

**Fitzmaurice River Region
Land Claim No. 189**

Report No. 76

Report of the Aboriginal Land Commissioner,
the Hon John Mansfield AM KC,
to the Minister for Indigenous Australians
and to the Administrator of the Northern Territory

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22 June 2022

The Hon Linda Burney MP
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House of Representatives
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By email: Linda.Burney.MP@aph.gov.au

Dear Minister,

RE: Fitzmaurice River Region Land Claim (No. 189)

In accordance with section 50(1) of the *Aboriginal Land Rights (Northern Territory) Act 1976 (Cth)*, I present my report on this claim.

As required by the Act, I have sent a copy of this report to the Administrator of the Northern Territory.

Yours faithfully,

A handwritten signature in black ink, appearing to read 'John Mansfield'.

The Hon John Mansfield AM QC
Aboriginal Land Commissioner



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22 June 2022

The Hon Vicki O'Halloran AO
Administrator of the Northern Territory
Office of the Administrator
14 The Esplanade
DARWIN NT 0800

By email: govhouse@nt.gov.au

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The Hon John Mansfield AM QC
Aboriginal Land Commissioner

WARNING

This report contains the names of Aboriginal people who are deceased.

Speaking aloud the name of a deceased Aboriginal person may cause offence and distress to some Aboriginal people.

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1. INTRODUCTION

1. This Report concerns the claim brought by the Northern Land Council (NLC) on behalf of a number of Aboriginal persons claiming to be the traditional owners of the claimed land in the Fitzmaurice River Region. It was made on 27 May 1997.
2. The Fitzmaurice River runs into the south eastern area of the Joseph Bonaparte Gulf, and immediately to its south at that point the Victoria River also runs into the Gulf.
3. The Fitzmaurice River runs roughly from east to west to the Joseph Bonaparte Gulf, part of the Timor Sea. So it is convenient to use the terms the northern bank and the southern bank to describe the line of its banks. It is also apparent that, as the Fitzmaurice River runs towards and into the Joseph Bonaparte Gulf, its width from bank to bank increases quite significantly. There is an issue about the location of the mouth of the river as it flows into the Gulf. It is addressed in the next section of this Report. In the area where the Fitzmaurice River runs into the Gulf, there are three islands, named Quoin Island (Northern Territory Portion 4171), Clump Island (Northern Territory Portion 4172) and Driftwood Island (Northern Territory Portion 4173), and a little distance upriver to the east an unnamed island (part of Northern Territory Portion 1637).
4. The Fitzmaurice River is some 350 kilometres west south-west of Katherine. It is in remote and isolated and rugged terrain with limited access. Access is also restricted by the monsoonal wet season for some months of each year. The monsoonal season is followed by a long dry season. There are extensive salt flats in the lower reaches of the river. The river is accessible by boat from the Joseph Bonaparte Gulf, and navigable for a considerable distance. The seven metre tidal range, twice daily, makes navigation challenging. The navigable section upstream runs roughly to the Koolendong Valley, an extensive valley running approximately north-east/south-west both to the north and to the south of the Fitzmaurice River.
5. The claim was made under section 50(1)(a) of the *Aboriginal Lands Rights (Northern Territory) Act 1976* (Cth) (ALRA) on 27 May 1997. The principal area of the claim as first made is broadly the beds and banks of the Fitzmaurice River.
6. For many years after the ALRA was enacted, it was unclear the extent to which a grant of land to a Land Trust under the ALRA which extended into the tidal waters of a river or of the sea entitled the traditional owners to control access to those waters. In addition, this particular claim area is in very remote country. It is understandable why, in those circumstances, the claim was not pursued as a matter of priority. It became much more significant following the decision of the High Court in *Northern Territory of Australia v Arnhem Land Aboriginal Land Trust* [2008] HCA 29; (2008) 236 CLR 24 (the *Blue Mud Bay* decision). In that decision, the High Court determined that, as the grant of land under the ALRA extended to the low water mark, the traditional owners of land granted under the ALRA could exclude others from entry to the intertidal zone and thereby to tidal waters within the boundaries of grants under the ALRA.
7. For reasons which will become apparent, it is desirable to set out in full the description of the land claimed, as expressed in the original application:

(i) Beds and Banks of the Fitzmaurice River

All that land in the Northern Territory of Australia being the beds and banks of the Fitzmaurice River from the mouth of the said river to where the river meets the western boundary of Wombungi Pastoral Lease (NTP 3685), and including the islands located within the boundaries of the said river.

The location of the land claimed is shown hatched on Map A attached to this application.

...

(ii) Northern Territory Portions 4171, 4172 and 4173

All those areas of land in the Northern Territory of Australia being Northern Territory Portion 4171, Northern Territory Portion 4172 and Northern Territory 4173, each to the low watermark.

The location of the land claimed is shown hatched on Map A attached to this application.

...

(iii) Land seaward of the Northern Territory

All that land in the Northern Territory of Australia which is adjacent to, and seawards of the low watermark of the seacoast of the mainland from, in the west, the point where the eastern-most point of the mouth of the Victoria River meets the aforesaid low water mark, (marked on Map B by the letter 'X'), and to, in the east, the point on the western boundary of Daly River/Port Keats Aboriginal Land, just north of Chindi marked on Map B by the letter 'Y';

Including, without limitation:-

- (A) any islands, or part of any island, to low water mark, in the region described above, including any rights, members or appurtenances of such an island, or part thereof;
- (B) the bed of any bays or gulfs of the mainland or of an aforesaid island (or part thereof), or part of any such bay or gulf, in the region described above; and;
- (C) all those sandbars, islands, islets, reefs, rocky areas and other formations enumerated on the map attached to this application;

The location of the land claimed is shown on Map B attached to this application. The arrows marked on the map, which extend from points 'X' and 'Y' in the directions shown on the map, show directions of two of the boundaries of the area in which the said land being claimed is located, the other boundaries being the low water mark between those two points and the seaward limits of the Northern Territory. It should be noted that in some instances, the low water mark and the seaward limits of the Northern Territory may be identical.

Note: Two maps showing the locations of the areas claimed are attached. The map depictions of the claimed areas are approximate only and are subject to the description of the claimed areas as set out above.

...

8. The Maps A and B referred to are Annexures A and B to this Report.

9. It is now accepted that the three named islands referred to above and being Northern Territory Portions 4171, 4172 and 4173 were not 'unalienated Crown land' at the time of the application, having been the subject of Crown Lease Perpetual No 1235 to the Northern Territory Land Corporation commencing on 29 January 1993. Consequently, that part of the land claimed in the application which is specified in (ii) is not available to be claimed. The NLC on behalf of the claimants accepts that. The common acknowledgement is also that each of those portions extends to the low water mark. As discussed below, the location of those portions is, however, significant in understanding the scope of the claim generally when it was made.
10. The third of the areas of the land claimed, as specified in (iii) in the original application, is also an area which the NLC, on behalf of the claimants, accepts is not now contentious. There was no evidence adduced to support the claim over that area. The NLC made no submission that this area should be the subject of any recommendation to the Minister. In the absence of such evidence, it is apparent that there can be no recommendation that it be granted to any traditional owners.
11. The area claimed was therefore narrowed from the original application to the beds and banks of the Fitzmaurice River, and being area (i) as described in the original application. There is a convenient depiction of the claim area as Map 1 in para 1.1 of the Anthropologist's Report on behalf of the Claimants, June 2017 (Exhibit A2) (the first Anthropologist's Report). It is Annexure C to this Report.
12. I will call it the Claim Area Map. The claim area is highlighted by colour. The small coloured section running north and south adjacent to the three islands is called Gunn Channel and connects to the Victoria River.
13. As that map depicts, the northern side of the claim area/Fitzmaurice River is bounded by the land held by the Daly River/Port Keats Aboriginal Land Trust (Northern Territory Portion 1637 on Survey Plan CP4183) (the Daly River/Port Keats ALT). That grant was made pursuant to the land being included in Schedule 1 of the ALRA upon its enactment.
14. On the southern side of the claim area, the Fitzmaurice River is bounded by Bradshaw Station or more commonly called in the evidence the Bradshaw Training Area (Northern Territory Portion 3686), held by the Commonwealth of Australia under Crown Lease Term 2078 for the Department of Defence. The area of the Bradshaw Training Area under that grant is identified by Compiled Plan 4953.
15. The eastern end of the area claimed is bounded by the western boundary of the land comprised in Pastoral Lease 1083 Wombungi (Northern Territory Portion 3685).
16. The area claimed, although on and along the Fitzmaurice River and its beds and banks, is an extensive one. The evidence suggests it is a length of some 276 km from the western opening of the river area to the sea adjacent to the three islands to the south and adjacent to the lower reaches of the Macadam Range to the north. It runs to the south eastern section of the land of the Daly River/Port Keats ALT. (I am attempting to use a neutral description for reasons which are apparent below). The eastern extremity of the claim area is the western boundary of Wombungi Pastoral Lease.

