

3. Like in the Pine Creek matter, in this matter 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, Clint Jason Walker and Excess Pty Ltd.<sup>2</sup> The deed recites that the Territory, Mr Clint Walker and Excess Pty Ltd reached agreement for the acquisition by the Territory of land required for the railway corridor through Section 4132 (of which Mr Clint Walker is the registered proprietor)<sup>3</sup> and land required for the widening of Stuart Highway through Lot 3 (of which Excess Pty Ltd is the registered proprietor), and that the agreed compensation in respect of the acquisition is the grant of Sections 3491-3497 subject to resolution of any native title issues and consolidation of Sections 3491-3497 with Section 4131, of which Excess Pty Ltd is the registered proprietor.
4. By the deed, Mr Clint Walker is to transfer to the Territory part of Section 4132 and Excess Pty Ltd is to transfer to the Territory part of Lot 3 (clauses 1-2), and the Territory has agreed to “seek to consider and resolve any native title issues that may arise in respect of the proposed grant of” Sections 3491-3497. In the event that the Territory is able to grant that land to Excess Pty Ltd the grant satisfies any claims that may arise in respect of the acquisition by the Territory of part of Section 4132 and part of Lot 3 (clauses 3(a) and 4(a)). In the event that the Territory is unable to resolve any native title issues in respect of Sections 3491-3497 within 18 months of the date of the deed to the Territory’s satisfaction, the Territory shall meet with Mr Clint Walker and Excess Pty Ltd to consider the exchange of alternative land as compensation, and if that cannot be done, to agree upon monetary compensation (clause 4(d)).
5. The relevant sequence of events in respect to the deed are:<sup>4</sup>
  - On 30 April 1997 the Minister signed off on a Departmental briefing memorandum that recommended the signing of notices of proposal for the acquisition of various parcels of land for the railway corridor, including Lot 4 Hundred of Strangways from Plan LTO 83/070B (130 Cox Peninsula Road) owned by Henry and Walker Ltd.<sup>5</sup>
  - At some time the Department gave the Minister a briefing on the native title risk assessment in respect to Sections 3491–3497 that referred to negotiations by the Territory to purchase part of Lot 4 for the railway corridor that was owned by Henry and Walker Ltd and part of Lot 3 for the widening of Stuart Highway that was owned by Excess Pty Ltd. The briefing paper describes Sections 3491–3497 as “disused mineral leases” and refers to a proposal from Mr Neville Walker, a director of both Henry and Walker Ltd and Excess Pty Ltd, that the land subject to the former mineral leases be granted to him or to someone to be advised by him in lieu of all compensation for the land to be acquired by the Territory. The briefing paper concluded that the future sale

of Sections 3491-3497 was considered to be medium to high risk in terms of native title continuing to exist.<sup>6</sup>

