

CITATION: *Minister for Lands, Planning and Environment v Huddleston and others* NT LMT 38

PARTIES: MINISTER FOR LANDS, PLANNING AND ENVIRONMENT
v
PADDY HUDDLESTON AND OTHERS ON BEHALF OF THE WAGIMAN PEOPLE

TITLE OF COURT: Lands and Mining Tribunal

JURISDICTION: Lands and Mining Tribunal Act

FILE NO(s): LMT-38-2001-LA(N) (20108444)

DELIVERED ON: 9 August 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
Objectors: Phillipa Heatherton

Solicitors:

Applicant: Ward Keller
Objectors: Northern Land Council

Judgment category classification: B
Judgment ID number: NTLMT 38
Number of paragraphs: 154

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

No. LMT-38-2001-LA(N) (20108444)

BETWEEN:

**MINISTER FOR LANDS, PLANNING
AND ENVIRONMENT**

Applicant

AND

**PADDY HUDDLESTON AND OTHERS
ON BEHALF OF THE WAGIMAN
PEOPLE**

Objectors

DECISION

(Delivered 9 August 2002)

DAVID LOADMAN, CHAIRMAN

HISTORY

1. By the filing of Form 2 and attachments on 5 June 2001, the Minister has referred the issue of the compulsory acquisition of,

All interests, including native title rights and interests (if any), in all that piece or parcel of land comprising of part Lot 291 Town of Pine Creek in the Northern Territory of Australia containing an area of 19 hectares more or less and bounded by lines described as follows ...

Commencing at a point on the eastern boundary of the Town of Pine Creek and situated 92.25 meters northerly from the northeastern corner of Lot 305; thence northwesterly by a line parallel to and 80 metres northeasterly from the northeastern- boundary of Lot 305 to an eastern boundary of proposed Lot 307; thence northerly by part of an eastern boundary of the said Lot for 50 metres; thence easterly by a line parallel to the southern boundary of Lot 305 to the eastern boundary of the Town of Pine Creek; thence southerly by part of the eastern boundary of the said Town 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 4 September 2000 the manner in which the Territory proposes to deal with the land if it is acquired is as follows:

(a) Grant a Crown Lease Term under the provisions of the *Crown Lands Act*, to Pine Creek Mango Plantation Pty Ltd or its nominee for the purpose of extending the existing Pine Creek Mango Plantation currently located on Lot 305 Town of Pine Creek. Upon completion of development, the Crown Lease Term may be surrendered in exchange for a freehold title and consolidated with Lot 305; and

(b) Provision of irrigation and additional planting of trees.

(c) Construction of improvements ancillary to the development including fencing, machinery shed etc.

(d) Any easements for the purpose of water supply, drainage, electricity supply, sewerage, access and general services as required by the Power and Water Authority and the Pine Creek Community Government Council.

3. The Objectors have by Notice of Objection dated 15 September 2000 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 3 December 1999 (D6015/99), and was entered on the Register of Native Title Claims 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. The Objectors' Form 3, filed on 28 June 2001 at the Tribunal, states:

GROUNDS FOR OPPOSING APPLICATION

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

The Objector does not dispute the applicants position that the proposed compulsory acquisition is a future act which falls within the parameters of s24MB(1) but does not admit that s24MD(1) of the Native Title Act 1993 ("the NTA") applies to the proposed compulsory acquisition.

- 2. The Objector admits that sub-division P of Division 3, Part 2 of the NTA does not apply.
- 3. There has been no agreement between the parties concerning the proposed compulsory acquisition.
- 4. The Objector makes no admission that the Applicant has complied with sections 36, 37 and 38 of the Lands Acquisition Act /NT).
- 5. The grounds for the Objector's objection to the proposed compulsory acquisition are set out in the objection lodged with the Minister in relation to this matter.

- 5. On 10 July 2001 by consent the Tribunal directed that all material be filed on or before 20 September 2001. This date has been extended from time to time by consent between the Applicant and the Objectors.
- 6. On 9 April 2002 the Tribunal convened a directions hearing in this matter in which an order was made by consent:

1. Any submission to be relied upon by either applicant or objectors shall be filed or served on or before 4:00 pm on 10 May 2002.

7. At the directions hearing on 9 April 2002 the Objectors adopted a course for the disposition of this matter which was set out in the letter of the Applicant's solicitors dated 25 March 2002 being a response by them to a communication from the Tribunal addressed to both parties' representatives which had not formally been responded to by or on behalf of the Objectors. As a consequence of such adoption the disposition of the matter was to proceed on the basis of the 25 March 2002 letter, namely:

- (a) there has been no agreement in relation to any of the issues;
- (b) the parties do not wish to examine or cross examine any deponent to any affidavit material filed;
- (c) the parties do not wish to make oral submissions or otherwise require the Tribunal to convene;
- (d) the parties request the Tribunal to make its decision on the written material filed on behalf of the parties;

And the order of 9 April 2002 contained the following:

2. The objectors mutatis mutandis adopt the position as set out in the letter to the Tribunal from the applicant's solicitors on 25 March 2002.

8. Subsequently, however, by letter of 9 May 2002, the representatives of the Objectors, Northern Land Council, wrote to the Tribunal in the following terms:

PROPOSED COMPULSORY ACQUISITION: MINISTER FOR LANDS PLANNING AND ENVIRONMENT V PADDY HUDDLESTON AND ORS

PROPOSED COMPULSORY ACQUISITION - PART OF LOT 291 OF PINE CREEK LMT-38-2001-LA(N); FILE NO 20108444

I refer to the above matter and to the materials filed on behalf of the Minister.

The Objector objects to the proposed compulsory acquisition in the terms of the notice of objection dated 15 September 2000, a copy of which is contained in Annexure 11 to the Affidavit of NA Blackley dated 5 July 2001.

Owing to a lack of resources, the Objector is not in a position to make detailed submissions and wishes the Tribunal to resolve this matter and make its recommendation on the basis of the materials without an oral hearing. In addition to previous materials filed with the Tribunal, the Objector wishes the Tribunal to take account of the matters detailed in this letter (below) and the matters stated in the attached affidavit. The following brief comments are made:

The subject area is covered by native title determination application D6015/99. Since the last directions hearing on 9 April 2002 we have become aware of certain matters requiring amendment to the native title claim application. In particular, it is necessary to amend the application to include further claimants. The amended claim will be lodged with the Federal Court this week. The attached affidavit detailing native title rights and interests in and around Lot 291 of Pine Creek is lodged on behalf of the Objector. The deponent, Ms Bessie Coleman, is a named claimant on the amended native title claim that will be lodged with the Federal Court this week.

I refer to the Respondents' Combined Submissions, Materials and Authorities filed in the Timber Creek matters on 13 November 2001 (File Nos 20102818, 2010844? and 20019145 ("the Timber Creek matters")). I also refer to the Form 4 and affidavit in support filed in the Timber Creek matters on 20 November 2001 seeking that certain questions listed in a schedule be answered prior to further hearing of those matters. Some of the questions raised in the Schedule of questions go to the validity of the *Lands Acquisition Act*, to the validity of all acquisitions purportedly carried out (or proposed to be) under that Act and the Tribunal's jurisdiction under section 38 of the Act. These questions are raised regardless of the purpose of any particular acquisition.

The arguments relied on in relation to the Timber Creek matters are relied upon in this matter.

The Tribunal published its reasons for dismissing the objections in the Timber Creek matters on 22 March 2002. The solicitor for the Objectors in the Timber Creek matters has recently advised the Northern Territory Government that the Objectors intend to seek review of the Tribunal's recommendations. This is likely to occur in the near future. It is submitted that no recommendation should be made by the Tribunal regarding the proposed acquisition in this matter until after review of the Tribunal's decision in the Timber Creek matters.

Nevertheless, it is submitted that, should the Tribunal elect to make a recommendation in relation to this matter before review of the Tribunal's decision in the Timber Creek matters, having regard to the purpose of the acquisition (a private commercial operation) and the effect of the acquisition on the objectors' native title rights (ie extinguishment), the objection in this matter should be upheld.

It is further submitted that should the Tribunal await the review of the recommendation in the Timber Creek matters and it were determined on review that the operation of the *Lands Acquisition Act* were valid insofar as it affects native title and the exercise of the power of compulsory acquisition were valid to the extent that it affects native title, the objection in this matter should nevertheless be upheld, having regard to the matters stated above.

9. On 15 May 2002 at a directions hearing convened by the Tribunal, the following order was made:

1. Leave to objectors:

- (a) to file the affidavit sworn by Bessie Coleman on 8 May 2002 in support of the objections of the existing objectors in the proceeding;
- (b) nunc pro tunc to objectors to file an affidavit by Kirsty Jean Gowans sworn 19 February 2002.

2. The objectors are required to advise the applicant and the Tribunal in writing on or before 24 May 2002 whether they intend to press or abandon the submissions set out in paragraph 7 of Northern Land Council letter to the Tribunal dated 9 May 2002.