17. There is a complex riverine topography in the area claimed and the immediate hinterlands comprising mudflats, islands, deep gorges and sandstone ranges. Professor McWilliam, the principal anthropologist who gave evidence in support of the claimants, says the area claimed and the immediate hinterlands constitutes about 300 000 hectares. It is largely inaccessible by wheeled vehicle, except during the dry season, and then only by rough tracks running north through the Bradshaw Training Area, and from Wadeye settlement through the Daly River/Port Keats ALT area, and by the Dorisvale Road through Wombungi Pastoral Lease.
18. The claimants comprise members of nine local descent groups, being (from west to east) Dalunggag, Wakal Jinang, Yambarnyi/Ngamar, Bugurniny, Maranguname/Madjalindi, Kimul, Kartinyen, Wujuman and Wagiman groups.
19. There is however significant dispute between the claimants and the Northern Territory about two fundamental matters. The first is the availability of the area claimed, or much of it, and the second is about that status of the claimants as traditional owners of the area claimed. Those matters are addressed in detail in the following sections of this Report. In addition, there are some issues arising from the matters specified in section 50(3) of the ALRA concerning detriment which it is also necessary to address.
20. Those matters were addressed in detail both by evidence and submissions. The Inquiry commenced on 8 August 2017. There was extensive evidence relating to the extent of the area available to claim, as to the issue of traditional ownership, and as to the issues of detriment and patterns of land usage. The evidence on traditional ownership took place at Table Hill on Wakal Jinang country near the area claimed between 3–6 September 2018, including inspection of certain sites on helicopter flyovers and stops during that period, and at Katherine on 30 October 2018. Some of that evidence was restricted. There were two principal anthropologists who gave evidence: Professor Andrew McWilliam and Dr John Avery. Dr Avery was called to give evidence by the Northern Territory. Their evidence of course included their reports, notes of their discussions, and oral evidence on 13 and 14 February 2020. The first Anthropologist's Report relied on by the claimants was prepared by an experienced anthropologist John Laurence: his report was adopted by Professor McWilliam. Evidence on the latter topics of detriment and patterns of land usage took place in Darwin between 26–28 February 2018 and on 25 June 2018, and was followed by extensive written submissions. There was considerable documentary material produced relating to all issues.
21. The course of submissions was not a typical one. Following the Claimants' Submissions and the Responsive Submissions of the Northern Territory, as was anticipated, the claimants provided their Reply Submissions on Traditional Aboriginal ownership on 28 July 2020 (the Claimants' Reply Submissions). That document attached three further documents not previously in evidence.
22. The first attachment was said to be a document entitled 'Big River Dreaming – Aboriginal Toponyms and Cultural Heritage in the Fitzmaurice River Region', by Professor McWilliam, Aboriginal Areas Protection Authority 1999, with 4 maps and 1 photograph. It comprised (in the copy provided with the submission) only the cover page, the maps and the photograph, without the text.

23. The second attachment was entitled 'The Little-Known Fitzmaurice region 'Wine-Red' Pictograms', by Graeme K Ward and Mark Crocombe, and published in *Rock Art Research*, 2014, Volume 31, Number 1, pp 14–30.
24. The third attachment was entitled 'Dating of Rock Paintings in the Wadey-Fitzmaurice Region, Northern Territory', by Alan Watchman, Graeme K Ward, Mark Crocombe and Ken Mulvaney, and also published in *Rock Art Research*, 2010, Volume 27, Number 2, pp 223–228.
25. Not surprisingly, the Northern Territory was given the opportunity to respond to that material. It provided quite extensive further Submissions in Response dated 29 September 2020. By letter of 9 October 2020, the claimants through the NLC reacted. They said that the Northern Territory response ranged 'far and wide' and beyond the matters raised in the supplementary material constituted by the three attachments, and raised a 'variety of new issues and fresh comments'. The claimants then said that they did not intend to respond further, unless I as the Aboriginal Land Commissioner considered their response would be of assistance on any particular matter. Without knowing what those putative responses might have been, it would of course be impossible to form any meaningful assessment of their utility. The claimants added that, in any event, they should not be taken to have agreed with the comments of the Northern Territory.
26. I have treated the three attachments as part of the submissions of the claimants, and have not regarded them as evidentiary material. I have not had them marked as exhibits. As submissions, or as part of the submissions, they may throw some light on the evidentiary material, including that of the two principal anthropologists. I have also treated the submissions for what they are: submissions as to matters I should address in determining whether the claimants, or any other Aboriginal persons, are the traditional owners of the area claimed or parts of it. The factual issues have been well ventilated over the course of the Inquiry in the manner I have described above. I did not consider it appropriate to invite the claimants to formalise the additional material as evidence by asking to re-open the evidence: they were represented by the NLC and would have been well aware of that option. They made no such application.
27. Ultimately, the exchange of written submissions on all topics was completed only on 15 October 2020.
28. Given the complexity of the principal issues, I note that I was greatly assisted by the care and thoroughness with which they were presented, and I am grateful to the legal teams and the anthropologists for that work.
29. As a matter of colonial history, the Fitzmaurice River was first explored in 1839, when the Beagle was engaged to undertake surveys of the northern Australian coast, including to search for inland rivers. On that journey, both the Fitzmaurice River and the Victoria River were explored, the former then being named after the assistant surveyor who led a small party led by Mr L R Fitzmaurice upriver for about 30 miles to chart its lower reaches. The journal records that the Beagle passed through a channel past the flat extending off the south end of the M'Adam Range (as it appears in the journal), and anchored between Driftwood Island and Quoin Island. The next day, Mr Fitzgerald and Mr Keys (hence Keys and later Keyling Inlet) set off from that

point to explore ‘the river-like opening, under the south end of M’Adam Range’. The report of the journey refers to discovering ‘a river that carried his boat thirty miles in an east direction from the south end of M’Adam Range’.

30. The next exposure of the local Aboriginal peoples to exploration was in 1855 when Gregory’s expedition traversed the Macadam Range, and crossed the Fitzmaurice River on the route south to the Victoria River. In that part of his journey, he recorded some sightings of Aboriginal people on the northern side of the Fitzmaurice River.
31. European pastoral developments then proceeded in the 1880s, including near what is now Timber Creek on the Victoria River. In or by 1894, the Bradshaw brothers had taken up a pastoral lease on the area south of the Fitzmaurice River, now known as the Bradshaw Training Area. The logbook of the early years of the station confirms extensive Aboriginal peoples in the area, both by the use of Aboriginal place names and by the records which reveal some most shameful behaviour towards them over a number of decades. There are recorded a number of most unfortunate incidents including killings in response to understandable Aboriginal opposition to the pastoral developments.
32. It was only in 1935 that any permanent European settlement in the general area was established. That was the Port Keats mission, established in that year.
33. A year earlier, the anthropologist W E H Stanner had visited the area. He described the Jaminjung as by then semi-nomadic and decimated in numbers. A number of Jaminjung resided on what was then Bradshaw Station and they had detailed knowledge of the Koolendong Valley. They included predecessors of the current claimants in the Kimul estate group. Stanner’s observations of the Aboriginal persons in the general area persisted over some decades. There is other contemporary observation of Aboriginal occupation and use on and around the Fitzmaurice River and in the Koolendong Valley and up to Port Keats. Mr Laurence and Professor McWilliam have also referred to the detailed anthropological research of the Falkenbergs in the early 1950s, focussing on Murinpatha social organisation and about the Madjalindi estate group, and of Blythe who has more recently reviewed contemporary aspects of Murinpatha social and ritual organisation. Reference is also made to other anthropological research, which includes some focus on the particular area claimed as part of the wider Victoria River District and the East Kimberley District.
34. Indigenous occupation continued nonetheless, despite the draw of station life and cattle musters, with the continuance of traditional activities, foraging, and ceremonial life. Mr Laurence refers to the particular geography of Bradshaw Station, with a succession of deep parallel valleys (including the Little Fitzmaurice, Koolendong, Yambarnyi and Wanamarra valleys), which preserved walking tracks linking the cattle stations south of the river with the river itself, and also with Port Keats. He identifies certain Aboriginal persons who had direct personal knowledge of those tracks and their usage.
35. Mr Laurence also describes the drift to regional towns and settlements by the claimant groups from the late 1960s, and then subsequently with the outstation movement the revitalisation of connections to ancestral country. Road access to

Wakal Jinang and Madjalindi Valley facilitated that focus including group dry season camping from Wadeye and Palumpa. The Indigenous Land Use Agreement with the Commonwealth provides for, and facilitates, a range of traditional activities on the Bradshaw Training Area, including camping, foraging, sacred site protection and for time spent on country.