- A Departmental minute dated 10 September 1997 refers to tenure searches for Sections 3491 – 3497 being conducted and concluded that those lands “have remained unalienated Crown land since expiry of their mining tenements”, which occurred on 31 December 1985.<sup>7</sup>
- On 23 September 1997 the Department made a recommendation to the Minister that he either approve in principle the grant of Sections 3491-3497 to Henry and Walker Ltd subject to the agreement of Excess Pty Ltd or agree to defer consideration until such time as the Commonwealth proposals to amend the *Native Title Act* in respect of the Wik decision are known.<sup>8</sup>
- On 27 November 1997 the Department recommended to the Minister that he approve in principle the grant of Sections 3491–3497 to Henry and Walker Ltd subject to resolution of any native title issues and other conditions as set out in an attached letter to be sent to Mr Walker.<sup>9</sup>
- On 8 December 1997 the Minister wrote to Mr Neville Walker advising that the Territory agreed in principle to the exchange of parts of Lots 3 and 4 for Sections 3491–3497 subject to the conditions set out in the letter.<sup>10</sup>
- On 18 December 1998 the Department wrote to Excess Pty Ltd referring to the agreement between the Territory and Mr Neville Walker. The letter noted that Lot 4 had been subsequently sub-divided and that the relevant owners were now Mr Clint Walker (Section 4132) and Excess Pty Ltd (Lot 3 and Section 4131). The letter asked whether the Territory’s original agreement with Mr Neville Walker could proceed. It enclosed a draft deed and noted that 18 months had now been allowed for the resolution of native title issues “rather than the agreed 12 months as it is felt 12 months may be optimistic due to the process that has to be undertaken.”<sup>11</sup>
- On 18 December 1998 the Department sent a letter to Mr Clint Walker in the same terms as the letter to Excess Pty Ltd.<sup>12</sup>
- On 29 January 1999 the Department received advice that Mr Clint Walker agreed to the conditions contained in the draft deeds and that final deeds would be prepared.<sup>13</sup>
- On 8 April 1999 the Department wrote to Mr Clint Walker, Mr Neville Walker and Excess Pty Ltd enclosing a deed in triplicate for execution by Mr Clint Walker and Excess Pty Ltd.<sup>14</sup>
- On 11 June 1999 the Department recommended to the Minister that he sign various amended notices of proposed acquisition. The briefing paper stated the issue for the Minister to consider to be:

To acquire native title rights and interests (if any) in Sections 3491 to 3497 Hundred of Strangways for a land exchange in lieu of compensation for the acquisition of land required for the Alice Springs to Darwin rail corridor and land required for the widening of the Stuart Highway at Noonamah.

The briefing paper referred to the agreement reached on 8 December 1997 between the Minister and Henry and Walker Ltd and the subsequent signing of the deed by Excess Pty Ltd and Mr Clint Walker.<sup>15</sup>

- On 21 June 1999 the Minister signed a notice of proposed acquisition and notice of proposal for the acquisition of Sections 3491 – 3497.<sup>16</sup>
- On 8 December 2000 the Department recommended to the Minister that he refer the Respondent's objection to the proposed acquisition of Sections 3491–3497 to the Tribunal for hearing.<sup>17</sup>

6. In these circumstances, there are no relevant differences to the jurisdictional issues raised in the Pine Creek matter and the jurisdictional issues that arise in this matter. Therefore, the Respondent in this matter adopts and relies on the written submissions filed by the Respondents in the Pine Creek matter dated 2 December 2002.

2 December 2002

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1. Annexures BJB10 - BJB12 to the affidavit of Beverley Joan Griffiths sworn 14 December 2000.
2. An undated and unexecuted copy comprises annexure BJB1 to the affidavit of Beverley Joan Griffiths sworn 11 May 2001. It appears to have been executed some time between April and June 1999: see par 5 below.
3. Recital C refers to Section 4131, but in the light of recital A and clause 1 this seems to be a typographical error.
4. The references that follow are based on the bundle of documents discovered by the Applicant that the Respondent seeks to have tendered in this proceeding, and include references to the bundle in the Pine Creek matter, such references being identified with the prefix "PC".
5. PC bundle, pp 25 – 26.
6. Bundle, pp 1 – 3.
7. Bundle, pp 4 – 5.
8. Bundle, pp 6 – 7.
9. Bundle, pp 8 - 11.
10. Bundle, pp 10 - 11.
11. Bundle, pp 12-13.
12. Bundle, pp 14-15.
13. Bundle, p 21.
14. Bundle, p 22.
15. Bundle, pp 25-27.
16. Annexures BJB10 – BJB12 to the affidavit of Beverley Joan Griffiths sworn 14 December 2000.
17. Bundle, pp 31 – 32.

81. On 17 December 2002 the Applicant filed Applicant's Further Submissions dated 17 December 2002 ("the Applicant's Further Submissions") as set out below:

#### **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<sup>1</sup>.
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 decision on that matter<sup>2</sup> as to the validity of the proposed acquisitions (paragraphs 312 to 408).
4. In addition, these submissions are to be read in conjunction with paragraphs 4 to 29 of the Applicant's Further Submissions filed in *Minister for Lands, Planning and Environment v Huddleston*. Those submissions are adopted and relied upon in this matter.