3. If the objectors elect to pursue the matters set out in paragraph 7 of the said NLC letter, written submissions and argument in support shall be filed and served on or before 4:00 pm on 30 May 2002.

4. Leave is granted to the applicant to file and serve submissions, which were due but not filed on 10 May 2002, on or before 4:00 pm on 7 June 2002, expanded as may be necessary by any submissions delivered by the objectors pursuant to order 3 above.

5. Any submissions in response to the submissions referred to in order 4 above shall be filed and served by the objectors on or before 4:00 pm on 21 June 2002.

10. By letter dated 24 May 2002 the Objectors' representatives advised that they wished to press the submission contained in paragraph 7 of the letter of 9 May 2002, in essence for a stay of the Tribunal recommendation.
11. Also on 24 May 2002 the Objectors filed a Form 4 application for leave to amend the Grounds for Opposing Application. This application was listed to be heard on 4 June 2002. The amended grounds of opposition are in the following terms.

AMENDED GROUNDS FOR OPPOSING APPLICATION

File No: LMT 38-2001-LA(N): 20108444

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

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

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

4. The proposed compulsory acquisition, being an acquisition of native title rights and interests in Crown land where there are no non-native title rights and interests in that land and being made for the purposes of granting leasehold and freehold interests in the land, would not have been made if the land were

subject to freehold title and is invalid by virtue of sections 9-10 of the *Racial Discrimination Act 1975* (Cth).

5. The acquisition and the extinguishment of all native title rights and interests in the land under the proposed compulsory acquisition is not required for any proposed use of the land.

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

8. The grounds for the Objector's objection to the proposed compulsory acquisition are otherwise set out in the objection lodged with the Minister by it in relation to this matter.

12. Pursuant to the order of 15 May 2002, the Objectors filed submissions on 30 May 2002 ("Objectors' May submissions"); the Applicant filed submissions on 11 June 2002 ("Applicant's submissions"); and the Objectors filed submissions in response on 21 June 2002 (Objectors' June submissions").

13. The Tribunal order made on 4 June 2002 is set out below:

1. The objectors are given leave nunc pro tunc to file amended grounds for opposing the application in the form set out in the application of 24 May 2002.

2. Absent the objection to the Tribunal delivering any decision at all set out in paragraph 7 of the NLC letter dated 9 May 2002, both parties request that there be no oral hearing and that the Tribunal make its decision on the material filed by the parties.

The Tribunal recorded that there was no agreement in relation to any issue between the parties.

14. On 5 July 2002 the Tribunal convened to hear oral submissions from both parties. Although the submissions in writing referred to do contain submissions which are only discretely relevant to the stay question, they are for the sake of completeness set out in this decision. The discrete issue of the stay has been addressed in a separate decision of the Tribunal, which crisply amounted to a refusal to stay the recommendation.

PRELIMINARY COMMENTS OF THE TRIBUNAL

15. By virtue of section 5A LAA this intended acquisition invokes the application of LAA because the act is -
 - ... in relation to an acquisition of an interest in land that comprises native title rights and interests -
 - (a) that is an act to which the consequences in section 24MD(6A) or (6B) of the Native Title Act apply;
16. Sections 24MD(6A) and (6B) NTA are part of Subdivision M of NTA having application in this intended acquisition.
17. 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.
18. 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.
19. “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.
20. In Subdivision P, NTA, the “Right to Negotiate” provisions are set out in section 25 NTA.
21. Section 26 NTA specifies when the Right to Negotiate provisions apply.
22. 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)

23. 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:

(b) 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

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

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

24. In the Applicant’s form 2, the Applicant asserts that the land falls within the provisions of section 251C(3)(a) NTA
25. Attachment A to the Applicant’s form 2 is said to be a copy of a proclamation by His Honour Eric Eugene Johnston, then the Administrator of the Northern Territory of Australia. The proclamation was signed (given [sic]) on 15 September 1983 pursuant to section 111(1)(c) of the *Crown Lands Act* of the Northern Territory (“CLA”) then in force and was published in the Northern Territory of Australia Government Gazette No G38 of 23 September 1983.
26. It is stated further in the Applicant’s Form 2 that pursuant to the transitional provisions of CLA, section 108 of Part 9 of CLA states amongst other matters that proclamations such as that set out in the preceding paragraph shall continue in force as if made under the relevant corresponding provisions of CLA, namely section 95(1) CLA.
27. Attachment B to the Applicant’s Form 2 is a map said to be prepared by the Department of Lands, Planning and Environment identifying the town

boundaries which include the location of the land. The land is said to be part of Lot 291 Town of Pine Creek. As the land falls within the area described in the Proclamation, it is asserted sub-division P NTA does not apply.

28. In the Form 3 the Objectors do not dispute the Applicant's position that the proposed compulsory acquisition is a future act which falls within the parameters of section 24MB(1) NTA. The Objectors however do not admit that section 24MD(1) NTA applies to the proposed compulsory acquisition.
29. In the amended Grounds of Opposition the Objector:-

does not dispute that it is Applicant's position that sub-division P of Division 3, Part 2 of the NTA does not apply, but only if the proposed compulsory acquisition is or would otherwise be a valid compulsory acquisition.
30. 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...".
31. "Registered native title claimant" in terms of LMT "has the meaning given in section 253 of the *Native Title Act...*" (s3(1)LMT)
32. 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."
33. "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*;

34. 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.
35. Those provisions, in broad compass, deal with compulsory consultation and mediation issues.
36. 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.
37. 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).
38. 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.**
39. 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.

40. 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.

41. The Applicant proposes to compulsorily acquire all of the land.

42. 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 on 19 March 2002. The position of the parties in relation to this matter is set out previously in this decision.

43. The Applicant asserts 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.
44. As has been recounted in its Form 3 the Objector denies that section 24 MD(1) NTA applies. Section 24MD(1) NTA succeeds a heading “**Treatment of acts that pass the freehold test**” and the section is the following terms:

Validation of act

(1) If this Subdivision applies to a future act, then, subject to Subdivision P (which deals with the right to negotiate), the act is valid.

Extinguishment of native title by compulsory acquisition

(2) If:

(a) the act is the compulsory acquisition of the whole or part of any native title rights and interests under a law of the Commonwealth, a State or a Territory that permits both:

(i) the compulsory acquisition by the Commonwealth, the State or the Territory of native title rights and interests; and

(ii) the compulsory acquisition by the Commonwealth, the State or the Territory of non-native title rights and interests in relation to land or waters; and

(b) the whole, or the equivalent part, of all non-native title rights and interests, in relation to the land or waters to which the native title rights and interests that are compulsorily acquired relate, is also acquired (whether compulsorily or by surrender, cancellation or resumption or otherwise) in connection with the compulsory acquisition of the native title rights and interests; and

(ba) the practices and procedures adopted in acquiring the native title rights and interests are not such as to cause the native title holders any greater disadvantage than is caused to the holders of non-native title rights and interests when their rights and interests are acquired;

then:

(c) the compulsory acquisition extinguishes the whole or the part of the native title rights and interests;

Sub-section (d) deals with matters that are not relevant in relation to the intended acquisition. It is the position of this Tribunal that section 24MD(1) NTA in fact applies to the intended acquisition.

45. It is the position of the Tribunal that LAA is a law which fulfills the requirements of sections 2(a) (b) (ba) of section 24MD(1) NTA. Consequently the result of any acquisition by the Minister actually acquiring the whole or part of such rights and interests extinguishes the whole or the part of the native title rights and interest it is so acquired.
46. In this matter it is the entirety of the native title rights which exist in the land which is the subject of the intended acquisition.
47. As is apparent from the amended Grounds for Opposing the Application, apart from grounds already canvassed, Ground 4 alleges invalidity based on sections 9-10 of the *Racial Discrimination Act 1975* (Cwth).
48. Ground 5 asserts that the extinction of all native title rights is not required for any proposed use of the land, which logically leads to the interpretation that some of them are.
49. Ground 6 asserts that the 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.
50. Ground 7 asserts that the purpose of the proposed acquisition is to extinguish native title rights and consequently is not for a purpose permitted by the Lands Acquisition Act (NT).

EVIDENCE

51. On 21 August 2001 Simone White, a Lands Officer with the Department of Lands Planning & Environment, swore an affidavit in support of the application (“White’s affidavit”).