2. THE CLAIM AREA: THE EXTENT OF THE CLAIMABLE LAND

36. The first issue concerning the claim area is to identify the outer limit of the available claim area. The Northern Territory said that the mouth of the Fitzmaurice River was some considerable distance inland or east of the point which the claimants asserted (as depicted in the coloured section of the Claim Area Map included above/annexed to this Report as Annexure C). The submission was that as a matter of recognised geographical standards, the mouth of the river was much further to the east of the area claimed.
37. The same argument applied equally to the ‘mouth’ of the Victoria River just south of the Fitzmaurice River and to the ‘mouth’ of the Keep River a little further to the south and west of the Victoria River.
38. Each of those three rivers flows into the Joseph Bonaparte Gulf.
39. Hence it was said first that, as the area claimed was by reference to the mouth of the river, it must have been restricted to the river eastwards of its ‘mouth’ as said to be geographically defined, and so excluding waters of estuaries and wider areas of what is commonly called the Fitzmaurice River as shown on other documents in the evidence.
40. The alternative submission was that, even if the area claimed extended to the area depicted in the Claim Area Map, the area between the geographical mouth of the river (as defined by the evidence called by the Northern Territory and supported by the Commonwealth) and westwards from that line was not available to be claimed because it was not ‘unalienated Crown land’ in the Northern Territory. Section 50 of the ALRA relevantly provides that a claim may be made in respect of unalienated Crown land. Section 3 contains definitions of ‘unalienated crown land’ and ‘Crown land’. It is clear that the term ‘Crown land’ means, and is confined to, land in the Northern Territory. In short, the argument meant that, for the purposes of the ALRA, the land in the Northern Territory in the vicinity followed the coastline down the eastern side of the Gulf to the point where the Fitzmaurice River flows into the Gulf and then indents eastwards some considerable distance from the natural line of the coast made by a line between the opposing headlands. The argument is that for the purposes of the ALRA there is a lengthy finger indentation to the ‘geographical mouth’ of the river along its northern side adjacent to the Daly River/Port Keats ALT across the ‘mouth’ and then running west again along the river boundary with the Bradshaw Training Area to the physical coastline between the Fitzmaurice River and the Victoria River. That area of flowing water and the underlying bed of the water is said to be excluded from being ‘land in the Northern Territory’ for the purposes of the ALRA. The same argument was made, albeit only somewhat belatedly, in respect of the Victoria River and further west the Keep River, where there is said to be similar ‘finger’ indentations.
41. In this claim, the contention of the Northern Territory (supported by the Commonwealth) then appeared to accept that where the Fitzmaurice River flows into the sea there is a short area of coastline which again is Crown land as defined in the ALRA and so ‘land in the Northern Territory’, including the three islands (but for their alienation). There was no suggestion that the three islands Quoin Island, Clump

Island and Driftwood Island were excluded from being Crown land, and available for claim but for their earlier alienation. I shall refer to the status of the unnamed island (part of Northern Territory Portion 1637) shortly.

42. The consequence of that contention is that the western boundaries of the Daly River/Port Keats ALT and of the Bradshaw Training Area, that is beyond the 'geographical mouth' of the river as proposed by the Northern Territory, do not abut 'land in the Northern Territory' for the purposes of the ALRA, even though the grant of the Daly River/Port Keats ALT upon the enactment of the ALRA extended to the low water mark of what seems to have been understood generally as the Fitzmaurice River.
43. As noted, the same issue arose in the Gregory National Park/Victoria River Land Claim (No 167) and the Legune Area Land Claim (No. 188) which were heard together (called in this Report the Legune Area Land Claim) in relation to the beds and banks of both the Victoria River and to a lesser extent the Keep River. I have conducted an inquiry into that land claim and have reported to the Minister concerning it: Gregory National Park/Victoria River Land Claim (No. 167) and Legune Area Land Claim (No. 188) Report No. 74 (25 June 2021) (Legune Report). It may be that the issue was raised in the hearing of the Legune Area Land Claim only as an afterthought, as the evidence in that hearing had been completed and it was by application then to re-open the evidence that the issue was raised there. The issue had been raised at an early juncture in the hearing of this claim, which took place after the hearing of the Legune Area Land Claim.
44. In fact the hearing of the evidence on this topic in both this claim and the Legune Area Land Claim took place together. In the Legune Report, I appended my reasons for rejecting the contention of the Northern Territory: see Annexure D to that Report. I shall adopt the same course in this Report, annexing those reasons as Annexure F.
45. However, it is first necessary to deal with the first matter argued by the Northern Territory on the issue. It is also desirable to refer in a little detail to the evidence specifically pertaining to this land claim. It is fair to say that, although the issue was common to both the land claims referred to, its primary significance related to the Fitzmaurice River Region Land Claim, at least having regards to the extent of the inland exclusion of the area claimed because it was west of the now defined 'mouth' of the river.

2.1. THE EXTENT OF THE LAND CLAIM

46. It is clear from the relative informality of the wording in the application itself that the expression 'from the mouth of the [Fitzmaurice River] to where the river meets the western boundary of Wombungi Pastoral Lease' is not used as a term of geographic precision in the sense that the Northern Territory and the Commonwealth now attribute to it. It is a way of identifying the area claimed.
47. The location is said to be shown as hatched on Map A (Annexure A to this Report) attached to the application. Reference to that map makes it clear that the claimants intended to claim traditional ownership of the beds and banks of the Fitzmaurice River to an imprecise line drawn roughly from the north western corner of the Bradshaw Training Area more or less north to the nearest point of the south western

corner of the Daly River/Port Keats ALT area. That is the hatched area identified as part or area 'i' in the application itself. It includes the area in the river where the unnamed island comprising Northern Territory Portion 1637 lies. It is a line drawn significantly further to the west than the 'mouth' of the river as identified in the evidence adduced by the Northern Territory and supported by the Commonwealth.

48. It is also shown as hatched almost up to the three islands referred in in part (ii) of the application.
49. In my view, it is clear enough what area was relevantly intended to be claimed in part (i) of the application.
50. That, of course, does not resolve the question of whether that area was available to be claimed as unalienated Crown land. The more substantive matter in dispute is whether the beds and banks of the Fitzmaurice River to the western end of the area claimed were in fact unalienated Crown land, and more specifically whether they were land in the Northern Territory either as that term is used in the ALRA, or indeed at all. The alternative is that, for the purposes of the ALRA, the land in the Northern Territory did not extend within the area of the river and its beds and banks to that point, but is confined to an area significantly further to the east.
51. Before turning to that question, I note that the Claim Area Map in the first Anthropologist's Report (referred to above and annexed to this Report as Annexure C) does not entirely accord with the area claimed in the application. It appears to extend the coloured area a little further to the west, so that a line is drawn from the northern tip of Clump Island slightly laterally to a point just east of north. In any event nothing turns on that discrepancy. If there were any significance attaching to it, I would confine the area claimed to that as identified in the application itself.
52. The other discrepancy is the inclusion of a narrow coloured area in the Claim Area Map by the inclusion of what is called Gunn Channel running south from the north western corner of the Bradshaw Training Area between the mainland and Driftwood Island and extending to the Victoria River. That area is clearly not hatched in Map A in the application (Annexure A to this Report). I do not consider that there is any basis for the claimants now to pursue an entitlement as traditional owners to that additional area.
53. Again, in the light of the findings made on the topic of traditional Aboriginal ownership, that additional coloured area does not result in the recommendation to the Minister being confined in any way resulting from the inclusion of that area in the Claim Area Map.
54. There is a further matter which should be recorded before turning to the 'mouth of the river' issue.
55. As noted, the northern boundary of the area claimed abuts the Daly River/Port Keats ALT area along its length. Schedule 1 Part 1 of the ALRA under the heading 'Daly River' provides with respect to the river boundary of that Land Trust (and going from east to west):

... southerly by a western boundary of the said Pastoral Lease [Coolibah Pastoral Lease No 597] to its intersection with the right bank [facing downstream] of the Fitzmaurice River; thence generally westerly by the said bank of the Fitzmaurice River to a point

north of the tidal limit of the said river; thence south to the low water mark of the right bank of the Fitzmaurice River; thence generally westerly by the said low water mark of the said River to its intersection with the low water mark of the seacoast of the Timor Sea; ...

