

CITATION: *Minister for Lands, Planning and Environment v Brown and others NTLMT 27*

PARTIES: MINISTER FOR LANDS, PLANNING AND ENVIRONMENT
v
JESSIE BROWN, IVY BRUMBY, RHODA BRUMBY, MARIE DOWLING, GARY MANBALLOO, AMY MARRAPUNYAH AND JULIE WILLIAMS

TITLE OF COURT: Lands and Mining Tribunal

JURISDICTION: Lands and Mining Tribunal Act

FILE NO(s): LMT-27-2001-LA(N) (20102899)

DELIVERED ON: 24 May 2002

DELIVERED AT: Darwin

HEARING DATE(s): Not applicable

JUDGMENT OF: David Loadman

CATCHWORDS:

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

Native Title Act 1993 (Cth), s26, s253

Lands Acquisition Act 1978 (NT), s38AA

Lands and Mining Tribunal Act 1998 (NT), s5

REPRESENTATION:

Counsel:

Applicant: Carolyn Walter/Raelene Webb

Objectors: John Hughes

Solicitors:

Applicant: Ward Keller

Objectors: Northern Land Council

Judgment category classification: B

Judgment ID number: NTLMT 27

Number of paragraphs: 130

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

No. LMT-27-2001-LA(N) (20102899)

BETWEEN:

**MINISTER FOR LANDS, PLANNING
AND ENVIRONMENT**

Applicant

AND

**JESSIE BROWN, IVY BRUMBY,
RHODA BRUMBY, MARIE DOWLING,
GARY MANBALLOO, AMY
MARRAPUNYAH AND JULIE
WILLIAMS**

Objectors

DECISION

(Delivered 24 May 2002)

DAVID LOADMAN, CHAIRMAN

HISTORY

1. By the filing of Form 2 and attachments on 26 February 2001 at the Tribunal, the Minister has referred the issue of the compulsory acquisition of:-

All interests, including native title rights and interests (if any), in all those parcels of land in the Town of Katherine in the Northern Territory of Australian containing an area of 26.53 hectares more or less being that part of Lot 2998 and 3016 and bounded by lines as described more fully below.

Commencing at the southeastern corner of Lot 2514, thence northeasterly by the southeastern boundary of the said Lot to its northeastern corner; thence southeasterly by part of the southwestern boundary of Crawford Street to intersect the southwesterly prolongation of the southeastern boundary of Lot 3154; thence northeasterly and northwesterly by the said prolongation, the said southeastern boundary and the most north-northeastern boundary of the said Lot to the southeastern corner of Lot 2966; thence northeasterly by the southeastern boundaries of Lots 2966, 2965, 2964 and its northeasterly prolongation to intersect the northeastern boundary of Chardon Street; thence

northwesterly by part of the said boundary to the southeastern corner of Lot 1349; thence northeasterly by the southeastern boundary of the said Lot and its northeasterly prolongation to intersect the southwestern boundary of the Stuart Highway; thence southeasterly by part of the said boundary to intersect the northerly prolongation of the western boundary of Uralla Road; thence southerly by the said prolongation and part of the western boundary of Uralla Road to intersect the southeasterly prolongation of the northeastern boundary of Lot 2518; thence northwesterly by the said prolongation and the said boundary of the northwestern corner of Lot 2518; thence southerly by part of the western boundary of the said Lot to intersect the southeasterly prolongation of the southwestern boundary of Lot 2514; thence northwesterly by the said prolongation to the point of commencement.

(“the land”) to the Lands and Mining Tribunal (“the 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.

2. According to the Notice of Proposal dated 27 October 1999 the manner in which the Territory proposes to deal with the land if it is acquired is as follows:-

- (a) To service and subdivide the land to enable industrial and commercial development, including to the construction and maintenance of roads and other essential services. To provide other public purpose land in accordance with any Development Permit issued in the *Planning Act*;
- (b) Grant Crown Leases (term) under the provisions of the *Crown Lands Act*, for the purpose of industrial development and ancillary commercial purposes. Upon completion of the development, the Crown Leases (Term) may be surrendered in exchange for freehold titles;
- (c) Completion of government infrastructure, provision of electricity, water, sewerage, drainage and other detailed land services;
- (d) Grant easements and other appropriate titles or interests for purposes such as sewerage, water supply, drainage, electricity supply, electronic communications, energy supply and general services required by the Power and Water Authority, Katherine Town Council and telecommunications companies etc.

3. The Objectors by Notice of Objection dated 29 October 1999 objected to the proposed acquisition of the land. Attachment A of that document reads:-

1. All of the land proposed to be acquired is subject to an application (‘the Application’) for determination of native title filed in the Federal Court on 25 May- 1999 (no. D6002/9), and is pending registration by the National Native Title Tribunal.
2. The native title holders are, traditionally, the owners of the land and waters subject to the Application (‘the application area’). The native title rights

and interests of the native title holders are set out in the Application. The rights and interests may be summarised as follows:

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

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

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

- (i) the freedom of access by any of the native title holders to the land concerned or adjacent land and their freedom to carry out activities of cultural significance on or adjacent to the land in accordance with their traditions;
- (ii) sacred sites on or adjacent to the land and Dreamings which pass through or are adjacent to the land; and
- (iii) prevent native title holders from:

- (A) protecting and maintaining sites on or adjacent to the land;
- (B) caring for the land in accordance with their spiritual obligations;
- (C) protecting the land from harm by observing and engaging in their customs, laws, practices and usages in relation to the land;
- (D) visiting and camping special or exclusive places; and
- (E) maintaining and passing on their spiritual knowledge of the land and retaining their knowledge- of the connection of individuals or groups to particular parts of the land.

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

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

- (i) the way of life, culture and traditions of the native title holders;
- (ii) the development of the social, cultural and economic structures of the native title holders.

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

- (i) manage, use or control the land;
- (ii) use or develop the land or its resources for their own social, cultural or economic purposes; and
- (iii) control the access of, or use by, others of the land.

4. On 20 March 2001 the objectors filed a Form 3 Response at the Tribunal.

In that document, the Objectors state:-

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

3. The Objector does not dispute the Applicant's position that sub-division P of Division 3, Part 2 of the NTA does not apply.

4. The grounds for the Objector's objection to the proposed compulsory acquisition are set out in the objection dated 29 October, 2000 and lodged with the Minister in relation to this matter.

5. On 20 December 2001, pursuant to leave granted, the objectors filed at the Tribunal Amended Grounds for Opposing Application. That document is set out below:

AMENDED GROUNDS FOR OPPOSING APPLICATION
LMT 27: File No: 20102899

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

1. The Objector disputes the Applicant's position that s.24MB(1) and s.24MD(1) of the *Native Title Act 1993* ("the NTA") are the provisions of the NTA that form the basis of the Application.