52. In paragraph 3 of White's affidavit she refers to a site inspection of the land and taking 10 photographs "of the area" taken on the occasion of that inspection. In the succeeding paragraph (4) she attaches a provisional survey plan and the said photographs recorded in electronic form with appropriate notations.
53. In paragraph 5 of White's affidavit she makes general observations concerning the topography and other relevant matters pertaining to the land.
54. In paragraph 6 of White's affidavit she asserts that following upon enquiries of the Office of the Department of Lands Planning & Environment at Katherine and from her own knowledge "there have not been any reports or complaints of campers in relation to proposed Lot 315". This Tribunal does not know what it is to derive from that, since in order to make a recommendation the Tribunal must obviously be concerned with actual usage for whatever purpose (or lack of it). The Tribunal infers that it must construe such allegations as a positive assertion that no camping has in fact occurred on the land by the Objectors or their agents or perhaps anybody at all.
55. Noreen Alma Blackley swore two affidavits on the Applicant's behalf in relation to the proceedings namely on 5 July 2001 ("Blackley's July affidavit") and on 22 August 2001 ("Blackley's August affidavit").
56. In Blackley's July affidavit she refers to certain formal matters which are not recounted in this decision.
57. In paragraph 3 of Blackley's July affidavit she refers to the fact that "the Pine Creek Mango Plantation Pty Ltd (ACN number not set out as ought to be the case), has applied for additional land in order to extend an existing mango plantation said to be currently located on Lot 305 Town of Pine Creek. Further that on 7 December 1999 advice was received from the NNTTA that there were no entries on the National Native Title Register of

determinations of native title in relation to the land. Further one entry only on the Register of Native Title claims existed in relation to the land. She annexes marked NAB 1 a copy of the written advice referred to.

58. In paragraph 4 of Blackley's July affidavit she asserts the status of the land to be vacant Crown land with no current title issued and annexes marked NAB 2 a copy of a search of the Register maintained by the Registrar General.
59. In paragraph 5 and succeeding paragraphs including 12 various formal matters are set out in relation to the procedural steps in the intended application.
60. In paragraph 13 of Blackley's July affidavit she asserts advice from NLC that an application for determination of native title over the land had been lodged under No. D6015/99. Further she refers to the delivery of a formal Notice of Objection to the proposed acquisition.
61. In paragraph 14 of Blackley's July affidavit she sets out that an invitation to consult (NAB 12), was dispatched to the Objectors. In paragraph 15 she asserts further that on 28 February 2001 a second invitation to consult was forwarded a copy thereof being marked NAB 13.
62. The remaining paragraphs of Blackley's July affidavit are of a procedural nature and do not bear repetition in this decision.
63. In respect of Blackley's August affidavit she refers (in paragraph 3) to "the economic and other significance of the acquisition to the Territory and to the region and the public interest in the acquisition". This of course is one of the criteria (sub section 2 c Section 38 AA LAA) and sets out sequentially the following matters:-
 - (a) That the Territory proposes to grant a Crown Lease for the proposed extension of the Mango plantation and that the Crown Lease term on

completion of development may be surrendered in exchange for a freehold title and consolidated with Lot 305;

- (b) That the company has a development proposal comprising provision of irrigation, planting of 900 mango trees, the construction of improvements “ancillary to the development including fencing and shedding”;
- (c) That the Territory proposes to grant easements for utilities;
- (d) That the company is a significant business employer and tourist attraction in the Pine Creek region. She attaches marked NAB 1 a copy of a brochure said to have been prepared by the company in contemplation of a sale of “the business”. It is regrettable that even on that public document the obligation specified in the Corporations Law to set out the ACN number is not observed.

- 64. In paragraph 4 of Blackley’s July affidavit she refers to the area of the unalienated Crown land being 19 hectares and asserts that no Town Plan Zone applies to the proposed development.
- 65. In paragraph 5 of Blackley’s August affidavit she refers to and attaches marked NAB 3 a number of documents said to be relevant to the tenure history of the land.
- 66. In paragraph 6 of Blackley’s August affidavit she sets out matters that are contained in the Applicant’s Form 2 and they are not repeated in this decision.
- 67. It is then asserted as it seems consistently to be and set out in paragraph 7 of Blackley’s August affidavit that the Minister doesn’t concede the existence of Native Title rights which this Tribunal ignores, as it has and will continue to do.

68. In paragraph 8 of Blackley's August affidavit she addresses the criteria set out in sub section 2(a)(i) and (ii) of Section 38 AA LAA postulating the following matters:-
- (i) That public access is possible, but is not authorised or encouraged there being an absence of any fencing;
 - (ii) From time to time at the request of the Department of Lands Planning & Environment the Pine Creek Fire Service conducts burning off on parts of the land having high fuel load;
 - (iii) There have been no reports of unauthorised camping or any utilisation of the land by either Department officers or members of the general public;
 - (iv) That the land contains no natural features such as creeks, comprising hunting ground (which this Tribunal doesn't understand). The concept of this Tribunal is that there is no particular physical topography which would identify any piece of land as "hunting ground" or the like, which might be the subject of traditional rights and uses;
 - (v) That the 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 uses. It is not clear from those assertions whether there is irregular use of the land for those purposes. The Tribunal will assume that what is intended to allege is that there is not known to be any use of the land for those purposes;
 - (vi) That "it is unlikely that the land is the subject of a significant use by Native Title holders ..." and that consequently it is unlikely extinction will have any significant "effect" [sic].

69. In paragraph (b) of paragraph 8 of Blackley's August affidavit she addresses the criteria set out in sub section 38 AA LAA (iii) "the development of the social, cultural and economic structures of the native title claim group".
70. In paragraph (b)(i) of paragraph 8 of Blackley's August affidavit there is reference to the location of the land in relation to "the development of the Town of Pine Creek and the Alice Springs to Darwin railway corridor".
71. In paragraph b(ii) of Blackley's August affidavit it is stated the land is "relatively arid and has no known physical features or known or registered sacred sites". In relation to the last aspect of the matter there is reference to a copy of an Aboriginal Areas Protection Authority Advice dated 29 June 2001 annexed and marked NAB16 to Blackley's July affidavit.
72. In sub paragraph (c) of paragraph 8 of Blackley's August affidavit as a consequence of the matters set out before it is asserted there is no real prospect for the development of any economic structure for the benefit of native title holders and that in any event the land offers no real basis for social, cultural maintenance or development.
73. In sub paragraph (d) of paragraph 8 of Blackley's August affidavit she addresses the criteria spelt out in sub section 2 (iv) of Section 38 AA LAA namely the freedom of access by the Native Title Claim Group and other matters as contained in LAA and set out in the paragraph asserting "... that proposed use of the land is such that the freedom of access and the continuation of native title rights would be incompatible to the development of the land".
74. In sub paragraph (e) of paragraph 8 of Blackley's August affidavit the criteria in sub section 2 (v) Section 38 AA LAA are addressed and she repeats the absence of sacred sites already referred to.
75. In paragraph 9 of Blackley's August affidavit, she attaches a true copy of an aerial photograph of the land, although the precise boundaries of the land do

not appear to this Tribunal to be marked on that photograph. It is presumed that the land is located somewhere in the area depicted on the photograph.

76. On behalf of the Objectors, Kirsty Jeans Gowans swore an affidavit on 19 February 2002 (“Gowans’ affidavit”). Gowans’ affidavit bears a remarkable similarity to an affidavit sworn by Penelope Alice Creswell, of Northern Land Council, on 21 November 2001 in another unrelated proceeding.
77. Gowans’ affidavit introduces herself as a solicitor employed by Northern Land Council.
78. Gowans’ affidavit descends to matters relating to the Upper Daly Land Claim, a claim made under the *Aboriginal Land Rights (Northern Territory) Act 1976*. The affidavit and the annexures to it being concerned essentially with matters related to discharging the burden of proving the existence of native title.
79. This Tribunal is not charged with the obligation of deciding whether there is or there is not native title reposing in the Objectors. That has consistently been this Tribunal’s practice. Further, however, and perhaps more importantly, the Tribunal’s practice finds corroborative treatment in a decision of the National Native Title Tribunal in application WF97/4 a Future Act Determination Application (20 February 1998) (“Strickland”). In paragraph 10 of *Strickland* the Honourable CJ Sumner in part said:

and the Tribunal will assume for the purposes of jurisdiction in an inquiry which involves registered native title claimants (as opposed to determined native title holders) that native title exists and will be affected by the proposed act (Waljen at 163-166).

80. In paragraph 21 of *Strickland*

A full inquiry into whether native title, as defined in s 223, exists and in what form is not appropriate in these proceedings. In circumstances where native title is not determined and where the Tribunal cannot make a determination of native title, it is not necessary or practicable to consider contested argument about the proof of native title or the scope

of it. The facts of this case demonstrate the difficulties involved in adopting such a course of action. A future act determination application inquiry could be turned into a full blown inquiry involving the examination of contested issues of law and fact which are currently before the Courts.

81. Given that premise for the Tribunal's decision it really becomes in the Tribunal's perception unnecessary to examine the remaining matters deposed to in Gowans' affidavit which substantially record factual history related to claims under the *Aboriginal Land Rights (Northern Territory) Act 1976*. It is not to the point in this Tribunal's perception that there have been, as undoubtedly there will be continue to be, successful claims in relation to areas of land contiguous or proximate to land which is the subject of a proceeding for compulsory acquisition.

82. In paragraph 16 of Gowans' affidavit after referring to various areas which are the subject of applications to determination of native title by the Wagiman People (the Objectors) she refers at sub-paragraph (d)

The area marked as 'DC98/8' is the application referred to in this Affidavit (over Lot 291 in the Town of Pine Creek)

83. The discrete probative value and relevance of this statement escapes the Tribunal.

84. In paragraph 17 of Gowans' affidavit she refers to a negotiated agreement in part comprising a relinquishment by the Objectors in turn for appropriate consideration of land to enable the railway corridor in respect of the railway line to be constructed from Darwin to Alice Springs to proceed.