56. It is common ground that the description means that the northern boundary of the area claimed above the tidal limit of the river is the shared boundary with the Daly River/Port Keats ALT, and from the tidal limit and extending westwards the boundary of the Daly River/Port Keats ALT land is the low water mark. Consequently, the northern boundary of the area claimed, downstream of the tidal limit of the river, is the line of the tidal low water mark extending to the low water mark of the sea at the coast (or, on the position of the Northern Territory, at least running west until the 'geographical mouth' of the river). It may be observed that such an analysis might mean that the land granted to the Daly River/Port Keats ALT west of the 'geographical mouth' of the river (to the low water mark) was not correctly granted, because the Northern Territory says that the area between the low water mark and the high water mark west of that point is not 'land in the Northern Territory' within the definition of Crown land in the ALRA. That is the position it has adopted in relation to the area below the high water mark and west of that point on the southern side of the river.
57. The claimants say that, as the grant to the Daly River/Port Keats ALT explicitly provides for a short southerly line at the tidal limit to the low water mark, upstream or east of that point the area claimed includes land to the top of the bank of the Fitzmaurice River. The Northern Territory says that none of the current title diagram and description, and Survey Plan CP4183 and the original Deed of Grant to the Land Trust (Volume 23 Folio 133) are explicit on that point.
58. I propose to proceed on the basis that the position put by the claimants is correct. First, because the Schedule 1 description in the ALRA seems to have addressed the point and recognised a difference between the tidal and non-tidal line for the boundary; and second because the submission is put on behalf of the claimants by the NLC which would also have responsibility for the proper interests of the Daly River/Port Keats ALT. It is correct to say, as the Northern Territory does, that the precise identification of the top of the bank by survey has not yet been undertaken.
59. The southern boundary of the area claimed is the southern bank of the Fitzmaurice River. There is a small section of the southern boundary, at its easternmost extreme, which abuts the western boundary of the Wombungi Pastoral Lease. For the same reasons, the top of the bank of the river is the boundary line of the claim area for that section of the southern boundary.
60. The remaining portion of the southern boundary (as claimed) abuts the Bradshaw Training Area. The tidal reach of the river, according to the evidence of Mr Gary Willis (which is not challenged) is just upstream from the confluence of Alligator Creek, and just west of Gauging Station G1820220 at 14.8666453 S, 130.230719 E. To that point from the 'mouth of the river' (wherever located), the area claimed is along the mean high water mark of the tidal water in the river. Eastwards of that point to the intersection with the Wombungi Pastoral Lease western boundary, the area claimed is to the top of the bank of the river.

61. I have expressed my conclusion about the extent to which the area claimed is available for claim as unalienated crown land of the Northern Territory, principally having regard to the proper construction of the ALRA. I do not accept the contention of the Northern Territory itself that the area claimed (to the extent that it lies west of the now defined 'mouth' of the Fitzmaurice River) cannot be included in the claimed area, irrespective of the evidence of Aboriginal persons who say that they are the traditional owners of that area.
62. As I did in the Legune Report, I annex to this Report as Annexure F my reasons for deciding that the expression 'land in the Northern Territory' in the ALRA and in the other relevant enactments referred to in the Annexure is not confined to the area east of where the Northern Territory contended is the 'mouth' of the Fitzmaurice River.
63. That point can be seen at the line at point B in the map which is Appendix 1 to the Annexure. It is considerably inland of the western extent of the claimed area, and largely excludes the 30 mile stretch of water which (as noted above) the party led by Mr Fitzmaurice described as a 'river like opening', east of the point of Driftwood Island and Quoin Island. It excludes an area where there are identified significant sites and Dreamings canvassed in evidence, including the sites *Dedeme* (Site 7), *Minbiya* (Site 9), and *Baya* (Site 10) and associated Rainbow, Water Buffalo and Mullet Dreamings. There are also identified sites at about the point where (the Northern Territory says) the 'geographical mouth' of the river lies known as *Binbungu* (Site 13) and *Burrbada* (Site 14) with associated Dreamings of the Black Whip Snake and Black Headed Python. Those points are further considered later in this Report.
64. It is appropriate to refer to the unnamed island containing the site Minbiya (Site 9) which is within the river and somewhat on its northern side but well to the west of the 'geographical mouth' of the river. It was not expressly referred to in the description of the grant of the land to the Daly River/Port Keats ALT in Schedule 1 Part 1 - Daly River of the ALRA (set out in part at [55] above). There, the relevant boundary is said to be the low water mark of the river running to the coast. The evidence did not clearly indicate whether the low water mark ran so as to include that island because the waters between the mainland and that island were all above the low water mark.
65. The Deed of Grant made on 30 May 1980 under section 10 of the ALRA refers to that description, but also includes reference to the Northern Territory Portions included in the grant, including Northern Territory Portion 1637. The Certificate of Title Volume 511 Folio 164, reflecting the grant, also includes at page 4 of 4 a map indicating that Northern Territory Portion 1637 includes the unnamed island by the bold marking. An enlargement of part of Survey Plan CP/004 183 also confirms that. At least one of the maps provided during the hearing also marked the unnamed island as included in that Portion.
66. Those matters have significance to the recommendation in Section 3.4 of this Report.

3. TRADITIONAL OWNERSHIP

3.1. THE RESPECTIVE POSITIONS OF THE CLAIMANTS AND THE NORTHERN TERRITORY

67. The significant dispute between the position of the claimants and the Northern Territory was exposed in the first exchange of written submissions.
68. The claimants say they constitute an assembly of the nine subgroups referred to in the Introduction to this Report, drawn from three distinct language groups: Jaminjung, Murinpatha (which includes the Murin Kura dialect) and Wagiman. The local descent groups are:
- Dalunggag (Group 1);
 - Wakal Jinang (Group 2);
 - Yambarnyi/Ngamar (Group 3);
 - Bugurniny (Group 4);
 - Marangunama/Madjalindi (Group 5);
 - Kimul (Group 6);
 - Kartinyen (Group 7);
 - Wujuman (Group 8); and
 - Wagiman (Group 9).
69. I have included the group numbering consistent with the submissions.
70. The claimants claim the entirety of the area claimed, because the fact and distribution of the underlying cultural or language blocs reflect the geography of the Fitzmaurice River and its hinterland, with the river being, historically, a meeting point of cultural and language blocs.
71. In the first Anthropologist's Report, it is said that, despite the diversity of languages spoken, there is an underlying logic and coherence regarding kinship, social organisation, spiritual affiliation and land tenure. The coherence is said to unite the nine groups in a broad cultural bloc that included active forms of interaction, trade, ceremonial engagement and marriage. It also says that that coherence was first identified by the anthropologist W E H Stanner in the 1930s and has been sustained and renewed since then through ongoing marriages, residence and participation in ritual events.
72. The Northern Territory accepts that the languages Jaminjung and Murinpatha reflect distinct cultural groups, in accordance with the geography of the Fitzmaurice River. It says that the work of Stanner may have first described the river as the boundary of Jaminjung and Murinpatha territories, each with distinct cultural traits. The Jaminjung extend to the south, and with subsections, kinship with four lines of descent, who practised second cross-cousin marriage and the rituals of subincision. The Murinpatha extend to the north, and did not have subsections, with a kinship system of only two lines of descent, and who practise marriage between (distant) first cross-cousins, but

did not practise originally the rituals of subincision. It is the Northern Territory's position that there are significantly different cultural features between the Jaminjung and the Murinpatha groups, said to be attributable to the Fitzmaurice River being an obstacle to greater intercourse between them. It is said also that the river was not a meeting point or focus for one broader cultural community.