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

3. The Objector disputes the Applicant's position that sub-division P of Division 3, Part 2 of the NTA does not apply.

4. The proposed compulsory acquisition could not or would not have been done if the subject land was subject to freehold title and the proposed compulsory acquisition is therefore invalid by virtue of ss.9-10 of the *Racial Discrimination Act 1975* (Cth).

5. The purpose 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 Acquisition Act (NT)*.

6. The proposed compulsory acquisition is unnecessary because no valid use of the land is proposed or is unnecessary for any proposed use of the land for which the acquisition is intended.

7. The grounds for the Objector's objection to the proposed compulsory acquisition are otherwise set out in the objection dated 29 October, 2000 and lodged with the Minister in relation to this matter.

Date of filing: Original filed 20 March 2001

Date amended: 19 December 2001 (leave granted on 12 December 2001)

6. At a directions hearing on 28 March 2001 the parties were directed to file their material on or before 18 June 2001. This date has been extended from time to time by consent between the Applicant and the Objectors.
7. On 28 March 2002 at a directions hearing convened by the Tribunal, the matter was set down for hearing for 5 days, commencing on 13 May 2002.
8. On 9 May 2002, Minutes of Consent were filed by the parties and the following order was made:
 1. The hearings dates 13 to 17 May 2002, inclusive, be vacated.
 2. The parties have leave to file and serve any further affidavit material by Wednesday 15 May 2002.
 3. The parties have leave to file and serve written submissions by Friday 17 May 2002.
 4. The parties confirm:
 - . they do not wish to cross-examine any deponent;
 - . they do not wish to make oral submissions;
 - . there has been no agreement in relation to any issue to be determined by the Tribunal.
 5. The parties request that the Tribunal then proceed to make its decision in relation to these matters on the written material filed to date and pursuant to this order.

PRELIMINARY COMMENTS OF THE TRIBUNAL

9. Section 22(1) of the *Lands and Mining Tribunal Act* (“LMT”) provides relevantly that the Tribunal may make a recommendation under section 5(1)(a) -
- (a) **upholding an objection to the act so far as it affects registered native title rights and interests; or**
 - (b) **that contains conditions about the doing of the act that relate to registered native title rights and interests and that are to be complied with by any parties to the proceeding.**
10. 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.
11. 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.”**

12. The applicant proposes to compulsorily acquire all of the land.
13. Pursuant to section 38AA(3) LAA, the Tribunal “must inquire” of the parties whether there are any issues relevant to its recommendation in relation to which the parties have reached agreement and, if any agreement has been reached and the parties consent to the Tribunal doing so, the Tribunal “must (if relevant) take the agreement into account”. Such an inquiry was made of the parties in writing. The response from the parties is recorded in paragraph 8 of this decision.

EVIDENCE AND/OR SUBMISSIONS

14. Attachment “A” to the applicant’s form 2 is a copy of a proclamation of His Honour Eric Eugene Johnston, the Administrator of the time, dated 26 February 1988 and as published in the Northern Territory of Australia Government Gazette No S11 dated 4 March 1988. The proclamation related to the alteration and extension of the boundaries of the municipality of Katherine, pursuant to section 7(1)(a) of the *Local Government Act* of the Northern Territory (“LGA”).
15. Section 267 of Part 14 LGA it is alleged sets out inter alia that proclamations such as that referred to above shall continue in force as if made under the relevant corresponding provisions of LGA. It is further asserted that as a consequence the proclamation referred to continues in force as though it was made pursuant to section 29 LGA.
16. The applicant further attaches a map marked “B” said to be prepared by the Department of Lands, Planning and Environment identifying both the area

described in the Notice and the location of the land. The applicant then asserts that as the land is located within the area described in section 251C(3)(c) NTA Subdivision P NTA does not apply.

17. The applicant submits in the Form 2 filed in the proceeding that there has been compliance with the provisions of sections 36, 37 and 38 LAA. The Objectors take issue with this assertion in the Form 3 filed in response to the Form 2 above.
18. Section 36 LAA specifies the date by when the applicant was required to invite the objectors to consult with him in accordance with section 37 LAA.
19. On 26 March 2001 Beverley Joan Griffiths swore an affidavit on behalf of the applicant in support of the application (“Griffiths’ March affidavit”). She sets out her position is Senior Project Officer with the Department of Lands, Planning and Environment.
20. In paragraphs 1 to 11 inclusive of Griffiths’ March affidavit, she deals with the various formal steps taken by or on behalf of the Minister in relation to the intended compulsory acquisition of the land including service on relevant parties of the relevant Notices of Proposal.
21. In paragraph 12 of Griffiths’ March affidavit, she refers to the fact that on 29 October 1999 NLC, on behalf of specified parties, advised of a lodgment with the Federal Court of an application for determination in respect of the land. In addition, it is deposed NLC enclosed a Notice of Objection to the proposed acquisition.
22. In paragraphs 13 and 14 of Griffiths’ March affidavit, she deposes to communications relating to the status of the determination set out in the last paragraph.
23. Having initially overlooked the statutory obligation to invite the relevant objectors to consult, in paragraph 15 of Griffiths’ March affidavit she

deposes to the dispatch of a letter dated 24 March 2000, belatedly, but actually inviting consultation over a period of 4 months commencing 14 days after the receipt of the said letter of 24 March 2000. Copies of the relevant communications are annexed to the affidavit.

24. In paragraphs 16, 19, 20 and 21 of Griffiths' March affidavit, there are allegations set out in regard to the consultation process. The culmination of the allegations is a request on the part of NLC to cancellation of a scheduled meeting on 23 May 2000 with a rider that NLC would contact the relevant party to arrange a fresh date for further consultation. Further that the consultation period duly expired on 12 August 2000 without any further consultation taking place and no agreement being reached between the parties.
25. In paragraphs 17 and 18 of Griffiths' March affidavit, there are allegations related to inquiries concerning the existence or otherwise of any "registered or recorded sacred sites" within the area of the land and BJJ19 to Griffiths' March affidavit is alleged to be a true copy of the advice from the Aboriginal Areas Protection Authority stating that there were none.
26. Paragraphs 23, 24 and 25 of Griffiths' March affidavit are formal allegations which do not bear any repeating in this decision.
27. An affidavit sworn by Tania Alayne Moloney on 1 May 2001 was filed on behalf of the applicant in the proceeding ("Moloney's affidavit").
28. In paragraph 1 of Moloney's affidavit, she set outs her position of Regional Lands Officer, Katherine, with the Department of Lands Planning and Environment. She details her areas of responsibility and says her duties include inspection of firebreaks and drainage problems on Crown land in the Katherine region.
29. Paragraph 2 of Moloney's affidavit sets out the duration of her then and previous position.