85. In paragraph 18 of Gowans' affidavit she refers to the location of registered sacred sites within or surrounding the town of Pine Creek and annexure KJG-9 to Gowans' affidavit is a map on which the location of such sites is depicted.

86. The remainder of Gowans' affidavit concerns procedural matters related to the current proceeding which allegations are essentially unremarkable and

unobjectionable information, although the utility in this proceeding of the sum total of such allegations is to say the least miniscule.

87. With leave, an affidavit affirmed by Bessie Coleman was filed on 10 May 2002 on behalf of the Objectors (“Coleman’s affidavit”). Bessie Coleman states that she is a Jarwoyn person and the possessor of native title rights and interests in land surrounding Lot 291 of the Town of Pine Creek in the Northern Territory.
88. In paragraph 2 and 3 of Coleman’s affidavit, she says that the Jarwoyn “used to have a big camp big camp [sic] in Lot 291. They had a big camp down by the river”. She also states that the land “was our hunting area” when she was a little girl.
89. In paragraph 4 of Coleman’s affidavit, she specifies the animals hunted and the fruits gathered. The point about all these allegations are that they are related to matters which occurred at some unknown stage in the past. It is not apparent as to her age and it is consequently not possible to fix a time with any precision.
90. In paragraph 5 of Coleman’s affidavit, she refers to Bonrook Station “that was our land too”, although the significance of these allegations in relation to matters before the Tribunal is obscure.
91. In paragraph 6 of Coleman’s affidavit, she refers to the fact that her sister is buried at Bonrook Station and that people specified worked there.
92. In paragraph 7 of Coleman’s affidavit, she refers to the fact that a lot of old people “used to walk around over that land at Lot 291”. Again the precise period when that occurred or indeed how it is related to the exercise of any native title rights is obscure. She does say that they also looked for fruit there.

93. In paragraph 8 of Coleman's affidavit, she asserts there was used "all around that land at Lot 291" (which seems then not to relate to a use on the land itself) "until that man with the Mango farm came". When that event occurred the Tribunal does not know. The remaining allegations have no probative value.
94. In paragraph 9 of Coleman's affidavit, there is reference to "a camp in the town too". This was specified for "for little Myali and Jarwoyn". When it was there, precisely where it was and when it ceased to be there, are all matters to which it is impossible to draw any inference.
95. Apart from some protest in paragraph 10 of Coleman's affidavit, in paragraph 11 she states "I want to go there. I want to take my kids there to show them the old roads, talk about it and show my grand-daughter". An understandable desire perhaps but again of no probative value in relation to the task before the Tribunal.

SUBMISSIONS

96. The Objectors' May submissions are set out below:

OBJECTORS' SUBMISSION

1.1 On 15 May 2002 The Lands and Mining Tribunal ("the Tribunal") ordered that the Objectors file supporting submissions regarding the submission set out in paragraph 7 of the Northern Land Council letter to the Tribunal dated 9 May 2002.

1.2 The said letter states that the Objectors rely upon the arguments in the so-called "Timber Creek matters" (File No.s .20102818, 20108447 and M20019145)

1.3 Specifically, paragraph 7 of the said letter submits that no recommendation should be made by the Tribunal regarding the proposed compulsory acquisition in this matter until after review of the Tribunal's decision in the Timber Creek matters.

2. REASONS RELATING TO JURISDICTION OF THE LANDS AND MINING TRIBUNAL

2.1 The review of the Tribunal's decision in the Timber Creek matters of 22 March 2002 is in part in regard to the Tribunal's findings in relation to

jurisdiction. It is submitted that no recommendation should be made by the Tribunal regarding the proposed compulsory acquisition in this matter because:

- Should the review of the jurisdictional grounds in the Timber Creek matters succeed then the recommendation made by the Tribunal will be invalid;
- While the jurisdiction of the Tribunal remains unclear it is unworkable for the Northern Territory Government to act on any such recommendation made by the Tribunal;
- In these circumstances, should the review of the jurisdictional grounds in the Timber Creek succeed, the time and resources of the Tribunal will have been wasted.
- Furthermore, should the review of the jurisdictional grounds in the Timber Creek succeed, and the Minister has in the interim made a decision to proceed with the acquisition after considering the Tribunal's recommendation in this matter, the acquisition may 'extinguish native title contrary to the provisions of the *Native Title Act 1993*.

These submissions are discussed further in the following paragraphs.

1.2 Both this matter and the so-called Timber Creek matters concern proposals to compulsorily acquire native title interests within towns for non-government parties. Such acquisitions are future acts under the *Native Title Act*. The validity of a proposed future act is dependent upon the appropriate processes required by the *Native Title Act 1993* being followed.

2.3 Future acts that are the compulsory acquisition of native title interests within towns for non-government parties are governed by section 24MD(6B) of the *Native Title Act 1993* (Cth). Section 24MD(6B) requires that if a native title claimant objects to the doing of such a future act and requests that their objection be heard by an independent person or body, then the Commonwealth, State or Territory proposing to acquire the native title interests must ensure that the objection is heard by an independent person or body [section 24 MD(6B)(f)]. In the Northern Territory future acts to which section 24MD(6B) of the *Native Title Act 1993* apply are governed by the *Lands Acquisition Act* [section 5A *Lands Acquisition Act*]. The body assigned to hear and determine objections to which section 24MD(6B) of the *Native Title Act 1993* apply is the Lands and Mining Tribunal [section 38 *Lands Acquisition Act*].

2.4 Where, as in this case, native title claimants have objected to the proposed future act they are entitled to have the required processes under the *Native Title Act 1993* followed, including that the Tribunal hears the objection and makes a recommendation.

2.5 However if, as is contended in the review of the Timber Creek matters, the Lands and Mining Tribunal does not have jurisdiction to hear such objections then any recommendation made by the Tribunal in relation to the objection will not be a valid determination, per section 24MD(6B) of the *Native Title Act 1993*

2.6 Consequently, one reason that the Objectors seek that the Tribunal does not make a recommendation in this matter is one of common sense and sensible utilisation of resources. Should the review of the jurisdictional grounds succeed the recommendation made by the Tribunal will be invalid and the time and resources of the Tribunal in making the recommendation will have been wasted.

2.7 A further consequence should the review of the jurisdictional grounds succeed is that a decision to acquire the native title rights and interests made by the Minister on the basis of an invalid recommendation of the Tribunal will not comply with Part 2 Division 3 of the *Native Title Act*.

2.8 Consequently, as stated at point 2.1, a further reason the Objectors seek that the Tribunal does not make a recommendation in this matter is that it is unworkable for the Northern Territory Government to act on any such recommendation while the jurisdiction of the Tribunal remains in question.

3. REASONS RELATING TO THE CONDUCT OF THE CASE

3.1 The review of the Timber Creek decisions also deals with the treatment by the Tribunal of evidence put before it during the Timber Creek matters and the treatment of registered native title rights and interests which affect the way the Objectors present their case.

4. LAW RELATING TO ADJOURNMENT AND STAY OF DECISION /STAY OF PROCEEDINGS

4.1 There exists a considerable body of case law dealing with questions of stays of proceedings where an appeal is on foot. The general rule in such cases is that an appeal from a judgment does not operate as a stay of the judgment unless there are special circumstances that would justify a stay. Such special circumstances exist where it is necessary to prevent the appeal, if successful, from being nugatory. Such circumstances might include where 'there is a real risk that it will not be possible for a successful appellant to be restored substantially to his former position if the judgment against him is executed' [McBride v Sandland (No.2) (1918) 25 CLR 369; see also Federal Commissioner of Taxation v Myer Emporium Ltd. (no.1)(1986) 160 CLR 220].

4.2 The submission in this matter is that Tribunal should refrain from making a recommendation in this matter pending the outcome of a review of another matter in which largely the same submissions have been raised. While the circumstances are not directly analogous to those described in the preceding paragraph, it is submitted that similar principles should apply.

4.3 It is submitted that pending the outcome of the review of the questions in the Timber Creek matters, the question of the Tribunal's jurisdiction is a significant legal question that is yet to be conclusively determined and which significantly affects the Objectors' interests in this matter.

4.4 Where the compulsory acquisition of their registered native title rights and interests is contemplated the Objectors are entitled to the benefit of those processes required by the *Native Title Act 1993* described above.

4.5 Yet if the Objectors' registered native title rights and interests are compulsorily acquired prior to the determination of the review of the Timber Creek matters that review may reveal that the process by which native title was extinguished did not comply with the processes required by the *Native Title Act 1993* and consequently, was illegal. In such circumstances, it is not clear whether the illegal extinguishment of native title rights will lead to reinstatement of the native title rights and interests or only to a right to compensation.