73. The relevance of subsections ('skins') to Dr Avery, the anthropologist engaged to advise the Northern Territory, was to help illuminate group structure and patterns of marriage, including marriageability. Dr Avery had observed upon possible interfamilial differentiation. The Northern Territory says that such issues might have been further explored to assist in defining local descent groups with common spiritual affiliations, but the material to expose such a state of affairs did not emerge. He also made observations about the standing of certain of the putative local descent groups on the Bradshaw Training Area side of the river, compared to the evidence concerning them on the northern side of the river.
74. The general position of the Northern Territory was also that the genealogies and oral evidence of Jaminjung and Murinpatha kinship, marriage and ceremonial ties show that the Jaminjung and Murinpatha belong to different communities extending either side of the river. In that context, Dr Avery remarked on the absence of evidence of those communities adapting to riverine life for subsistence. They focussed on grasslands, billabongs, creeks and tidal flats for resources.
75. The Northern Territory also accepts that, as a result of and following the development of the region in the late 19th and early 20th centuries, when the Aboriginal communities spread more widely and mixed on cattle stations and the like, the Jaminjung and Murinpatha mixed more and endeavoured to accommodate the others' cultural systems. However, it says that both those groups have in essence preserved the cultural distinctions to the present time.
76. The graphic encapsulation of the Northern Territory submission, adopting the words of Dr Avery, is that the groups had 'their backs to the river' and that the river comprised a 'hard boundary' between them.
77. The Northern Territory says that there is little in the first Anthropologist's Report, or in the Supplementary Amendments to that Report of 28 August 2017 (Exhibit A2(A)) (Supplementary Anthropologist's Report) to describe Wagiman social organisation. It says the Wagiman cultural identity was formed in the 20th century and was consolidated into the Upper Daly Land Claim (comprising the Douglas (Wagiman), Umbrawarra Gorge-Jindare (Wagiman), and Upper Daly Land Claims (Nos. 11, 12 and 32) by the *Upper Daly Land Claim Report No. 37* given in three separate volumes on 10 August 1989, 8 February 1990 and 2 March 1990 (*Upper Daly Land Claim Report*). It noted that the Wagiman language is nearly extinct. Justice Kearney as the Aboriginal Land Commissioner recommended a grant in favour of a select group of Wagiman-descended families that had formed communal ties to traditional lands on certain cattle stations where they had worked over a number of generations, and had by that experience developed a common spiritual affiliation and primary spiritual responsibility for certain lands: see that Report at [81]. Hence, the Northern Territory says that the current Wagiman social organisation is a synthesis of their historic station way of life within Aboriginal traditions.

78. I note also that the two principal anthropologists Professor McWilliam and Dr Avery conferred prior to the hearing to explore the extent to which their respective views might be refined. One option raised was that the claimants might form a single community, particularly with respect to the Jinimin sites which largely spanned the length of the area claimed. The exploration of that possibility did not produce an agreed outcome. It is not necessary to go into details. There is an extensive section of the Responsive Submissions of the Northern Territory in which it explains why it says the *Jinimin* story (also described as the Rainbow Serpent/Little Bat story) does not assist the claimants. The Claimants' Reply Submissions explain that they do not say the story explains the creation of the river, or represents a single sacred site. It is a major mythology 'that unites the riverine communities in a shared tradition': at [5.3]. Obviously, that relevant evidence will have to be addressed in some detail.
79. The Northern Territory says that no Aboriginal witness suggested that the claimants comprise a single community with respect to the river.
80. Before turning to consider the specific evidence, I indicate that I do not draw any adverse inference in relation to the claimants, and the status of the claim group or groups as they were presented, by reason of the number of claimant witnesses, or the fact that some of them were not called to give evidence. I do not need to go into detail. There was some evidence of illness, old age and frailty, the need to attend medical appointments, attending to sorry business and work commitments. When the evidence was taken on country near Table Hill, there was concurrently a hearing in the High Court of Australia concerning the assessment of compensation under the *Native Title Act 1993* (Cth) for the extinguishment of native title within the township of Timber Creek, upriver on the Victoria River. That was a very important matter for some of the claimants, and a decision to attend that hearing is entirely understandable. The decision was subsequently given on 13 March 2019: *Northern Territory of Australia v Mr A Griffiths (deceased) and Lorraine Jones on behalf of the Ngaliwurru and Nungali Peoples* (2019) 269 CLR 1; HCA 7.

3.2. THE CLAIM GROUPS

81. The claimants' contention was that there should be a single grant recommended by this Report based on the traditional ownership by a collective of Aboriginals comprising each of the nine individual local descent groups referred to above, with each of the individual groups having primary spiritual responsibility for particular sites within the area claimed. They acknowledge that there are three language groups within the claim group, but say that the evidence shows close social and cultural connections between each of the nine subgroups, including by:
- Intermarriage across the subgroups, creating patterns of familial relations that, even if separate from and parallel to the descent of rights, informed the underlying social and cultural interconnection across and along the river;
 - Common life experience;
 - Joint endeavours (culture camps – an entitlement under the Bradshaw Training Area Indigenous Land Use Agreement);
 - Shared use of the river, and common recognition of rights to fish and hunt;

- Mutual respect and recognition, exemplified formally and expressly in evidence and informally as shown by the way the on country hearings were conducted;
 - Sharing of Dreamings (including the Rainbow – Little Bat mythology); and
 - Shared participation in ceremony and the transmission of cultural knowledge.
82. Before considering the evidence in relation to those features, it is worth referring back to the definition of ‘traditional Aboriginal owners’ in section 3 of the ALRA. It means:
- ... a local descent group of Aboriginals who:
- (a) have common spiritual affiliations to a site on the land, being affiliations that place the group under a primary spiritual responsibility for that site and for the land; and
 - (b) are entitled by Aboriginal tradition to forage as of right over that land.
83. I accept that each of the principal anthropologists Professor McWilliam and Dr Avery, are well qualified and experienced in relation to the matters in dispute, and including exposure to the present claimants. They each worked for a period of time with the Aboriginal Areas Protection Authority, as well as carrying out other work concerning the claimants’ cultural and social customs and responsibilities. Much of the work for the first Anthropologist’s Report (Exhibit A2) was done primarily by the anthropologist Mr Laurence, with Professor McWilliam. That report was supplemented by the Supplementary Anthropologist’s Report (Exhibit A2(A)) prepared by Mr Laurence. Professor McWilliam accepted it as a useful supplement, but specifically declined to ‘adopt’ it.
84. It is desirable to note that the Supplementary Anthropologist’s Report (Exhibit A2(A)) notes and endeavours to correct inconsistent spellings of group names and place names, attributed by Mr Laurence to the use of alternative orthographies. In my view, nothing really turns on the resolution of such matters in the final terms of this Report. Professor McWilliam and Dr Avery consulted both formally and informally from time to time prior to and during the course of the hearing. I am confident they clearly understood their respective positions. Spelling inconsistencies, whatever the cause, did not feature as important in their concurrent oral evidence.
85. Apart from that, there are some elements of the Supplementary Anthropologist’s Report which merit notice. It recognises that there are differences in the social organisation of the Jaminjung, Murinpatha and Wagiman claimants, which are described in a little detail. There is nothing in that section of the Supplementary Anthropologist’s Report which in any respect causes concern about the views of Professor McWilliam.
86. Before the commencement of oral evidence, Professor McWilliam and Dr Avery conferred at my request to endeavour to clarify and explain the extent to which they were in agreement and the nature of the ongoing issues between them. Following that process, they provided a Joint Report of their consultations.

87. Their Joint Report of those discussions first dealt with the local descent groups of traditional owners: the norms relating to descent and to spiritual affiliations to sacred sites, local Dreamings, and the bodies of ceremonial symbols such as sacred body designs (*buwarraja*). It was accepted that the link to the father is the primary normative basis of affiliations to sacred sites, Dreamings and bodies of related ceremonies. Other relatives might have such associations in special circumstances.
88. Professor McWilliam said there were illustrations of descent group members through matrilineal affiliations carrying such responsibilities, but ultimately subject to the seniority of patrilineal. He gave examples where matrilineal was accepted due to limited alternative options and family circumstances. Dr Avery drew the distinction between a rule-involving conception and a reason-involving conception of normativity, and doubted that the reason-involving conception was traditional. That led to a discussion about the meaning of ‘common spiritual affiliations’ and ‘primary spiritual responsibility’ in the definition of ‘traditional Aboriginal owners’ in section 3 of the ALRA. The idea of ‘following the father’ is often expressed by Jaminjung claimants with reference to the father’s father (*gagung*), but Dr Avery did not agree that such usage is evidence of a principle of descent constituent of descent groups.
89. I interpose to note that it is important not to import into the statutory prescriptions or definitions a rigidity of meaning in circumstances where that rigidity does no longer exist in fact. Professor McWilliam and Dr Avery agreed that, as a matter of long standing, the traditional rule for descent is patrilineal. But, in my view, it is wrong to apply such a rule rigidly and inflexibly when there is evidence that a particular group or groups of Aboriginal people have shown some flexibility in its application. Such flexibility may have become necessary through the well-recorded disruptive experiences of exposure to European settlement and its effects on group or family location and coherence. It may have evolved from the progressive recognition of the contribution and influence of matrilineal within those groups, and their preparedness to fill roles which previously they did not fulfil, sometimes forced by circumstances, and so to ensure the group’s coherence and the maintenance of its customs and rules. There may be other factors requiring the transmission of responsibility to those who are younger and more active in the adherence to and preservation of traditional laws and customs, and of traditional knowledge. The inquiry by the Commissioner is directed to determining the contemporary character and composition of the local descent group or groups and its spiritual and other traditional responsibilities and entitlements.
90. The consultation between Professor McWilliam and Dr Avery and their Joint Report also addressed the strength of attachment to the land claimed, and the adequacy of the evidence about the attachment to the bed of the Fitzmaurice River below the low water mark in the tidal areas (to which both the Daly River/Ports Keats ALT land and the land of the Bradshaw Training Area extended). That led to the rhetorical question about whether one group’s land met the land of the other group on the opposite side of the river, or in the middle of the river, or elsewhere or was somehow common. That issue was unresolved between them, although Professor McWilliam agreed that regional location of ceremonies and ritual performances, and maintenance of site responsibilities may inform the final conclusions.