30. In paragraph 3 of Moloney's affidavit, she says that on 24 April 2001 she duly inspected the land and in paragraph 4 of the said affidavit refers to photographs TAM2 and TAM3 which she took at the time of that inspection and which she annexed to her affidavit.

31. In paragraph 5 of Moloney's affidavit, she states that as a result of her inspection she made observations, namely:

5.1 There is a large open drain on the south east corner of the application area which is constantly channelling water during the wet season from Lots on the adjoining Lots on the other side of Uralla Road. Two water pipes are visible traversing the drain presumably providing water between Uralla Road and the industrial area. Power lines have also been constructed to the west of Lot 2998.

5.2 The application area is surrounded on three sides by development being Uralla Road and the rural residential subdivision on the far side of Uralla Road, the Stuart Highway and the Katherine East Industrial Subdivision of which all Lots on the boundary of Lot 2998 are occupied and have a road network in place.

5.3 An old railway line previously ran through part Lot 3016 and the mounds are still in existence and covered with ballast and appear in Annexure TAM 2.

5.4 There are numerous tracks through the application area regularly used by the Northern Territory Fire Service to access bush fires every season and to act as fire breaks. Tracks are also frequented by quad bikes and motor bikes for recreational purposes.

5.5 There was no visible rubbish due to the long grass. Annexure TAM 3 shows the typical vegetation on the application area. Vegetation type is not very dense with fires going through the area regularly each season usually controlled burning by the Fire Service to prevent wildfire spreading to the industrial area.

5.6 I am informed by Ms Miriam Lang, Regional Natural Resources Assessment Officer with the Department at Katherine and verily believe that the tree species on the application area are ironwood and various eucalyptus, the grasses consist of mission grass, black spear grass and sorghum and weeds such as rubber bush and the soil is a soft loamy red earth with sporadic limestone outcropping.

5.7 No creeks run through the application area and no trees known to be of cultural or heritage significance were identified.

5.8 The land is flat to the untrained eye and several open unlined drains have been constructed to help drain the water away from the industrial area.

5.9 A truck loading ramp constructed of brick and concrete was located in the middle of the application area on part Lot 2998. This may be a remnant from the construction of the Stuart Highway as it lies close to Lot 2518 which was the subject of a Crown Lease for the purposes of a construction camp.

32. At paragraph 5.10 of Moloney’s affidavit, she says that 2 vacant parcels of land the details of which are not set out are available for purchase through LJ Hooker, Katherine (an estate agent).
33. In paragraph 6 of Moloney’s affidavit, she asserts that in the 5 years of her employment with the Department of Lands, Planning and Environment specific instances have caused her to carry out inspections of the land. She asserts that she has never observed any persons “occupying the application area”. She asserts further that on 24 April 2001 already referred to she observed no signs of any persons having camped on the land.
34. The remaining allegations in Moloney’s affidavit are of a formal nature and are not repeated or referred to by the Tribunal.
35. On 4 May 2001, Beverley Joan Griffiths swore a further affidavit on behalf of the applicant (“Griffiths’ May affidavit”).
36. Leaving aside formal matters, she asserts in paragraph 4 of that affidavit:
 4. The economic and other significance of the acquisition to the Territory and to the region and the public interest in the acquisition comprises the following:
 - 4.1 The proposed development is an extension of the Katherine East Industrial Area. There is significant demand for the release of the subject land which is likely to result in a substantial expansion of industrial and ancillary commercial activity in the area.
 - 4.2 It is proposed to service and subdivide the land to enable industrial and commercial development including the construction and maintenance of roads and in particular the extension of Chardon Street to Uralla Road and other essential services for the purposes of industrial development and ancillary commercial purposes.
 - 4.3 The development of the land will include the provision of other public purpose land in accordance with any development permit issued under the Planning Act.
 - 4.4 It is proposed to grant Crown Leases under the provision of the Crown Lands Act for the purposes of industrial development and ancillary commercial purposes. Upon completion of the development the Crown Leases may be surrendered in exchange for freehold titles.
 - 4.5 It is proposed to complete Government infrastructure, and provide electricity, water, sewerage, drainage and other detailed land services.

4.6 It is proposed to grant easements and other appropriate titles or interests for purposes set out in clause 4.5 as well as for electronic communications, energy supply and general services required by the Power and Water Authority, Katherine Town Council and telecommunications companies.

37. In paragraph 5 of Griffiths' May affidavit, she asserts that the allocated expenditure for the land is \$825 000.00 and that "the development will result in the employment of various building and trades persons and is significant in the context of the Katherine local economy".
38. In paragraph 6 of Griffiths' May affidavit, she sets out the zoning under the relevant "Katherine Town Plan" which would permit the proposed usage.
39. It is then asserted on behalf of the Minister that no native title rights exist and this Tribunal, as it has and will continue to do, ignores the Minister's assertions in that respect.
40. Paragraph 8 of Griffiths' May affidavit is really a statement of the law and invites no comment from the Tribunal.
41. In paragraph 9 of Griffiths' May affidavit, referring to an aerial photograph marked BJG1, she states the following:-

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

9.1.1 the subject land is a parcel of land within the boundaries of the town of Katherine. A tenure history search indicates that Lot 2998 was inside the Katherine Telegraph Station reserve from 1888 to 1948. It has been vacant Crown Land since then. Public access is possible but not encouraged;

9.2 having regard to the matters set out above it is the Minister's position that:

9.2.1 the subject land contains no natural features such as creeks, hunting grounds or the like which might be subject of traditional rights and users;

9.2.2 the subject land is not known to be regularly used by any native title claim group or holder for the purposes of carrying out any traditional rights, ceremonies or users; and

9.2.3 in terms of the development of the social, cultural and economic structures of the native title claim group the fact that the subject land is bound on one side by freehold lots, on two other sides by the Stuart Highway and

Uralla Road respectively and has no known physical features or known or registered sacred sites, suggests that in relation to the subject land:

(i) there is no real prospect for the development of any economic structure for the benefit of native title holders; and

(ii) the subject land would not appear to offer any real basis for social or culture maintenance or development;

9.3 a truck loading ramp linked to the construction of the Stuart Highway has been constructed on the subject land by public highway authorities and a dis-used railway line constructed by the Australian Railways Commissioner passes over the subject land.