4.6 It is submitted that were native title to be extinguished illegally (as a result of a failure to extend to the registered native title holders the benefit of the future act processes required by the *Native Title Act 1993*) then a right to

compensation would not substantially restore the Objectors to their former position in relation to their native title rights. That compensation would not serve to restore the Objectors to their former position is apparent from the fact that the value of native title lands to the culture and community of the native title claimants is invaluable and extinguishment cannot be completely compensated in financial terms.

97. The text of the Applicant's submissions, without the attachment, is set out below:

APPLICANT'S SUBMISSIONS

Background

1. The Minister for Lands and Planning ("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 part Lot 291 Town of Pine Creek ("part Lot 291 ").
2. The location of part Lot 291 is shown on the map marked "NAB 4" and the aerial photograph marked "NAB 6" , annexed to the affidavit of Noreen Alma Blackley sworn on 22 August 2001.
3. All of part Lot 219 within the boundary of the Town of Pine Creek as proclaimed in the Australian Government Gazette no.129 on 20 September 1973 and as amended and extended by proclamation under the Crown Lands Act and published in the Northern Territory of Australia Government Gazette G38 of 23 September 1983 pursuant to section 7(1)(a) of the *Local Government Act* 1979. By section 267 of the *Local Government Act* the proclamation made under section 7(1)(a) of the previous Act continues in force as if it were made under section 29 of the present Act.'
2. The Northern Land Council ("the NLC") is the representative Aboriginal/Torres Strait Islander body in the relation to part Lot 291 and, having been so recognized by the Commonwealth Minister under section 203RD of the NTA.

The proposed compulsory acquisition

3. The Territory proposes to compulsorily acquire all interests (including native title rights and interests) in part Lot 291 Town of Pine Creek under the provisions of the LAA.
4. The subject land is presently vacant Crown land. Part Lot 291 was unalienated Crown land from 1936 to 1 July 1961. From 1 July 1961 until 9 April 1965 part Lot 291 formed part of Pastoral Lease 643 (Bonrook). On 9 July 1965, an area of 1.25 square miles was surrendered from PL 643 including part Lot 291 and part Lot 291 became unalienated Crown land.
5. The proclamation published in the Northern Territory Government Gazette no G38, 23 September 1983 is referred to in the tenure history marked "NAB 3" annexed to the affidavit of Noreen Alma Blackley sworn on 22 August 2001 but was omitted from the copies of relevant documents attached. For the sake of completeness a copy of the later proclamation is attached hereto

6. The manner in which the Territory proposes to deal with the land, if it is acquired, is as follows:
- (a) Grant a Crown Lease (Term) under the provisions of the *Crown Lands Act*, to Pine Creek Mango Plantation Pty Ltd or its nominee for the purposes of extending the existing Pine Creek Mango Plantation currently located on Lot 305 Town of Pine Creek. Upon completion of the development, the Crown Leases (Term) may be surrendered in exchange for a freehold title and consolidated with Lot 305;
 - (b) Provision of irrigation and additional planting of trees;
 - (c) Construction of improvements ancillary to the development including fencing machinery shed etc.
 - (d) Grant of any easements for the purposes of water supply, drainage, sewerage, access and general services required by the Power and Water Authority and the Pine Creek Community Government Council.
7. Part Lot 291 is bounded on the southern side by the Pine Creek Airstrip, on the west by the Stuart Highway, on the east by Bonrook Station and to the north, by vacant Crown land.'
8. There is no Town Plan Zone applicable to part Lot 291 under the Pine Creek Town Plan. Accordingly there is no bar to the development of the land as proposed.
9. The proposed use of part Lot 291 is likely to result in increased commercial activity within the Town of Pine Creek as the Mango Plantation is a significant business, employer and tourist attraction in the area.
10. The compulsory acquisition of native title rights and interests over part Lot 291 pursuant to the LAA is sought to ensure the validity of the grant of an interest in the land to a third party in the event that native title is determined by the Federal Court to exist in respect of part Lot 291.

Process

11. A Notice of Proposed Acquisition of Land for part Lot 291 was published in the Northern Territory News on 30 August 2000 and Notices of Proposal were served on the Registrar of the National Native Title Tribunal, the Chief Executive Officer of the NLC and the Objectors on 5 October 2000. The Notice of Proposal was served by mail on the NLC on 5 September 2000 and the Objectors with 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 ("Notice of Objection").'
13. On 15 September 2000 the NLC, acting for the Objectors, lodged a Notice of Objection to Proposed Acquisition of part Lot 291 and advised that an application for determination of native title (D6015/99) had been lodged in respect of the land by the Objectors and was pending registration
14. By letter dated 13 December 2000, the Objectors were invited to consult with the Applicant. On 28 February 2001 a second invitation to consult was forwarded to the Objectors. The consultation period expired on 24 April 2001 with no further consultation and no agreement being reached.

16. By letter dated 23 May 2001 the Applicant applied to have the objection to the acquisition heard by the Lands and Mining Tribunal ("the Tribunal").

17. A Form 3 response to this application was filed on 28 June 2001 and amended grounds for opposing the application were filed with the Tribunal on 4 June 2002.

18. On 30 May 2002 the Objectors filed submissions which in part assert that no recommendation should be made by the Tribunal pending a review of the decision of the Tribunal in file nos.20102818, 20108447 and 20019145 ("the Timber Creek Matters").

Jurisdiction of the Tribunal

19. 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.

20. 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. Specifically, for present purposes, section 24MD concerns future acts which pass the "freehold test".

21. 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".

22. 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.

23. Thus, in order for the LAA to apply to the proposed compulsory acquisition, the 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.

24. 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.

25. In respect of part Lot 291, the Objectors challenge the jurisdiction of the Tribunal to hear the Objections on the basis that the 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 the proposed compulsory acquisition:

(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

(c) is a proposed invalid exercise of the power of compulsory acquisition.

26. The same challenge was made to jurisdiction in the Timber Creek Matters and certain questions, raising issues concerning the application and effect of the *NTA* and the *RDA* in the protection of native title, were posed for the consideration of the Tribunal. In relation to those grounds of objection, the Applicant adopts its submissions made in the Timber Creek Matters as to the jurisdiction of the Tribunal and the reasons of the Tribunal delivered on 22 March 2002 in dismissing that challenge.

27. 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 Objectors 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.

Stay Application based upon Judicial Review Application in Timber Creek Matters

28. By letter dated 9 May 2002 the Objectors submitted that no recommendation should be made by the Tribunal in this matter until the outcome of an application for judicial review, filed purportedly pursuant to section 45A of the *LAA* in relation to the decision of the Tribunal in the Timber Creek Matters.

29. On 4 June 2002 the Tribunal made orders sought by the Objectors in a Form 4 Application dated 24 May 2002 to amend the grounds of objection filed in this matter to include the jurisdictional arguments raised in the Timber Creek Matters. Those arguments are addressed in paragraphs 20 to 26 inclusive above.

30. As to the merits of the application for judicial review, until the Minister for Lands and Planning exercises his administrative powers under the *LAA* and acquires the land in the Timber Creek Matters, the Objectors are not "persons aggrieved" within the meaning of section 45A (3)(a) of the *LAA*.

31. As to whether the circumstances in this matter are such that if judicial review overturned the decision of the Tribunal in the Timber Creek Matters, the appeal would be nugatory with respect to this matter, the Applicant points to the authority of *McBride v Sandland (No 2)* in opposing the Objectors' application for a stay of proceedings in those circumstances. A recommendation of the Tribunal that the Applicant compulsorily acquire part Lot 291 would not, of itself, effect compulsory acquisition and thereby preclude the restoration of the position of the Objectors with respect to the land. If the Tribunal recommends that part Lot 291 be acquired, the Applicant must consider relevant matters, including where appropriate, the matters set out in paragraph 2.1 of the Objectors' Submissions, in the exercise of his administrative powers under the *LAA*.

32. As there is no evidence before the Tribunal of the exercise of native title rights and interests on part Lot 291 by the Objectors, no basis exists upon

which the Tribunal can establish "sufficiently exceptional circumstances" to disturb the general rule relating to stay of proceedings pending an appeal.

The Objections - Registered native title rights and interests

33. The Objectors are the registered native title claimants in Federal Court proceedings D6015 of 1999 ("Application") in relation to land and waters which includes part Lot 291 in the Town of Pine Creek.

34. The native title rights and interests claimed in the Pine Creek Application 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;

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;

(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) to determine and regulate membership of, and recruitment to, a landholding group.

Evidence of claimed incidents of native title which could be affected

35. 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.

36. The Objectors have filed the following affidavits in support of their objections to the compulsory acquisition:

(a) Affidavit of Bessie Coleman affirmed on 8 May 2002

(b) Affidavit of Kirsty Jean Gowans affirmed on 19 February 2002

37. In her affidavit Gowans refers to a settlement by negotiation of the Upper Daly (repeat) Land Claim whereby land is being granted to the Wagiman People as Aboriginal Land or Freehold land. The affidavit further refers to other applications for determination of native title over areas of land in or around the Town of Pine Creek.