91. It was agreed that the strength of attachment may be a particular issue in respect of the claim made by the Wagiman (Group 9).
92. Professor McWilliam suggested the question about strength of attachment may be more difficult to answer in the western portion of the claim area, where the river widens considerably and the riverbed is continuously underwater. That area is part of the contentious area in question as being west or downstream of the 'geographical mouth' of the river. He pointed out that there was to be evidence of active spiritual responsibility to existing sites of significance, and referred to 11 particular sites. It is necessary to review the evidence about those sites in due course.
93. Finally, their discussion focussed on the possibility of the *Jinimin* mythology providing an integrated claim community. That did not result in agreement on the topic. It is referred to above. As there noted, it was not presented by the claimants as a mythology of such commonality and significance as to provide the foundation for there being one relevant group or justifying a recommendation that a single grant of the area claimed be made.
94. There were three further substantive reports from the anthropologists which came into evidence prior to their oral evidence. They followed the oral evidence from the claimants.
95. Professor McWilliam provided a Supplementary Anthropology Submission on behalf of the Claimants, dated 27 January 2019 (Exhibit A34) (the McWilliam Anthropology Submission). That was in the light of the oral evidence provided by the claimants, and the inspection of the claim area by helicopter. Dr Avery then provided an extensive 'Expert Report regarding Assessment of Traditional Evidence to date presented in the Inquiry' dated 9 April 2019 (Exhibit NT16). He issued an erratum and added some transcript references on 19 December 2019, and represented his report with that detail. I will refer to it as the Avery Report. Finally, Professor McWilliam provided a Response to the Avery Report dated 3 June 2019 (Exhibit A35), which I will call the McWilliam Response.
96. Professor McWilliam in April 2019 provided Flight Notes of the three helicopter flights over the claim area on 4 and 5 September 2018 (Exhibit A36). That was obviously some months after the flights. As Professor McWilliam was largely directing the course of the flights, his opportunity to take notes at the time was limited. The Flight Notes, as their text demonstrates, are not particularly precise, and a somewhat liberal record, being a mixture of noted observations of some of the persons in the helicopter and some comments of Professor McWilliam. Dr Avery also provided Comments on the Flight Notes on 15 April 2019 (Exhibit NT15). They take the form of comments on each section of the Flight Notes in sequence. He expressed reservations about the reliability of aspects of the Flight Notes, and their utility. I share the concerns of Dr Avery, as they reconcile with my impressions at the time of the flights. It was clear that there was some uncertainty about who was to be on each helicopter flight, and about who was to speak during the flight about particular features, and indeed at times there was some confusion about which particular site (as identified on the Sites and Dreamings Map) was being referred to. Nonetheless, although there was some hesitancy about the identification of, or location of, certain sites, there was in some instances shared and vigorous response to identifying certain

locations and their significance. Obviously, too, as the number of persons on the flights was quite restricted, it was not an ideal environment for reliably noting each significant site. I suspect some, if not all, of the Aboriginal persons who were on the flights had previously had the benefit of such an inspection of the claimed areas.

97. I have been cautious about the use of the Flight Notes save where there is a complementary observation of Dr Avery confirming the reliability. In other respects they have left a general impression of a claim group firmly confident of their claim to country and in some instances with a detailed knowledge of it and Dreamings associated with certain sites.
98. On the issue of local descent groups and principles of membership, Professor McWilliam starts with re-affirming that the preference is for patrification, but subject to exceptions for non-normative filiations as legitimate pathways to membership of the local descent groups. That, he said, was a consequence of the degree to which Aboriginal communities have had to adjust to contingent histories – the adaptation to the massive disruption to Aboriginal patterns of life in the general Victoria River District and east Kimberley from European pastoralism and settlement from the 1880s. He referred to examples of that in other regional communities in the general region.
99. Thus, he said the oral evidence confirmed three contemporary modes of affiliation to Aboriginal estates associated with the Fitzmaurice River:
 - A predominantly patrilineal model (following the father) (Wakal Jinang, Madjalindi, Kartinyen), where ideally the ownership group is restricted to those affiliated through fathers and father's fathers;
 - A more mixed arrangement of patrilineates and matrilineates (especially mother's father) accepted as full members of the local descent group (Dalunggag, Yambarnyi, Bugurniny, Kimul and Wujuman); and
 - A third group that has consolidated recruitment via a cognatic or 'language group' model (Wagiman) that covers the upper reaches of the Fitzmaurice River claim. That is a model (he said) which was recognised in the *Upper Daly Land Claim Report* referred to above. That is explicitly referred to in the first Anthropologist's Report of June 2017.
100. He said the first grouping was more associated with the northern banks of the river, and referred to the evidence of Frank Jinjair (Wakal Jinang) and Roger Waditj (Madjalindi), and then of Thecla Nayeri (Kartinyen) to demonstrate that it is not necessarily exclusive as she suggested that her children will become members of her father's country group through her, as the conventional pathway to her father's country for them no longer existed. The Murrinkura language group is, he said, consistent with past practice, as previously noted by Stanner in 1936.
101. The second grouping permitting patrification and matrification was said to follow 'widely accepted practice' across the Victoria River District, and to exist widely in groups south of the river. He suggested that evidence indicated that forms of matrification existed in this area with an antiquity and tradition extending before the response to recent historical conditions. He referred to the evidence of Glennis Newry (Yambarnyi) and Amy Johnson (Dalunggag) where the concept of claiming membership of more than one local descent group is expressed.

102. The third group with a cognatic or language group recruitment system applies only to the Wagiman language group, and was confirmed by the evidence of Jabulgari George Jnr Huddleston. He noted that the *Upper Daly Land Claim Report* had recognised that model of descent for the purposes of the ALRA.
103. The second topic Professor McWilliam addressed in the McWilliam Anthropology Submission was primary spiritual responsibility, in particular in relation to the bed of the Fitzmaurice River, and more especially its western reaches extending to the outer limits of the area as claimed. As noted above, Dr Avery's position was that the river functioned as a divider of interests of those groups on opposite banks, rather than a one uniting those groups in common spiritual affiliations.
104. Professor McWilliam does not identify much in the oral evidence which is of significance. He accepts that, where there are groups which face each other across the river, 'there is a high degree of indeterminacy' about the boundaries on the point of spiritual responsibility. He also accepts that the width of the river at different stages may be significant. So much is, in my view, largely self-evident. It would be surprising if it were otherwise. There are several sites where specific assertions of ownership to riverine places were made, and which point to forms of ownership linked to the river channel and the riverbed itself.
105. The references are to sites as identified in the Site Register and Sites and Dreamings Map prepared by Professor McWilliam and Mr Laurence and dated 7 June 2017 (Exhibit A3). It was complemented by a larger format Supplementary Sites Map (Exhibit A3(A)), a Sites and Dreamings Map, including additional sites in a larger format of 1 September 2017 (Exhibit A3(B)), a Site Register with supplementary sites of 31 August 2017 (Exhibit A3(C)) and a Sites and Dreamings Map of 31 August 2018 (Exhibit A3(D)). A consolidated Sites Map in larger format of 31 August 2018 was also produced (Exhibit A3(E)). The description and numeration of sites was largely consistent throughout, although evolving in content and in a few instances with corrected locations. Although those exhibits were marked as confidential, some of the data in them was referred to in open submissions. To that extent, I will refer to that data, largely using the references from the consolidated Sites and Dreamings Map (Exhibit A3(C)).
106. The evidentiary references by Professor McWilliam were:
 - Majella Chula (Madjalindi/Marangunname) referred to a large number of named places including *Ngarringarri* (site 21). It is a rocky bar in the middle of the main channel of the river near the junction of a large tributary that extends north into the Madjalindi Valley. Bartholomew (Barty) Bainimbi said he knew of that place and that it was part of his country (*yuwa*);
 - The sites *Binbunu* (site 13) and *Burrbada* (site 14) were also referred to. Professor McWilliam says that the 'false' river mouth of the Fitzmaurice River coincides with a line of three rocky outcrops known as *Burrbada* on the southern bank. During his evidence (restricted) Frank Jinjair said that Wakal Jinang estate extends 'across the river' to the hill site *Burrbada* before turning back with a rock wallaby story (mentioned during one of the inspections by flight). There is no specific evidence reference to *Binbunu*; and

- *Dedeme* (site 7) further to the east and in the river stream itself was identified by Wakal Jinang estate claimants as a site within the main channel of the river towards its mouth. Frank Jinjair spoke of that place where there is dangerous saltwater, ‘boiling water’, which is a place they are not allowed to go to, and with a Dreaming inside. Professor McWilliam identified the site of *Dedeme* as immediately to the west of the immersed island or tidal mud flat *Minbiya* (site 9) and so in the river channel itself.