42. In Griffiths' May affidavit, she makes the following further allegations:-

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

10.1 The proposed use for the subject land is such that freedom of access and the continuation of native title rights would be incompatible with the development of the subject land as an industrial and commercial precinct.

43. She reiterates a matter already dealt with in Griffiths' March affidavit as to the absence of sacred sites to conclude the allegations.

44. On 13 May 2002 Beverley Joan Griffiths swore a third affidavit on behalf of the applicant ("Griffiths' third affidavit"). In Griffiths' third affidavit, she deposes to the fact that in her May affidavit there was an error in relation to the current zoning of the land. In paragraph 3, she sets out that at the time the Notice of Proposed Acquisition was published on 25 October 1999, the then and current zoning of the land is I2(General Industry) in respect of Lot 2998 and S1 (Strip nearest the Stuart Highway) and SP.P1 Katherine East Railway Siding for Lot 3016. In the circumstances, she states that the proposed development is either a permitted or consent use, depending upon the zoning.

45. In Griffiths' third affidavit, she also deposes to the incorporation into a new policy framework of issues known as the "Katherine Planning Concepts and Land Use Objectives" in which respect she refers to the affidavit filed on

behalf of the applicant and sworn by Christopher Humphries to which there will be subsequent reference.

46. In paragraph 5 of Griffiths' third affidavit, she refers to the creation of documents being a coloured map "showing the land" (annexed to the affidavit and marked BJG1) and another map "showing the boundary" (annexed to the affidavit and marked BJG2), which reflect certain topographical features.
47. Christopher Humphries swore an affidavit on 14 May 2002 on behalf of the applicant ("Humphries' affidavit"). In paragraph 1 of Humphries' affidavit, he introduces himself as Manager, Development Assessment Services, Rural, with the Department of Infrastructure, Planning and Environment and sets out his duties.
48. In paragraph 2 of Humphries' affidavit, he refers to familiarization with the Notice of Acquisition in respect of the land.
49. In paragraph 3 of Humphries' affidavit, he asserts that the proposed development is in accordance with the current zoning of the subject land and sets out that zoning.
50. In paragraph 4 of Humphries' affidavit, he refers to the fact that the land was inundated by a flood known as the "Katherine Floods" in 1998 and in support of that allegation refers to a map (annexed to his affidavit and marked CH1) which, he says, demonstrates the flood levels seen in the 1998 Katherine Floods.
51. In paragraph 5 of Humphries' affidavit, he deposes to the review of planning policy for the town of Katherine and the publication of the Concepts and Objectives referred to in Griffiths' third affidavit.
52. In paragraph 6 of Humphries' affidavit, after recounting some further matters relating to the utilization of the land, he states -

It is considered feasible that the subject land may be developed for commercial and industrial use where the flood impact is minimal. In addition, having regard to the map of the Katherine Flood Inundation Area (Annexure "CH 1"), the depth of flooding on the subject land is shallow enough for the engineering of access roads infrastructure and buildings sites above 1% EAP to be economically viable along the periphery of the constrained area. It is considered that notwithstanding the designated flood area as non-urban in the policy document, if flooding issues are addressed, the land may be developed as a mixture of urban and non urban purposes.

53. On behalf of the objectors in this matter Ivy Brumby affirmed an affidavit on 12 June 2001 ("Brumby's affidavit").
54. In paragraphs 1 to 4 of Brumby's affidavit, she introduces her life and other personal details, some of which are not relevant to the matter before the Tribunal but no doubt comprise background material.
55. In paragraph 5 of Brumby's affidavit, she says that having looked at a map she is aware of the location of the land and concludes by saying "*it is near Walpiri camp, up on the Highway*".
56. In paragraph 6 of Brumby's affidavit, she claims "*It is part of my country*" and she describes in general terms what happened historically prior to the town (presumably Katherine) existing. Further what occurred what occurred prior to "*Walpiri people live there*". The Tribunal is not clear as a consequence whether it is being asserted that the Walpiri occupation of that land occurred prior to the establishment of the town, but nothing turns on that paragraph.
57. In paragraph 7 of Brumby's affidavit, she asserts "*We used to camp here [on the river] and everywhere. Later I camped at 14A and my first daughter was born there*". Unfortunately the precise location of these occurrences is not capable of being gleaned from the assertions. It is also far from clear as to whether in any event the location of the places referred to are on the land.
58. In paragraph 8 of Brumby's affidavit, she states "*My grandparents and my father used to hunt round here everywhere, hunt along from here, up and down the river*". She then identifies the species of animals successfully

hunted and wild produce, which ultimately she generically identifies as “*bush tucker*”. Again the Tribunal is simply unable to say, whether what is being asserted, is the fact that those alleged activities occurred on the land the subject of this application.

59. A further affidavit has been filed on behalf of the objectors affirmed by Julie Williams on 9 June 2001 (“Williams’ affidavit”).
60. In paragraph 1 of Williams’ affidavit, she identifies what she understands about her family background.
61. In paragraph 2 of Williams’ affidavit, she identifies the land in terms: “*That country is my country, from my grandfather right back!*”.
62. In paragraph 3 of Williams’ affidavit, she says “*It is my grandfather, my mother and my uncle’s country*”. She then seems to confuse “*my country*” with the previous described country, although perhaps nothing turns on that but ultimately states that there was walking “*...this way and that*”. She asserts there was hunting, camping and fishing on the one hand, ceremony dancing and “*sometimes big spear fight*”.
63. In paragraph 4 of Williams’ affidavit, she says “*... we used to go hunting, walk around here. That was before the town was here. Long time ago.*”.
64. In paragraph 5 of Williams’ affidavit, she alleges that during the war (presumably World War II) her grandfather used to live at 14A and “*All along that river, still hunting and fishing*”.
65. The Tribunal observes that these last allegations do not enable the Tribunal to reach any conclusion as to the precise involvement of the land if at all in the matters referred to.
66. In paragraph 6 of Williams’ affidavit, she says that the old people used to work for white people, and somewhere at “*Bruce Camp*” they used to get free tucker etc. She concludes that paragraph by saying “*Amy grandmother*

used to work there". The Tribunal presumes that she had a grandmother whose name was Amy who did in fact have employment at Bruce Camp. If that is wrong, it does not seem to the Tribunal to matter significantly.