38. It is submitted that any agreement reached between the Territory and the Wagiman People regarding other land or the existence of other native title applications in the area in or around Pine Creek does not assist in establishing the native title rights it is claimed exist over part Lot 291 and in relation to which the Tribunal must determine what effect the proposed acquisition will have on those rights.

39. In her affidavit Gowans refers to a Draft Land Use Objectives document prepared by the Department of Infrastructure Planning and Environment. The same challenge to the acquisition based upon Draft Land Use Objectives was made in the Timber Creek Matters. The Applicant adopts the reasons of the Tribunal in dismissing that challenge.

40. In her affidavit Coleman identifies herself as a "Jarwoyn person" and claims native title rights and interests "in and surrounding Lot 291 of the Town of Pine Creek". Ms Coleman evidence is that the "Jarwoyn people used to have a big camp down by the river" and that "when [she] was a little girl Lot 291 was our hunting area."

41. No witness has deposed to the use of part Lot 291 for any of the claimed incidents of native title by the Objectors.

42. There are no registered or recorded sacred sites located on part Lot 291.

Section 38AA criteria

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

(a) 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.

(b) 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.

(c) In any event access to any site of significance is ensured under section 46 of the *Sacred Sites Act*: see also sections 33-35.

(d) The evidence is that there has been no reports or complaints to the Department indicative of occupation of part Lot 291

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

(a) 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.

(b) 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.

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

(a) On the basis of the evidence given the acquisition would appear to have no effect on the social cultural and economic structures of the claim group.

(b) There is no evidence of any competing proposals for development of part Lot 291.

46. 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.

(a) Even if the acquisition 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 part Lot 291.

47. 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

(a) There is no evidence of sites of particular significance on the land; those sites are protected by Sacred Sites Act in any event

48. Ways of minimising the impact of the acquisition on registered native title rights and interests, including in relation to access to part Lot 291

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

(b) 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 part Lot 291 (if it continues to exist), the inquiry is directed to any practical effect of that extinguishment on registered native title rights. Accordingly 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 e.g. alternate residential locations, allocation of some land in a land development for residential or cultural purposes.

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

(a) Evidence of the economic or other significance of the acquisition is found in the affidavit of Blackley sworn 22 August 2001 at paragraphs 3(a), 3(b), 3(d) and annexure NAB 1.

50. The public interest in the acquisition

(a) Evidence of the public interest in the acquisition is found in the above references to the affidavit of Blackley sworn 22 August 2001. It is clearly in the public interest to provide an opportunity for the growth of a proven commercial activity which will provide employment opportunities in the region.

98. The Objectors' June submissions are set out below.

OBJECTORS' SUBMISSIONS

1. The Objectors rely on the submissions contained in their letter to the Lands and Mining Tribunal (the 'Tribunal') dated 9 May 2002, the submissions filed in the Tribunal on 30 May 2002, the amended grounds of objection filed 24 May 2002, and the Affidavits of Ms Gowans filed on 20 February 2002 and Ms Coleman filed on 10 May 2002.

Stay Application based on Timber Creek matters

2. It is noted that at paragraph 28 of the Applicant's Submissions the Applicant has mistaken the basis of the judicial review requested in the Timber Creek matters and consequently, that the comments as to the validity of that application at paragraph 30 are incorrect.

The effect of the proposed compulsory acquisition on the registered native title rights and interests referred to the Tribunal

3. In making a recommendation in relation to the acquisition of native title rights and interests the Lands and Mining Tribunal (the 'Tribunal') must take into account the matters listed in section 38AA(2) of the *Lands Acquisition Act* (the 'LAA'). In particular the Tribunal must take into account '... the effect that the acquisition will have or is likely to have on registered native title rights and interests that were referred to the Tribunal...' [s 38AA(2)(a)]

4. The registered native title rights and interests that were referred to the Tribunal include entitlements, under traditional laws acknowledged and customs observed, to exercise native title rights and interests in relation to the area claimed which include as follows:

(a) to possess, occupy, use and enjoy the area claimed to the exclusion of all others;

(b) to speak for and to make decisions about the use and enjoyment of the application area;

(c) to reside upon and otherwise to have access to and within the application area;

(d) to control the access of others to the application area;

(e) to use and enjoy the resources of the application area;

(f) to control the use and enjoyment of others of the resources of the application area;

(h) to maintain and protect places of importance under traditional laws, customs and practices in the application area;

(i) to maintain, protect, prevent the misuse of and transmit to others their cultural knowledge, customs and practices associated with the application area;

(j) to determine and regulate membership of, and recruitment to, a landholding group.

5. The Applicant's submissions filed on 11 June 2002 stated at paragraph 35 that 'Although it is not appropriate for the Tribunal to embark on a full inquiry into whether native title exists and, if so, in what form, it must look for evidence of the existence and exercise of registered native title rights in respect of the subject land and the effect of the proposed acquisition/s on the enjoyment of those rights.'

6. It is submitted that the Applicants have attributed to the Tribunal greater powers than are required under the *Lands Acquisition Act* [the 'LAA']. The Tribunal is not required by the LAA to 'look for evidence of the existence and exercise of registered native title rights'. The LAA requires the Tribunal to take into account 'the effect that the acquisition will have or is likely to have on *registered* native title rights and interests' [s38AA(2)(a)]. It is the fact of registration that enlivens the Tribunal's jurisdiction and it is regarding the *registered* native title rights and interests that the Tribunal must ascertain the effect of the proposed compulsory acquisition. There is no further requirement on the Objectors to prove the *exercise* of the native title rights and interests. The Tribunal is required to treat such rights and interests, once registered, as existing and must assess the effect of the proposed compulsory acquisition on them on that basis.

7. Further evidence of the registered native title rights and interests is found in the Affidavit of Ms Kirsty Gowans filed on 20 February 2002. Ms Gowans' affidavit details sacred sites within the town of Pine Creek in the vicinity of part Lot 291 [paragraph 5 and Appendix 3 of Ms Gowans Affidavit], sites within the vicinity of Pine Creek [paragraph 6 and Appendix 3 of Ms Gowans Affidavit], areas held as Aboriginal land in the vicinity of Pine creek [paragraph 11 and Appendix 4 of Ms Gowans Affidavit] and other native title applications lodged by the Objectors over areas of land in and around the Town of Pine Creek, including land immediately abutting part Lot 291 [paragraph 16 and Appendix 7 of Ms Gowans Affidavit].

8. The Applicant's submissions state at paragraph 38 that '...any agreement reached between the Territory and the Wagiman People regarding other land or the existence of other native title applications in the area in or around Pine Creek does not assist in establishing the native title rights it is claimed exist over part Lot 291 and in relation to which the Tribunal must determine what effect the proposed acquisition will have on those rights'. As stated above, the Tribunal is required to make a recommendation based upon the registered native title rights and interests referred to it. The Objectors are not required to prove the existence of their native title rights and interests. Nevertheless, the evidence of further native title rights and interests in land surrounding the claimed area provides the context in which the Tribunal's assessment of the effect of the proposed the compulsory acquisition on the registered native title rights and interests referred to it, must be made.

9. The registered native title rights and interests in part Lot 291 are a part of the claimants' broader native title rights and interests in lands surrounding the area. The existence and exercise of those rights and interests must be considered in the context of the rest of the claimants' claimed native title lands. To properly assess the effect of the proposed the compulsory acquisition on the native title claimant group, the Tribunal must assess the effect of the

extinguishment of native title in Lot 291 in diminishing the native title claim group's land base, and the effect of this on the matters listed in s 38AA of the LAA.

10. Further evidence of the registered native title rights and interests is found in the affidavit of Ms Bessie Coleman filed on 10 May 2002. Ms Coleman's affidavit attests to the occupation and residence of part Lot 291 [paragraphs 2, 7 and 8] and to the occupation and residence of lands surrounding part Lot 291 [paragraphs 5, 6, 7, 8 and 9] by the native title claimant group. Ms Coleman's affidavit attests to the use of part Lot 291 as a hunting ground and a place to gather food [paragraphs 3, 4 and 7]. She attests that these rights and interests were exercised until the time when the Mango Farm was developed in the land immediately adjoining part Lot 291 [paragraph 8].

11. Ms Coleman further asserts her right as a native title holder to speak for and make decisions about the use and enjoyment of the area and to control the access of others to the area [paragraphs 8 and 10]. Ms Coleman further attests to her right as a native title holder to transmit to others the cultural knowledge, customs and practices associated with the application area [paragraph 11].

12. The Applicant's submissions state at paragraph 41 that 'No witness has deposed to the use of part Lot 291 for any of the claimed incidents of native title by the Objectors'. It is submitted that this is incorrect. Ms Coleman's affidavit attests to the use of part Lot 291 according to the registered native title rights and interests described in the previous paragraph and in the amended native title application. The Objectors' objection to the proposed compulsory acquisition is on behalf of all native title claimants for the claimed area. Ms Coleman's affidavit is the evidence of a native title claimant over the claimed area.