107. The third topic dealt with in the Supplementary Submission concerned common spiritual affiliations. He said the oral evidence of the claimants showed that the Rainbow and Little Bat mythology (*Nyurrkban/Kunmanggur/Kanamgeg* and *Jinimin*) was a strong presence along the Fitzmaurice River, and provided persuasive testimony that the local descent groups are strongly inter-connected by this dominant and ancient ancestral tradition. Aspects of the mythology were spoken of by Basil Dodd (Kimul) at Gimul Gorge (Site 28); Tommy Dodd, Katheen Carlton and Roger Waditj (Kimul), and Rollo Waditj all spoke of it, with Rollo speaking in relation to Kartinyen; Frank Jinjair in relation to his country (Wakal Jinang); and George Huddleston (Wagiman) spoke of it in relation to the gorge country upstream of Kartinyen and Laurie Creek.
108. Professor McWilliam also drew attention to the ‘demonstrated knowledge and understanding’ shown by Majella Chula (also known by her bush name ‘Binbirrij’) and her sister Marita Anne (‘Ngagarra’) in relation to their father, Kilimbin’s estate of Maranguname (Madjalindi). It was impressive and detailed evidence.
109. The exchange of expert reports then involved Dr Avery presenting the Avery Report, and Professor McWilliam then provided the McWilliam Response. Both are briefly referred to above.
110. Dr Avery there made some comments about the general quality of the evidence given by the claimants. As I have noted, I agree that the location of sites while flying by helicopter was not fully satisfactory as there were some difficulties identifying certain sites, and some inconsistency in site location. Nevertheless, the option of using helicopter surveys and stops for on-site evidence was a realistic one, given the remoteness and scale of the area claimed. Allowance must also be made for the disadvantage to the claimants, or some of them, who had not previously undertaken such flights. Having seen the conduct of some of the claimants during those flights, the speed of travel, the limitations of visibility to one side or the other, and the nature of the areas below, I do not intend to regard any inconsistencies or ambiguities said to arise from observations made during the flights as adversely significant to the claimants. The other evidence both at Table Hill and Katherine also was in some instances a little vague, and I share the view of Dr Avery that the evidence of Jubulgari George Jnr Huddleston and Bill Harney given at Katherine related more to the area of the Upper Daly Land Claims.
111. Dr Avery has a summary of his conclusions in the Avery Report at [1.28] to [1.36].

112. He accepted that the Jinjair family are the traditional owners of the Wakal Jinang (Group 2) country, including the rock wallaby rocks in the Fitzmaurice River – an area also referred to by Professor McWilliam as noted above. He also accepted that the descendants of Thathath in the male line are the traditional owners of Madjalindi country (Group 5), with the language Murinpatha: they are also known as Keringbo and Rakmaliyan. And he accepted that the Dodd family of Kimul (Group 6) are descendants of Bugun in the male line, and encompass the Jaminjung people as traditional owners of the Koolendong Valley country on the southern side of the river, including the southern bank of the river. He doubted that they have primary spiritual responsibility for any site north of the river. He said it is equally likely that the Murinpatha have that spiritual responsibility. He did not think they had primary spiritual responsibility for the land in the river itself from the *Jinimin* site to their land on the Bradshaw Training Area.
113. He thought there was insufficient evidence to establish who were the traditional owners of the Kartinyen (Group 7) country north or south of the river, although Rollo Barry may have the spiritual responsibility for Kartinyen sites and land. Mr Barry declined to take a position as claimant on his mother's side.
114. One clear area of dispute, as already observed, is the assertion by Dr Avery that normally traditional ownership follows the male line, and that maternal connections to country can be significant but not for 'claiming' country. The first part of his proposition is shared, but Professor McWilliam considers that there are circumstances where the maternal line can be a path to country.
115. Dr Avery said that the evidence in support of the claims to Dalunggag (Group 1), Yambarnyi/Ngamar (Group 3), Wujuman (Group 8) and Wagiman (Group 9) was not sufficient to form any clear impression of spiritual affiliations to relevant sites and responsibilities for those lands.
116. More generally, as I have already noted, it is generally accepted that Stanner's anthropological observations in the 1930s are both relevant and significant.
117. Also, as observed earlier in this Report, there is a major difference between Dr Avery and Professor McWilliam about whether the Fitzmaurice River and its escarpment comprise a 'hard boundary' between the claimant groups on either side of the river, although the evidence showed there were a few dangerous river crossings. Dr Avery says there is no evidence that the people of the Fitzmaurice River used the river jointly as a resource. Their focus was upon local waterholes and creeks.
118. Finally, in his summary, he says that, despite the issue having been flagged (as it was at the joint conference of experts), no witness was asked about the extent of their land into the sections of the river within the area claimed. Consequently, Dr Avery says that there is insufficient evidence to support the claim into the sea or the bed of the river beyond the low water mark.
119. As to that, Professor McWilliam in the McWilliam Response of 3 June 2019 refers back to what he said on the topic in his Supplementary Report (noted above). He adds that the large tidal water movement (5–7m twice daily) means that there are extensive areas of the river where it is possible to walk and forage, which were used to 'move across country' and to collect food: fish, turtle eggs and the like. They are resources

of the estate undifferentiated in the evidence from the areas inundated at high tide. So, he says, there is a strong likelihood that that is the case, and was part of the ancestral inheritance. He accepts that there are no clear statements of traditional ownership to deeper channels and the lower reaches of the Fitzmaurice River where the river broadens out over hundreds of metres, but says that ‘arguably the spiritual elements that have been identified in this part of the claim areas provide some evidence of claim’: p 8[1.3]. He also refers to confirmed foot crossing in the middle and upper reaches of the river upstream of *Ngarringarri* (site 21), including *Banalang* (site 48) (Policeman’s Crossing) and stretches of the river including *Gangeny* (site 63) in the Kartinyen estate. He says that these areas are estates of Kimul and Kartinyen covering both sides of the river and incorporating the river itself. Jabulgari George Jnr Huddleston gave evidence of movement from Wombungi Station to the upper reaches of the area claimed.

120. The Avery Report of 9 April 2019 then extensively canvasses the two main topics: anthropology in application to this land claim, and common spiritual affiliations. Those issues are taken up in detail in the submissions of the Northern Territory. My consideration of them is set out below.
121. It is clear that there is no issue about the entitlement to forage as of right over the country over the father’s and the mother’s country and probably that of any familial relative: see Dr Avery in his Report at [1.125].
122. The McWilliam Response of 3 June 2019 provides a summary response. He points out that Dr Avery at [1.56] accepts that the material tends to support the presentation of the land claim in terms of nine local descent groups and that the cultural relations across the Fitzmaurice landscape are not significant for the land claim. He accepts that the questions of Dr Avery about the inter-relationships between claimant families, the extent of totemic affiliations and sub-section association are consistent and operational, and possible patterns of succession to different estates would require extensive further research and may produce answers. But, he says, the full opportunity to pursue that research was not possible ‘in the time allocated to prepare the land claim materials’: p 2[1.0]. As the claim was first made in 1997, I read his comment as relating to the time allocated to him. It is not clear over what period Mr Laurence (or any other anthropologist) was researching the claim. At all events, his focus was on site mapping and confirmation of estate areas (some areas had never been mapped), claimant genealogical affiliations and their ties to country in relation to shared spiritual linkages and responsibilities, rights to forage and related matters.
123. On the first of the two more fundamental issues (that is, traditional ownership and patrification), Professor McWilliam repeats in essence his view that patrification is no longer the exclusive pathway to succession. He identifies the Murinpatha and the Jaminjung groups as the more typical of the form of evolution to accommodate matrification or mother’s country succession. He refers to particular evidence of Jabulgari George Jnr Huddleston which supports his view.
124. On the second of those two issues (common spiritual affiliation), Professor McWilliam takes issue with Dr Avery about the strength of evidence about common spiritual affiliation. He says there is convincing testimony of strong spiritual connections and knowledge of the estate areas of the Wakal Jinang, Madjalindi

and Kimul. He accepts that the evidence of the Kartinyen and Wujuman was less compelling but was ‘arguably sufficient to corroborate its significance and focal importance’. He agrees that in the other cases, the testimony of the relevant claimants and their expressed knowledge of spiritual affiliation and responsibility for sites and places on country ‘was not well articulated in the hearings’: p 5[1.1].