67. In paragraph 7 of Williams' affidavit, she talks about matters related to land which does not seem to be land forming part of the land which is the subject of this application. That land seems to be related her husband's people.
68. In paragraph 8 of Williams' affidavit, she states "*We can go too all our country when we feel like it, walking or maybe fishing. Sometimes, we don't go places because this place is going to be a big town*". The Tribunal doesn't know what to make of that series of allegations.
69. Paragraph 9 of Williams' affidavit really does no more than re-assert matters set out in paragraphs 2 and 3.
70. In paragraph 10 of Williams' affidavit, she says "*I don't know any sacred sites on that place but one day we should go out there and see that place again properly*". The Tribunal can make nothing at all of this allegation.
71. In paragraph 11 of Williams' affidavit, in general terms she asserts that "*we*" are entitled to some economic benefit and concludes "*that was for the claim, to get some benefit for our country*". This may amount to an assertion that compensation should be awarded to the objectors in the event that they are ultimately successful in establishing a determination of native title in respect of the land in the Federal Court. If this Tribunal proceeds to make recommendations as to acquisition by the applicant in this matter, that undoubtedly will be the result in due course.
72. Albeit bearing an incorrect file reference number for the Tribunal, the objectors have filed an affidavit affirmed by Jessie Brown on 23 July 2001 ("Brown's affidavit").

73. In this Tribunal finding, much of the content of Brown's affidavit, whilst interesting, is not relevant to the Tribunal's function and in some instances represents "evidence" which arguably is not admissible even given the lack of constraint which would otherwise have been imposed by the rules of evidence. Further the content seems more appropriate for the purposes of adducing evidence before a curial body charged with deciding whether or not to find the existence of native title. This Tribunal must concern itself with matters that relate discretely to any piece of land which is the subject of an application for compulsory acquisition.
74. Perhaps the only allegation which this Tribunal can act upon is contained in paragraph 16 of Brown's affidavit in which she says that the land is Aboriginal land and "*we got every right to use it*". The allegations in Brown's affidavit do not however establish any existing use and this Tribunal therefore finds little of any merit to be embraced and utilised by it in relation to the decision which it is charged to make.
75. Frances Jessie Claffey affirmed an affidavit on 25 July 2001 which has been filed on behalf of the objectors ("Claffey's affidavit").
76. In paragraph 1 of Claffey's affidavit, she identifies her position as "Native Title Anthropologist – Katherine, Anthropology and Land Tenure Branch, Northern Land Council".
77. As has been the case with several other affidavits filed in applications made to this Tribunal, in paragraph 5 of Claffey's affidavit, there is an assertion of an ability to identify the "*Aboriginal native title holders*". That is a function of the Federal Court.
78. Again relevantly the Tribunal can only usefully notionally embrace allegations contained in paragraph 6 of Claffey's affidavit. That amounts to the following "*...I am aware that this area has been and at times continues to be used for hunting and gathering activities*".

79. There is however no empirical evidence as to any occasion which has been observed or any regular practice. Most importantly, there is nothing to indicate that the utilisation for hunting and gathering activities has recently occurred. As has now been often stated in decisions of this Tribunal, historical usage, particularly usage which occurred a substantial time ago, is not in this Tribunal's perception an appropriate criterion which could justify the Tribunal in not recommending acquisition. In the circumstances the probative value of the allegations in Claffey's affidavit is minimal in this Tribunal's finding.
80. On 26 February 2002 an affidavit was filed on behalf of the objectors of Jessie Brown, affirmed on 26 February 2002 ("Brown's second affidavit"). This affidavit concerns itself with the land, the subject of this application, and another piece of land, not relevant to this application. The Tribunal confines itself to allegations which relate to the land, the subject of this application, as contained in paragraphs 2 to 7 of Brown's second affidavit, set out below:
2. The land we Dagoman are claiming includes the land coloured orange in the map annexed to this affidavit and marked "Annexure 1016". This is a large block of empty land.
 3. The Government wants to divide this land up for sale and we Dagoman oppose this..
 4. I have been thinking about setting up a nursery to grow bush tucker, and then making a business of this for our people. I have talked about this with some other groups of Aboriginal people, especially some people in Milingimbi, who are also planning to do this. I was a Park Ranger myself for many years, and so I know useful people for this. We have talked about how we would do it, I plan to try this out as a pilot project at Binjari.
 5. There are Dagoman people who know how to do this kind of thing; finding the land is the hard part.
 6. We would need land for a store to sell the bush tucker I would like to see 1348, nearby, used for a store for selling Aboriginal products.
 7. We need a building to use to organise work programmes with CDEP funding. Sometimes many young men have no work and get into trouble. There are lots of kids who have gone to college and come back educated, but when they come back there is no work for them, so they get bored and get into lawlessness. They need jobs. All the young men are just waiting around for the Railway work

to begin, but that is not enough, Some of the young men have been to mechanical training school, and many know how to fix cars. We can use this land for a mechanic's workshop, and get them working, We need this land for a training centre, for mechanical trades, and for training in office work, like shorthand & typing and using the computer, accounting, and other work-type skills.

81. In paragraph 4 of Brown's second affidavit she asserts a 'thought' about setting up a nursery to grow bush tucker. The Tribunal has got no idea where "Binjari" is.
82. The Tribunal finds it difficult to accept that land for the purposes of "*a nursery to grow bush tucker*" is difficult to find.
83. The Tribunal notes the allegations made in paragraph 6 and 7 of Brown's second affidavit. The allegations are undoubtedly commendable. The Tribunal has a balancing function. If it could be established, for instance, that that land was indeed appropriate for the use and that the prospective use was in any way achievable that would be a different position from the position which now pertains.

SUBMISSIONS

84. Notwithstanding the consent order dated 15 May 2002, giving leave to file any further affidavit material by 15 May 2002 and written submissions by 17 May 2002, no further material was received on behalf of the objectors by those dates.
85. On 17 May 2002, pursuant to the consent order dated 15 May 2002, the solicitor for the applicant filed submissions in relation to LMT-27, LMT-28, LMT-30, LMT-44, LMT-46 and LMT-47 ("applicant's submissions"). The first part of the applicant's submissions contains a history of the proceedings, which has already been substantially set out either in this decision or in the affidavit material filed on behalf of the applicant. The second part of the applicant's submissions is set out hereunder.

86. As is apparent the applicant's submissions deal with the instant matter and also other related matters. Rather than try and separate out the issues which discretely relate to this proceeding, the Tribunal will simply recite the allegations in full. They are:-

JURISDICTION OF THE TRIBUNAL

90. By section 5A(1)(a), the LAA applies to a proposed acquisition if 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 NTA apply.

91. Section 24MD falls within Subdivision M of Division 3 of Part 2 of the NTA. Division 3 deals mainly with "future acts" which are defined in section 233 of the NTA. Relevantly, for present purposes, section 24MD concerns future acts which pass the "freehold test.