#### The Deed

5. The Respondents contend that the Minister cannot, by entering into the Deed with Mr Walker and Excess Pty Ltd, 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 27 to 29 and repeats paragraphs 19 to 29 of its submissions filed in *Minister for Lands, Planning and Environment v Huddleston* with appropriate modifications.

#### **THE OBJECTIONS**

6. 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**

7. The Respondents are the registered native title claimants in a native title claim over sections 3491, 3492, 3493, 3494, 3495, 3496 and 3497 Hundred of Strangways ("the land")<sup>3</sup>.
8. The native title rights and interests claimed are<sup>4</sup>:
  - (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 area<sup>5</sup>;

(j) to determine and regulate membership of, and recruitment to, a landholding group<sup>6</sup>.

Evidence of claimed incidents of native title which could be affected

9. 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 those set out in subparagraphs 8(i) & (j) above.
10. The Respondents have relied upon the affidavit of Keith Risk affirmed 16 August 2002<sup>7</sup> in support of their objection to the compulsory acquisition.
11. There is no evidence as to the present exercise of the claimed native title rights on (or near) the land. The only evidence relevant to previous use of the land is in respect of motor-bike<sup>8</sup>, camping at the Elizabeth River on Bees Creek Road "as young fellas"<sup>9</sup> and crabbing around the bottom of Elizabeth River<sup>10</sup>.
12. The land has been fenced off at least since 1972<sup>11</sup>: see Mr Risk's evidence that it "has been fenced off as long as [he] can remember"<sup>12</sup>.
13. The evidence of Mr Hassall is that for at least 30 years there has been no actual use of, or entry onto, the land other than by persons authorised to do work on the property, except by a few people after Cyclone Tracey and perhaps isolated instances of people being on the property without authority<sup>13</sup>.

**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

14. 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 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

15. 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.
16. 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

17. 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

18. 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

19. 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

20. As there is likely to be no impact of the acquisitions on native title rights and interests, this criteria has little or no relevance in the present inquiry.

21. In any event, minimising impact of the acquisition does not mean that the decision should not proceed. As the principal effect of the acquisition 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

22. It is likely that the use of the land will be consistent with the use of Section 4131 Hundred of Strangways for running livestock<sup>14</sup>. Such use would be of some (if not significant) economic benefit to the livestock industry in the Northern Territory, including the Noonamah region.

23. In addition the proposed exchange of the land is a “simple, effective and comparatively inexpensive method of creating the Railway corridor and compensating” Mr Walker”<sup>15</sup>. 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

24. The Applicant does not assert any significant public interest in the proposed use of the land, other than that which attaches to an ongoing livestock industry in the Northern Territory, of which the present property plays some small part.
25. 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.
26. 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: 17 December 2002

Raelene Webb  
Counsel for the Applicant

1. The reference to "Mr Ah Toy" in paragraphs 30 and 34(c) of the 4 May 2001 submissions should read "Mr Walker and Excess"
2. *Minister for Lands, Planning and Environment v Griffiths* (LMT, 2 March 2002).
3. Affidavit of Phillipa Jane Hetherington affirmed 21 November 2002 ("Hetherington 21/11/02"), paras 2 & 3.
4. Hetherington 21/11/02, annexure PJH-1, schedule E. It is not apparent whether these are the claimed rights and interests as registered.
5. 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].
6. Similarly, this is not a right in relation to land or waters, and is not capable of recognition as native title; see footnote 4.
7. "Risk 16/8/02".
8. Risk 16/8/02, para 13.
9. Risk 16/8/02, para 14.
10. Risk 16/8/02, para 15.
11. Affidavit of Herbert Thomas Hassall sworn 7 November 2002 ("Hassall 7/11/02")
12. Risk 16/8/02, para 13.
13. Hassall 7/11/02, paras 7 & 10.
14. See Blackley affidavit para 6; para 48 of 4 May 2001 Submissions. See also Hassall 7/11/02, para 4.
15. Blackley affidavit, para 5; see para 48 of the Applicant's Submissions dated 4 May 2001.