Section 38AA Lands Acquisition Act criteria

13. In making its recommendation the Tribunal must take into account the effect of the proposed compulsory acquisition on registered native title rights and interests referred to the Tribunal. It is submitted that because the proposed compulsory acquisition of all native title rights and interests would cause total extinguishment of native title in the area the impact of the proposed acquisition is fundamental. In particular, the Tribunal is required to consider the effect of the proposed compulsory acquisition on the matters listed in section 38AA(2) of the LAA.

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

14. The Applicants state at paragraph 43 of their submissions that '... 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'. It is submitted that this is incorrect. As stated above, where the effect of the proposed compulsory acquisition would be to extinguish native title the effect is fundamental because it removes all future capacity to exercise native title rights and interests in the area. Once lost, native title does not revive. The effect of the acquisition is to permanently remove from the native title claim group, the right to enjoy any of the registered native title rights and interests.

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

15. The Applicants state at paragraph 44 of their submissions that 'On the basis of the evidence given, the acquisition would appear to have *no impact at all on the way of life, culture and traditions*'. It is difficult to see how the Applicant substantiates this assertion in the fact of the unchallenged evidence of Ms Coleman. Ms Coleman's sworn evidence is that, until the Mango Farm was developed, the native title claimant group physically occupied part Lot 291 and used the land in accordance with their traditional rights and customs. Further, Ms Coleman gives evidence that the native title claimants currently assert their rights in relation to part Lot 291.

16. The existence of native title claims and the existence of prior successful claims under the Aboriginal Land Rights Act is also evidence of the assertion of an interest in the traditional country of the claimants, including part Lot 291.

17. The Tribunal has before it a copy of the report of the Aboriginal Land Commissioner, summarising the evidence before him concerning the way of life, culture and traditions of the native title claimants (then Aboriginal Land claimants). That report is Annexure KJG-1 to the Affidavit of Kirsty Jean Gowans affirmed 19 February 2002). It details:

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

18. It is submitted, that the loss of all native title rights and interests will have an impact upon the claimants' capacity to access, use and control the area of land, subject to the acquisition. The extinguishment of native title rights and interests in part Lot 291 further diminishes the native title claimant group's traditional lands. It is submitted that the loss of rights and interests in part Lot 291, when taken together with past (and future) losses of land, will have a progressive detrimental impact on the capacity of the native title claim group to maintain its' way of life, culture and traditions.

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

19. The Applicants state at paragraph 44 of their submissions that 'On the basis of the evidence given, the acquisition would appear to have *no effect on the social cultural and economic structures of the claim group*'. It is submitted that this is incorrect. Land ownership, in itself, could form a basis for economic development of the native title claim group. The removal of the opportunity for the native title claim group to use and develop part Lot 291 (and the gradual reduction of the native title claim group's land base) is detrimental to its future

economic, social and cultural development. Extinguishment of native title rights and interests removes the opportunity and the capacity of the native title claim group to choose regarding the development of their future social, cultural and economic structures.

20. The Applicant's submissions further state that 'there is no evidence of any competing proposals for development of part Lot 291'. In this respect, the objectors note that the Tribunal found in previous cases that its role was not to balance competing land use proposals but to assess the impact of the proposed compulsory acquisition of native title rights and interests in accordance with the Act.

(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;

21. The purpose of the proposed acquisition of the part Lot 291 is to allow for the extension of the existing Pine Creek Mango Plantation currently located on Lot 305 Town of Pine Creek. This involves the provision of irrigation, additional planting of trees and construction of ancillary improvements including fencing. The Applicants submit at paragraph 10 that the native title rights and interests in part Lot 291 are to be compulsorily acquired in order to "...ensure the validity of the grant of an interest in the land to a third party in the event that native title is determined by the Federal Court to exist in respect of part Lot 291".

22. It is submitted that extinguishment of native title for the purpose of granting rights in land to a third party is unlawful. The submissions in the so-called 'Timber Creek matters' are relied on in this respect.

23. It is further submitted that, in the alternative, that the extinguishment of all native title rights and interests in the land is not necessary to allow the development proposed for part Lot 291. Consequently, it is submitted that the Applicant has not sufficiently attempted to minimise the impact of the acquisition on registered native title rights and interests.

24. The Applicant further submits at paragraph 48 that 'As the impact of the acquisition on registered native title rights and interests is likely to be minimal, this criteria has little relevance in the present inquiry'. As stated above, it is submitted that where native title rights and interests are to be permanently extinguished, the effect is fundamental.

25. The applicant further submits at paragraph 48 that the Tribunal's inquiry '... is directed to any practical effect of that extinguishment on registered native title rights'. The Applicant's submissions imply that acquisition only impacts on native title claimants if it is actual physical interference with claimants' access to land. It is submitted that this is incorrect. As stated above, it is not the exercise of native title rights and interests that the Tribunal must consider. The Tribunal is required by s 38AA LAA to assess the effect of the acquisition upon the enjoyment of the *registered* native title rights and interests. The Tribunal is required to assume that those rights exist.

26. It is submitted that if the acquisition of part Lot 291 is to proceed, it will have the effect of terminating the enjoyment of the following registered native title rights and interests:

a) to reside upon and otherwise have access to and within the application area;

b) to control the access of others to the application area;

c) to use and enjoy the resources of the application area;

d) to control the use and enjoyment of others of the resources of the application area;

27. It is submitted that if the acquisition of part Lot 291 is to proceed, it will have the effect of impairing the enjoyment of the following registered native title rights and interests:

a) to maintain and protect places of importance under traditional laws, customs and practices in the application area;

b) to transmit to others their cultural knowledge, customs and practices associated with the application area;

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

28. The Applicant submits at paragraph 9 that "The proposed use of part Lot 291 likely to result in increased commercial activity within the Town of Pine Creek as the Mango Plantation is a significant business, employer and tourist attraction in the area." A similar statement is found at paragraph 3(d) of the Affidavit of Noreen Alma Blackley, filed 23 August 2001, where she states that "The company is a significant business, employer and tourist attraction in the Pine Creek region". Yet the Applicant provides no evidence to support these assertions. No information is provided about the number of employees or financial situation of the company. Neither is any information provided regarding whether acquisition of land will increase numbers of persons employed by the company or in any other way contribute to the economy of the region or the Territory. The only evidence filed regarding the business is a brochure attached to the affidavit of Ms Blackley that appears to be a marketing brochure 'prepared by the Company in contemplation of the sale'. The brochure is undated and provides no information about the value of the business.

29. The terms of section 38AA(2) are mandatory; where the extinguishment of native title rights and interests is proposed for the purpose of granting interests to a third party the Tribunal must take into account "the economic or other significance of the acquisition to the Territory and to the region in which the land the subject of the acquisition is located, including the Aboriginal peoples who live in the region". As the proposal is made by the Applicant it is incumbent upon the Applicant to show some economic or other benefit of the proposed acquisition to the region, including the Aboriginal peoples who live in the region. In this case the Applicant has not provided sufficient evidence for the Tribunal to make an assessment regarding whether the economic or other significance of the proposed acquisition.

(d) the public interest in the acquisition.

30. The Applicant submits at paragraph 50 that "It is clearly in the public interest to provide an opportunity for the growth of a proven commercial activity which will provide employment opportunities in the region". As stated above, no evidence has been adduced by the Applicant to substantiate its claim that the Mango Farm is a 'proven commercial activity' or that the proposed acquisition will increase employment opportunities.

31. It is further submitted that the acquisition of native title rights and interests for the purpose of granting interests in land to a third party is not in the 'public interest'. The submissions in the 'Timber Creek matters' are relied upon in this respect.

TRIBUNAL'S COMMENTS AND FINDINGS ON SUBMISSIONS

99. The Objectors' May submissions are all related to the stay issue and consequently warrant no further comment.
100. In respect of the Objectors' challenge to the Tribunal's jurisdiction as set out at paragraph 25 in the Applicant's submissions, on the grounds that the proposed compulsory acquisition

(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

(c) is a proposed invalid exercise of the power of compulsory acquisition.

the Applicant correctly asserts an analogous challenge having been made to the Tribunal's jurisdiction in the "Timber Creek matters" which are specified. In that matter, submissions were made which were adopted by the Applicant as are the reasons of the Tribunal delivered on 22 March 2002 in dismissing the challenge to its jurisdiction.

101. At paragraph 35 of the Applicant's submissions, the Tribunal's obligation is in the Tribunal's finding correctly set out and that is

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.

102. In paragraphs 37 and 38 of the Applicant's submissions, the contention is made correctly in the Tribunal's finding, that settlement in relation to land in the Territory of native title issues is of no assistance in the Tribunal's function concerning the land.