92. The consequences of subsections 24MD(6A) and (6B) apply if the acquisition is not an act to which Subdivision P applies, including, as here, where 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"

93. Additionally, the consequences of subsection 24MD(6B) of the NTA apply if, as here, the compulsory acquisition is for the purpose of conferring rights and interests in relation to the land on a person other than the Territory'

94. Thus, in order for the LAA to apply to each of the proposed compulsory acquisitions, each acquisition must:

- (a) be a future act as defined in section 233 of the NTA;
- (b) pass the "freehold test"; and
- (c) be an act to which Subdivision P does not apply.

95. 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.

96. In respect of Part Lot 2998 and Lot 3016 and Lots 3011 (A) and 3160, the Respondents challenge the jurisdiction of the Tribunal to hear the Objections on the basis that each act of proposed compulsory acquisition is not an act to which Subdivision M of Division 3 of Part 2 of the NTA applies, on the grounds that each of the proposed compulsory acquisitions'

- (a) does not pass the freehold test so as to attract the consequences of section 24MD(6B) of the NTA and the application of Part IV of the LAA; and/or
- (b) is discriminatory for the purposes of sections 9-10 of the *Racial Discrimination Act 1975* (Cth) ("the RDA"); and/or is a proposed invalid exercise of the power of compulsory acquisition.

97. The same challenge was made to jurisdiction in *Minister for Lands, Planning and Environment v Griffiths* (LMT, 22 March 2002) and certain questions, raising issues concerning the application and effect of the NTA and

the *RDA* in the protection of native title, were there posed for the consideration of the Tribunal. In relation to those grounds of objection, the Territory adopts its submissions made in *Minister for Lands, Planning and Environment v Griffiths* as to the jurisdiction of the Tribunal and the reasons of the Tribunal delivered 2 March 2002 in dismissing that challenge.

98. For the purposes of the Tribunal's jurisdiction, it remains only to consider whether or not there has been compliance with sections 36, 37 and 38 of the *LAA*. In the absence of challenge from the Respondents or any obvious issue of fact or law which questions it, the Tribunal is entitled to assume that there has been compliance with those sections, presumptions of regularity apply.

THE OBJECTIONS

Registered native title rights and interests

Katherine Determination Application No 1 (DC99/2: D6002/1999)

99. The Respondents are the registered native title claimants in Federal Court proceedings D6002 of 1999 in relation to land and waters which includes Part Lot 2998 & Lots 3016, 3011 A 3160, 3173 & 3018 in the Town of Katherine.

100. The native title rights and interests claimed in Katherine Determination Application No 1 as accepted for registration are

- (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 use, enjoy and manage the resources of the application area;
- (e) to control the use and enjoyment of others of the resources of the application area;
- (f) to share, exchange and/or trade resources derived on and from the application area;
- (g) to maintain and protect places of importance under traditional laws, customs and practices in the application area;
- (h) to maintain, protect, prevent the misuse of and transmit to others their cultural knowledge, customs and practices associated with the application area
- (i) The right to determine and regulate membership of, and recruitment to, a landholding group

Katherine Determination Application No 2 (DC00/1 Lot 1348 Katherine D6001 /2000)

101. The Respondents are also the registered native title claimants in Federal Court proceedings D6001 of 2000 in relation to Lot 1348 the Town of Katherine.

102. The native title rights and interests claimed are the same as for Katherine Determination Application No 1.

Katherine Determination Application No 3 (DC00/9 Lot 3160 Katherine

103. Katherine Determination Application No 3 has not been accepted for registration and appears to have been lodged in error. However it does not yet

appear to have been withdrawn. However, that it may remain on foot is of no effect in this inquiry.

Evidence of claimed incidents of native title which could be affected

104. 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.

105. The Respondents have filed the following affidavits in support of their objections to the compulsory acquisitions:

Katherine No 1 Objection - Part Lot 2998 and Lot 3016

- (a) Affidavits of Jessie Brown affirmed 23 July 2001 and 26 February 2002
- (b) Affidavit of Ivy Brumby affirmed 12 June 2001
- (c) Affidavit of Julie Williams affirmed 9 June 2001
- (d) Affidavit of Frances Jessie Claffey affirmed 25 July 2001 [anthropologist]

Katherine No 2 Objection - Lot 3011 (A)

- (e) Affidavits of Jessie Brown affirmed 23 July 2001 and 26 February 2002
- (f) Affidavit of Myrtle Williams affirmed 12 June 2001
- (g) Affidavit of Ivy Brumby affirmed 12 June 2001
- (h) Affidavit of Julie Williams affirmed 12 June 2001
- (i) Affidavit of Frances Jessie Claffey affirmed 25 July 2001 [anthropologist]
- (j) Affidavit of Eunice Woods affirmed 26 February 2002
- (k) Affidavit of Neville Brown affirmed 26 February 2002

Katherine No 3 Objection - Lot 3160

- (l) Affidavits of Jessie Brown affirmed 23 July 2001 and 26 February 2002
- (m) Affidavit of Julie Williams affirmed 12 June 2001
- (n) Affidavit of Frances Jessie Claffey affirmed 3 July 2001 [anthropologist]

Katherine No 4 Objection - Lot 1348

- (o) Affidavit of Jessie Brown affirmed 26 February 2002

Katherine No 5 Objection - Lot 3137

- (p) Affidavit of Jessie Brown affirmed 26 February 2002
- (q) Affidavit of Eunice Woods affirmed 26 February 2002
- (r) Affidavit of Neville Brown affirmed 26 February 2002

Katherine No 6 Objection - Lot 3018

- (s) Affidavit of Jessie Brown affirmed 26 February 2002

106. No witness gave evidence of the use of any of the Lots for any of the claimed incidents of native title. The only evidence as to the present exercise of native title rights and interests related to hunting and gathering activities in the Katherine area generally.