**TRIBUNAL COMMENT**

82. The Tribunal's following comment is by way of introduction and is not a finding.
83. Whilst the Tribunal has no function in determining whether or not native title exists, because that is a function of the Federal Court of Australia alone, it is entitled to and does operate in this matter on a premise which it adopts as the most favourable to the objectors. The Tribunal will assume in favour of the objectors that the objectors have established that native title to the land exists. That is simply to enable the Tribunal to make a recommendation by analogy, which it would be able to, in respect of an

intended acquisition of an ordinary fee simple estate of the land. It is the highest and best position which the objectors can attain.

## **FINDINGS**

84. The findings pertaining to this matter are in respect of those issues which are analogous with the identified issues in LMT-12 and exactly the same with the exception of certain factual matters to which the Tribunal will return. *Mutatis mutandis* the Tribunal's decision in relation to this matter, in relation to issues of stay and jurisdiction are identical with its findings in LMT-12 and ought be regarded as being set out herein.
85. Some of the factual differences between this proceeding (LMT-13) and LMT-12 are of such little significance that there is little point in isolating them and dealing with them discretely. An example is the perceived possible use in relation to this matter of the land if dealt with as required by the Applicant. That, it is perceived, will be used to run livestock although that aspect of the matter is of course not clear.
86. The Deed in this matter necessarily is of course discretely different, only in the sense in fact that it involves different contracting parties. Effectively it is otherwise the same as the Deed referred to in LMT-12.
87. In relation to matters concerning section 38AA LAA, the evidence as to alleged usage of the land by or on behalf of the Respondents is to be ascertained by reference to the allegations in Risk's affidavit. The controverting of those allegations or comments otherwise in relation to those allegations on behalf of the Applicant is to be discerned from Hassall's affidavit. That last mentioned statement of course is to be amplified by the necessary observance of the allegations contained in Griffiths' December affidavit and Griffiths' May affidavit also filed on behalf of the Applicant.
88. Apart from necessary difference in paragraph numbers, the treatment of registered native title rights and interests is the same as in LMT-12.

89. In relation to section 38AA LAA criteria, there is so little difference dictated in the treatment that it is superfluous in this Tribunal's finding to sequentially traverse the same ground.
90. For the sake of brevity, the Tribunal simply adopts the treatment of those criteria set out in the Applicant's further submissions in paragraphs 14 to 26:-

*The effect of the proposed compulsory acquisition on the enjoyment by the claim group of the claimed native title rights and interests*

*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 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*

*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.*

*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*

*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*

*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*

*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*

*As there is likely to be no impact of the acquisitions on native title rights and interests, this criteria has little or no relevance in the present inquiry.*

*In any event, minimising impact of the acquisition does not mean that the decision should not proceed. As the principal effect of the acquisition 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*

*It is likely that the use of the land will be consistent with the use of Section 4131 Hundred of Strangways for running livestock. Such use would be of some (if not significant) economic benefit to the livestock industry in the Northern Territory, including the Noonamah region.*

*In addition the proposed exchange of the land is a "simple, effective and comparatively inexpensive method of creating the Railway corridor and compensating" Mr Walker". 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*

*The Applicant does not assert any significant public interest in the proposed use of the land, other than that which attaches to an ongoing livestock industry in the Northern Territory, of which the present property plays some small part.*

*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.*

*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.*

**RECOMMENDATION**

91. The Tribunal recommends that the Minister compulsorily acquire the land unconditionally.

Dated: 18 February 2003

**DAVID LOADMAN**  
CHAIRMAN