103. At paragraph 39 of the Applicant's submissions, reference is made to Gowans affidavit detailing Draft Land Use Objectives and adopts the reasons of the Tribunal set out in dismissing that proposition.
104. In paragraph 41 of the Applicant's submissions, essentially the same comments as have already been made in respect of the allegations in Coleman's affidavit is highlighted in that there is no use of the land deposited to "for any of the claimed incidents of native title by the Objectors".
105. The Applicant's submissions next focus on Section 38AA LAA criteria. There is then addressed sequentially the various criteria in paragraphs 47 to 50. The above mentioned submissions basically accord with findings of the Tribunal.
106. In paragraph 6 of the Objectors' June submissions, correctly in the Tribunal's finding, it is pointed out that it is not required of the Tribunal to "look for evidence of the existence and exercise of registered native title rights". It is further correctly set out that the Tribunal's function is to determine "the effect that the acquisition will have or is likely to have on registered native title rights and interests". It is indeed the fact of registration of native title rights and interests that must be focussed on and it is on those registered native title rights and interests that the effect of the acquisition must be considered. The Tribunal has already indicated its position following *Strickland* and no further comment is warranted in relation to those matters.
107. In paragraph 7 of the Objectors' June submissions, reference is made to alleged further evidence which is irrelevant in the light of the Tribunal's attitude based on *Strickland* and insofar as such "registered native title rights and interests" do not relate to the land there is no relevance in such rights and interests.

108. In paragraph 8 of the Objectors' June submissions, it is asserted that the agreement referred to in paragraph 38 of the Applicant's submissions should be received in evidence of "further native title rights and interests in land surrounding the claimed area" should be taken into account. The Tribunal rejects that proposition as invalid.
109. In paragraph 9 of the Objectors' June submissions, it is asserted that the registered native title rights and interests pertaining to the land "are a part of the claimants' broader native title rights and interests in land surrounding the area". That may or may not be the case but the Objectors cannot 'have their cake and eat it'. As submitted in paragraph 6 of these submissions, it is the effect of the acquisition on the registered native title rights and interests in the land which must be the focus of the Tribunal's attention.
110. In paragraph 10 of the Objectors' June submissions, reference is made to Coleman's affidavit. The Tribunal does not propose to make any further comment to the comment it has already made in relation to the allegations in that affidavit.
111. It is however correct, as stated in paragraph 12 of the Objectors' June submissions, that there is some evidence in Coleman's affidavit of the use of part Lot 291 in respect of claimed incidents of native title. The vagueness and lack of precision relating to those allegations have already been commented on by the Tribunal and no further comment is made on that issue.
112. The allegations made in paragraph 13 of the Objectors' June submissions are best described as trite. Of course the Tribunal must take account of the applicable law as stated.
113. In paragraph 14 of the Objectors' June submissions, the proposition of the Applicant that "where there is no evidence of present use ... the effect of the proposed acquisition is minimal" is said to be an untenable proposition. It

is not the Tribunal's function to ensure that native title is not extinguished if the acquisition is otherwise lawful, that must be the effect of recommending it should proceed. It is the Tribunal's function to decide whether the enjoyment of those rights and interests is established and if there is no enjoyment deposed to currently or at least reasonably recently, the impact on the enjoyment must as a matter of logic be minimal.

114. At paragraph 15 of the Objectors' June submissions, assertions are made which the Tribunal finds are not valid. There is nothing in Coleman's affidavit to demonstrate current or recent exercise of any native title rights or interests.
115. The Tribunal rejects as quite invalid the submission in paragraph 16 of the Objectors' June submissions. Further comment about that paragraph and paragraph 17 is simply that the Tribunal repeats it is not its function to determine the existence of native title rights. It proceeds on the basis that they exist. It is therefore of no utility to the Tribunal to have evidence before it which may or may not be corroborative or supportive of a contention that native title rights and interests actually exist in the land.
116. It is true, as stated in paragraph 18 of the Objectors' June submissions, that the loss of native title rights and interests in the land, either incrementally observed or otherwise, at least may have some detrimental impact on the capacity of the native title claim group to maintain its way of life, culture and traditions. The task before the Tribunal is to decide whether the impact on their way of life, culture and traditions is significant enough to militate against any recommendation being made by the Tribunal in respect of the acquisition.
117. The Tribunal accepts the validity of the submission in paragraph 19 of the Objectors' June submissions. The issue again is whether the ascertainable effect is sufficient to warrant a refusal to recommend the acquisition.

118. The submission in paragraph 20 of the Objectors' June submissions is embraced as being correct.
119. The submissions made in paragraphs 21 and 22 of the Objectors' June submissions are as is set out, identical to those made in the "Timber Creek matters". The response of the Tribunal is to reject these submissions as lacking any validity, for the reasons provided in the "Timber Creek matters".
120. In paragraph 23 of the Objectors' June submissions, it is inconceivable to the Tribunal that any specific native title rights and interests could remain extant if the acquisition was to be recommended. Since the Objectors have not specified what right or interest could necessarily be allowed to stand and permit the acquisition to proceed, the Tribunal is unable to make any further comment on the matter.
121. Paragraph 24 of the Objectors' June submissions calls for no comment in the Tribunal's perception.
122. In paragraph 25 of the Objectors' June submissions, the implication referred to in the Applicant's submissions is certainly not an implication found to exist by this Tribunal. The remaining allegations do not warrant being traversed.
123. In paragraph 26 of the Objectors' June submissions, there is some specification of terminating specified incidents of native title rights. The fact of the matter is acquisition will terminate all registered native title rights and interests and so consequently the allegations in paragraph 27 of the Objectors' June submissions do not warrant any comment.
124. In paragraph 28 of the Objectors' June submissions, the submission attacks the Applicant's submission of a likely result in increased commercial activity if the mango plantation expands. An attack is similarly made in relation to the allegations specified in paragraph 3(d) of Blackley's August

affidavit. The evidence is surely the allegation sworn to by Blackley, which is in no way controverted by any evidence relied upon by the Objectors. In the absence of any controverting evidence the Tribunal is surely entitled to take into account sworn evidence such as contained in Blackley's August affidavit. It finds that to be so in any event.

125. In paragraph 29 of the Objectors' June submissions, it is submitted that there is some onus incumbent on the Applicant to show some economic or other benefit of the proposed acquisition as specified. The Applicant has tendered evidence as previously recited of Noreen Alma Blackley. The obligation is for the Tribunal to take into account the specified criterion is trite, since it is clearly compulsory that it should. That exercise must be performed on whatever evidence is available to the Tribunal and proffered by either or both parties for the assistance of the Tribunal to discharge the appropriate function.
126. The submission about the lack of evidence or the methodology of evidence to be provided in paragraph 30 of the Objectors' June submissions is rejected.
127. There is further no comment warranted in the allegations obtained in paragraph 31 of the Objectors' June submissions, which have been set out before and traversed by the Tribunal.
128. None of the oral submissions made by either party on 5 July 2002 have any bearing on the merits of the recommendation.

FINDINGS

129. 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 and to proceed to consider whether or not a recommendation should be made and if so on what terms.

130. Clearly the grounds of objection being Grounds 4, 5, 6, and 7 in the Objectors Amended Grounds for Opposing Application filed 24 May 2002 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.
131. For the purposes of summarising the findings in the Timber Creek proceeding, the Tribunal 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.
132. Notwithstanding that the Tribunal’s findings are as set out 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.

133. Subdivision P *NTA* does not apply by virtue of the fact that the land is land falling within the terms of the definition of Section 251C(3)(a) *NTA*.
134. 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.
135. 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.

136. The Tribunal is empowered in terms of Section 5(1)(a) LMT to hear and make recommendations about the objection to the acquisition of land.
137. The Tribunal determines that the Objectors are registered native title claimants.
138. 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.
139. 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.
140. The Tribunal finds that Subdivision P NTA does not apply to the intended acquisition of the land.
141. The Tribunal finds that the Objectors lodged the required objection within the time prescribed by LAA.
142. The Tribunal finds that the public interest in the acquisition of the land is a significant consideration to be taken into account by the Tribunal.
143. The Tribunal finds that there are no Aboriginal peoples who live on the land or in the immediate vicinity of or region of the land.
144. The Tribunal finds that it is of significant community benefit that the proposed development proceed subsequent to the Minister compulsorily acquiring the land.
145. Where the Tribunal concludes that an objection by the respondent 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".

146. 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 the 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.
147. 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.
148. 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.
149. In relation to paragraph 3(a), it is correct such a result will ensue. The standard Tribunal finding applies.
150. In relation to sub-paragraphs (3)(b)(c)(i) and (iii) in the light of the allegations contained in Blackley's July and August affidavits, the Tribunal concludes it is dubious whether any of the facilities will be curtailed or extinguished for reason that they have not existed in living memory. Insofar as that may be an invalid observation, the standard Tribunal finding applies.
151. In relation to paragraph 3(c)(ii), the Tribunal firstly points to Blackley's August affidavit which the Tribunal finds establishes that there are no registered sacred sites on the land. Insofar as there is any validity to the

objection that there will be interference with or an affect upon Dreamings, the standard Tribunal finding applies.

152. 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 Blackley's July and August affidavits in relation to the topography of the land and otherwise the Tribunal states that the standard Tribunal finding applies.
153. 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

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

Dated: 9 August 2002

DAVID LOADMAN
CHAIRPERSON