107. There are no registered or recorded sacred sites located on any of the Lots under consideration.

Section 38AA criteria

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

108. The effect of the compulsory acquisitions 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 areas and there are no known sites, 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 acquisitions on the way of life, culture and traditions of the claim group

109. 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. i

110. 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 acquisitions on the development of the social, cultural and economic structures of the claim group

111. Jessie Brown's evidence is that:

- (a) She has been thinking about setting up a nursery to grow bush tucker as a pilot project at Binjari [but not on any of the Lots];
- (b) Part Lot 2998 and Lot 3016 could be used as a training centre
- (c) She would like to see Lot 1348 used as a store to sell Aboriginal products and as an Aboriginal Art Centre
- (d) Perhaps Lot 1348 could be used partly for passing on languages in the Katherine Area,
- (e) Lot 3011 (A) could be used as a Dagoman Living area and for a Dagoman office as well as for a swimming pool and a recreation centre;
- (f) The Dagoman might lease Lot 3137 to the Christian Family Centre and then "do something ourselves with the land in the future
- (g) She has been thinking about having a hotel or hostel on Lot 3160, or it would be a good place for a sport and recreation centre for Aboriginal kids
- (h) The Dagoman people want to keep Lot 3018 to be used in the future for a business for selling to Aboriginal people living in Katherine
- (i) Whilst the development of a cultural centre in Timber Creek is an aspiration to be encouraged, there is plenty of other land in and around Timber Creek upon which to develop such an enterprise.

112. The evidence does not suggest that there are any competing proposals for development of the Lots. No firm proposals in respect of any of the Lots are in evidence. None of the "proposed uses" appear to have developed beyond aspirations for future development of Aboriginal interests in Katherine.

The effect of the proposed compulsory acquisitions 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

113. 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 acquisitions on any area or site on the land concerned of particular significance to the claim group in accordance with their traditions

114. 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 acquisitions on registered native title rights and interests, including in relation to access to the land

115. As the impact of the acquisitions on registered native title rights and interests is likely to be minimal, this criteria has little relevance in the present inquiry.

116. In any event, minimising impact of the acquisition does not mean that the decision should not proceed. As the principal effect of the acquisitions is to extinguish native title over the subject land (if indeed it still continues to exist), the inquiry is directed to any practical effect of that extinguishment on registered native title rights. For example, if the claimants had been residing on the land, but the impact of the acquisition was to require relocation, then ways of minimising that effect are to be investigated; ie alternate residential locations, allocation of some land in a land development for residential/cultural purposes etc.

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

117. The economic or other significance of the acquisitions can be summarised as follows:

Part Lot 2998 and Lot 3016 - future release for industrial development

(a) The proposed development is an extension of the Katherine East industrial area as a result of significant demand for land and will likely result in a substantial expansion of industrial and commercial activity in the area. Expenditure allocated for the extension of the Katherine East subdivision is \$825,000.00; the increased employment which will result is significant in the context of the Katherine local economy.

Lot 3011 (A) - future release of land for residential purposes

(b) The proposed development is an extension of the Katherine East Residential Area in response to a significant demand for residential land which is not subject to flooding. Release of the land will permit expansion of the Katherine population and is likely to result in increased opportunities for the building trades and ancillary activity in the Katherine area during the development.

Lot 3160 - proposed extension of the Katherine Showgrounds

(c) Expenditure on the development will be in the vicinity of \$100,000 - \$150,000 and will have a noticeable impact on the economy in Katherine. The present facilities of the Katherine Showground will be significantly improved.

Lot 1348 - proposed sale by auction for commercial/industrial development

(d) The establishment of new business premises in the industrial area of Katherine is significant in the context of the Katherine economy and will provide both short and long term potential employment opportunities.

Lot 3173 - direct grant to Centre for church hall.

(e) The Centre proposes to spend \$130,000 to develop a family worship centre. The development will require the employment of contractors and others and will have an impact on the economy of Katherine. The proposed development will also improve the range of family support services offered, including to the Respondents and other Aboriginal people in the area

Lot 3018 - direct grant to Lake Marong Pty Ltd for food and beverage distribution facility (existing business)

(f) The business distributes food and beverages to local Katherine businesses, providing employment opportunities and a range of products for eventual sale to local consumers. Expansion of the existing business on the land will provide better consumer choice and service and will also create employment during further construction.

The public interest in the acquisitions

118. The public interest in the acquisitions is summarised as follows:

Part Lot 2998 and Lot 3016 - future release for industrial development

(a) Paragraph 117(a) above is repeated. It is clearly in the public interest to provide opportunity for industrial and commercial activities in the region which will provide employment opportunities.

Lot 3011 (A) - future release of land for residential purposes

(b) Paragraph 117(b) above is repeated. It is clearly in the public interest to make available flood free residential land in the Katherine region.

Lot 3160 - proposed extension of the Katherine Showgrounds

(c) Paragraph 117(c) above is repeated. It is clearly in the public interest to expand facilities for the public in the manner proposed: see particularly paragraphs 7 and 8 of the affidavit of Beverley Griffiths sworn 15 June 2001 [File 20104540].

Lot 1348 - proposed sale by auction for commercial/industrial development

(d) Paragraph 117(d) above is repeated. It is in the public interest to provide development opportunities in flood free areas of Katherine with consequent benefits to the community.

Lot 3173 - direct grant to Centre for church hall.

(e) Paragraph 117(e) above is repeated. It is in the public interest to permit and encourage the provision of support services such as those offered by the Centre in Katherine.

Lot 3018 - direct grant to Lake Marong Pty Ltd for food and beverage distribution facility (existing business)

(f) Paragraph 117(f) above is repeated. It is in the public interest to foster the food and beverage distribution and to increase employment opportunities in the region

TRIBUNAL COMMENT

87. The Tribunal's following comment is by way of introduction and is not a finding.
88. 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. The Tribunal otherwise accepts its obligations are accurately set out in paragraph 104 of the applicant's submissions.

FINDINGS

89. By virtue of section 5A(1)(a) 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 ...

90. Sections 24MD(6A) and (6B) NTA are part of Subdivision M of NTA having application in this intended acquisition.
91. 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.
92. 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.
93. “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.
94. In Subdivision P, NTA, the “Right to Negotiate” provisions are set out in section 25 NTA.
95. Section 26 NTA specifies when the Right to Negotiate provisions apply.
96. 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)
97. 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.

98. In the applicant’s form 2, the applicant asserts that the land falls within the provisions of section 251C(3)(c) NTA
99. It is asserted by the applicant that the land is within a municipality constituted under section 29 of the *Local Government Act* of the Northern Territory.
100. Section 5 *Lands and Mining Tribunal Act 1999* (“LMT”) provides for 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...”.
101. “Registered native title claimant” in terms of LMT “has the meaning given in section 253 of the *Native Title Act...*” (s3(1)LMT)
102. 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.”
103. “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*;

104. 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.
105. 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.
106. In terms of section 22 LMT, 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).
107. The application is validly before the Tribunal in terms of section 38 LAA and the Tribunal formally finds that the Tribunal has jurisdiction to become seized of the matter.
108. Subdivision P NTA does not apply.
109. The Tribunal finds that there has been compliance with sections 36, 37 and 38 LAA in this matter and in the circumstances that this matter is properly within the jurisdiction of the Tribunal.
110. The Tribunal asserts that it cannot deal with issues of compensation until or unless the Federal Court has ruled that a Native title claim should be upheld.
111. The Tribunal determines that the Objectors are a registered native title claimant.

112. The proposed compulsory acquisition is a “future act” as defined in section 24 MB (1) *Native Title Act* 1993 (“NTA”) being a non-legislative act that passes the freehold test.
113. Pursuant to the provisions of section 24MD(1) NTA and subject to the provisions of sub-division P NTA such compulsory acquisition is valid under the NTA, which has the consequence that upon compulsory acquisition all or any native title interest related to the land are upon acquisition extinguished by such acquisition.
114. The Tribunal finds that Subdivision P NTA does not apply to the intended acquisition of the land.
115. The Tribunal finds that the Objectors lodged the required objection within the time prescribed by LAA.
116. Clearly the grounds of objection 4, 5, and 6, in the Amended Grounds For Opposing Application filed 20 December 2001 are grounds which are either in identical or sufficiently similar terms as the corresponding grounds which were set out as objections in *Minister for Lands, Planning and Environment –v- Griffiths* (“the Timber Creek proceeding”). As part of this decision the Tribunal adopts its reasons of 22 March 2002 by way of finding in respect of the grounds referred to above.
117. For the purposes of summarising the finding in the Timber Creek proceeding states its findings were, in summary, there was no room for invalidity to be imported by section 9 and 10 of the *Racial Discrimination Act*; that it was not necessary for the validity of the acquisition or proposed acquisition that the Territory itself had to propose or actually “use” the land; that the provisions of section 43 LAA were sufficient to import validity into a use for any purpose whatsoever; and that as a consequence, the intended purpose as stated in the Notice of Proposal was in fact a purpose permitted by section 43 LAA.

118. Notwithstanding the Tribunal's findings above and out of an abundance of caution, an extract from the Timber Creek proceeding is set out below:

... the Tribunal sets out the questions and answers referred to in the 6th paragraph of NLC letter of 22 November 2001:-

104. ... the Applicant answers the Respondents questions as follows:

Q1. Is the LAA as amended since 1 July 1993 a future act within the meaning of section 24MA of the NTA?

A1. (a) No, because it does not relevantly affect native title and is not a future act.

(b) In the event that the LAA (as amended since 1 July 1993) affects native title, it is a future act within the meaning of section 24MA of the NTA but it is not an act to which the consequences of sections 24MD(6A) or (6B) apply.

Q2. Are the compulsory acquisitions future acts within the meaning of section 24MB(1) of the NTA?

A2. Yes, because they are future acts which either:

(a) validly affect native title; or

(b) if invalid to any extent because of the existence of native title, would affect native title to that extent if valid; and

(c) could be done of native title holders held ordinary title; and

(d) the *Northern Territory Sacred Sites Act* makes provision for protection of sites.

Q3. Are the compulsory acquisitions authorized by section 43 of the LAA or section 35 of the Northern Territory (Self-Government) Act and Regulations?

A3. Yes, for the reasons set out in paragraphs 71-95 above.

Q4. Is the LAA inconsistent with the RDA?

A4. No, but even if it was, it complies with the NTA in all relevant respects and is therefore valid for the purposes of the NTA.

Q5. Are the proposed acquisitions unlawful by virtue of section 9 of the RDA?

A5. No, but even if they were, each acquisition complies with the NTA in all relevant respects and is therefore valid for the purposes of the NTA.

Q6. Are the proposed compulsory acquisitions valid?

A6. Yes.

The Tribunal adopts as its own the answers to the Objectors' questions by the Applicant set out above.

119. For the sake of brevity, the Tribunal adopts as its findings in relation to section 38AA LAA criteria, the submissions set out in the applicant's submissions save obviously where they are expressly excluded by the verbiage of such submissions as not being of application to the land. The relevant allegations are consequently set out either entirely or in part in the applicant's submissions from paragraphs 108 to 117 inclusive.
120. The Tribunal next turns to a consideration of the objections which are set out at paragraph 3 of this decision.
121. Where the Tribunal concludes that an objection in specific terms should not discretely prevent the compulsory acquisition of land, but that compensation if any to be awarded (subject to establishing the relevant determination in the Federal Court) is in the Tribunal's finding a sufficient recompense for any deprivation of the land or facilities use or extinction of native title, the Tribunal will refer to such philosophy as "the standard Tribunal finding".
122. In relation to paragraphs 2(a)(b)(c)(d)(e) and (f) set out in the said Attachment A to the Objectors' objection, the Tribunal observes the matters set out in affidavits filed on behalf of the applicant. In the circumstances the Tribunal finds that in practical terms there is little or no deprivation in the manner as set out. Insofar as there may be, the standard Tribunal finding applies.
123. In relation to paragraph 2(g) of the said Attachment A of the objection, there is no evidence before the Tribunal as to the existence of the alleged "trade resources". The Tribunal is unable to find that such "trade resources" exist or if they do that they are affected but in the event, the Tribunal is in error in making such finding, the standard Tribunal finding applies.
124. In relation to paragraph 2(h)(i)and (j), the Tribunal doubts whether these are valid grounds of objection but insofar as they may be, the standard Tribunal finding applies.

125. In relation to paragraph 3(a), it is correct such a result will ensue, the standard Tribunal finding applies
126. In relation to sub-paragraphs (3)(b)(c)(i) and (iii) in the light of the allegations contained in affidavits filed on behalf of the applicant the Tribunal concludes it is dubious whether any of the facilities will be curtailed or extinguished for reason that they have not in living memory existed. Insofar as that may be an invalid observation, the standard Tribunal finding applies.
127. In relation to paragraph 3(c)(ii), the Tribunal firstly points to affidavits filed on behalf of the applicant which the Tribunal finds establishes that there are no registered sacred sites. Insofar as there is any validity to the objection that there will be interference or an affect on Dreamings, the standard Tribunal finding applies.
128. In relation to paragraph 3(d), the Tribunal finds the basis of the objection to be untenable in the circumstances and adopts the evidence set out in affidavits filed on behalf of the applicant in relation to the topography of the land and otherwise the Tribunal states that the standard Tribunal finding applies.
129. In relation to paragraph 3(e) and (f), in the Tribunal's observation these are simply repetitious of other previously stated grounds of objection. Insofar as that observation may not on close scrutiny be valid, the standard Tribunal finding applies.

RECOMMENDATION

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

Dated: 24 May 2002

DAVID LOADMAN, CHAIRMAN