125. It will be necessary to review carefully the evidence and the submissions in the light of that qualified acknowledgement.
126. The issue of the ‘hard boundary’ which Dr Avery promoted is, said Professor McWilliam, based on Stanner’s material. He asserts that there is simply no evidence to support that proposition as a contemporary state of affairs. The estates of Wakal Jinang, Kimul and Kartinyen through the relevant witnesses did not support that approach, or more specifically that the Jaminjung language group (which those three groups comprise) have succeeded to the Murinpatha estates.
127. I also, of course, had the benefit of hearing the evidence of both Professor McWilliam and Dr Avery on 13 and 14 February 2020. As was apparent throughout the hearing, their evidence was coherent and respectful of the other’s point of view. They were both knowledgeable and thoughtful. It is not surprising that their oral evidence maintained their respective positions and did not expose significant oversight or misapprehension on the part of either of them of any of the claimants’ evidence or of relevant ethnographic material. The difference in their conclusions is largely, I think, a consequence of the approach each adopted to the significance of the evidence.

3.3. CONSIDERATION

128. I start with the position that, having regard to the location of the Daly River/Port Keats ALT land, granted at the time of the enactment of the ALRA, it would be surprising that the traditional ownership recognised by that grant did not in fact in some form involve some activities below the banks of the Fitzmaurice River, and where that boundary is tidal, beyond the low water mark. It is hard to conceive that the traditional owners of that land did not on occasions venture into some parts of the waters of the river and did not have any regard to any physical features of the river as relevant to their traditional beliefs.
129. The same may be said of the southern boundary of the claim area, abutting the Bradshaw Training Area. Indeed, the evidence shows that there is an Indigenous Land Use Agreement concerning the use by traditional owners of the Bradshaw Training Area. It is most unlikely that there is or was a hard line between that area the subject of that Agreement, and along the southern bank of the river, so that the claim area adjacent to the southern bank of the river was not used at all by the then-traditional owners and that they had no traditional beliefs about any parts of the river including physical features of or within the river.
130. I approach the evidence of the claimants in that light. Indeed, it is fair to note that the Northern Territory did not contest that likely reality, at least for the banks of the river east or upriver of its defined ‘mouth’ of the river. Its focus, in areas east or upriver of the ‘mouth’, was upon whether there was one group of traditional Aboriginal owners as claimed or perhaps two or more, with the river as a hard boundary between south

and north, and that there was not sufficient evidence of any activities in or on any part of the river where it is permanent water (whether tidal or non-tidal – that is, beyond its banks) to establish traditional Aboriginal ownership of those areas. As one proceeded downriver and west of the ‘mouth’ as described by the Northern Territory, it was said to become increasingly apparent that, with the widening of the distance between the banks of the river, the existence of traditional Aboriginal ownership of those waters became increasingly unlikely.

131. The geography does not point to a consistently progressive widening of the waters of the river downstream of the Northern Territory’s nominated ‘mouth’. The ‘mouth’ is shown on Appendix 1 to Annexure F at point B on that map. On the Sites and Dreamings Map it is in the vicinity of the sites *Burrbada* (No. 14) in or on the southern side and *Binbungu* (No. 13) in or on the northern side of the river. Downriver of that point, although the river generally widens, it has an arm extending to the northeast, and includes the unnamed island which is part of the area granted to the Daly River/Port Keats ALT. There is an identified site *Baya* (Site 10) within that north-eastern reach of the river. Apart from the significance of the existence of identified sites in the waters of the river in that section, it is hard to conceive that the traditional Aboriginal owners of the Daly River/Port Keats ALT area, when taking advantage of that island area, had no activities in, or beliefs about, the waters between the island and the mainland within their granted area or in relation to the waters of the river to the south of the island, or more precisely beyond the low water mark of the tidal waters in that area.
132. I have noted above the general process of movement of Aboriginal groups to the south and southwest in response to the tide of pastoral expansion, and that the present evidence must be understood in that light. I have also referred above to the need to take into account, when applying the statutory prescription to the issues to be addressed, the circumstances that may have altered what was originally a purely patrilineal descent system to a more flexible one, and to the process of responding to difference in the subgroups’ traditional laws and practices to accommodate the greater sharing of life and experiences brought about by the changes induced by history. Thus, Professor McWilliam says, for some time there has nevertheless been a broadly consistent understanding of existing patterns of connection to country and the identities of the ‘rightful’ people who belong to them. In his dealings with the people of the ‘Koolendong Pocket’ (as it was called), he did not learn of any suggestion to support entitlement other than to the Kimul people. Nor does he accept that there is some uncertainty about the place *Mayiwa* (site 52). I am unable to resolve the disagreement between the two anthropologists, as it is not clear the extent to which there is admitted evidence as distinct from personal observation, not acceded to as correct, made during one of the helicopter flights. I do not propose to place weight on this aspect of disputed fact.
133. It is obvious that there are serious and significant disputes on relevant matters between the two anthropologists who provided reports and gave evidence. It will be important to consider their respective views carefully, in the light of the oral evidence of the claimants. In doing so, it will also be important to maintain a focus on the issues which are required to be addressed under the ALRA. As I have observed in the context of the issue about the ‘mouth of the river’, the real task is to properly understand the meaning and scope of the words as used in the ALRA itself, and to apply them in reaching conclusions in relation to the claim.

3.3.1. Local descent groups

134. First, as to the collective group of claimants and the composition of the nine respective local descent groups. For clarity, I hereafter refer to the nine local descent groups as ‘subgroups’.
135. There is clear evidence that several subgroups mixed with each other increasingly over time through and on cattle stations. The once apparently rigid kinship and descent or succession systems within the family or local descent groups or subgroups constituting the Murinpatha and Jaminjung language groupings gave way to more flexible attitudes to the traditional rules over time. Principally the descent rules are through one’s father’s father, although there are instances where the descent has been through mother’s father or mother’s father’s father. At one extreme, the local descent group constituted by the Wagiman subgroup clearly have more flexible or cognatic descent rules. None of the subgroups, in my view of the evidence, insists on an exclusively patrilineal descent rule. I note in particular the evidence of Amy Johnson, Glenis Newry and Jabulgari George Jnr Huddleston.
136. There was consistent evidence from each of the subgroups, and in the presence of members of other subgroups, of close relationships by their references to each other and by their descriptions of their relationships to each other across sub groupings. There was no adverse reaction to any of that evidence. In the viewings by helicopter, there was at times a common sharing of the location of sites, by the reaction of those present. I do not place any real weight on that latter aspect as those present were limited in number and the record does not indicate who was reacting to the locating of sites at the time. For instance, Jabulgari George Jnr Huddleston (Wagiman) described Wagiman and Wujuman as ‘family’; Frank Jinjair (Wakal Jinang) said that he and Basil Dodd (Kimul) ‘got the same river’; Tommy Dodd (Kimul) called Richard Bloomer (Wujuman) his son and Glenis Newry (Yambarnyi/Ngamar and Bugurniny) as his grandmother; and Amy Johnson described her connection to country through her mother (Kimul) and through her father (Dalunggag).
137. There was evidence of the subgroups sharing visits to country, rather than excluding other subgroups from such experiences. The culture camps on Bradshaw Training Area arranged periodically under the Indigenous Land Use Agreement included variously members of the Yambarnyi/Ngamar and Bugurniny, Dalunggag, Kimul, Wujuman, and Kartinyen subgroups.
138. There was consistent evidence from members of the various subgroups.
139. There was evidence that certain Dreamings, including the Rainbow Dreaming, *Jinimin* or Little Bat Dreaming and some others, were shared through the areas of the subgroups.
140. There was evidence of trading (*winan*) and passages of messages between the several subgroups, consistent with the paths of the Dreamings, particularly from Jabulgari George Jnr Huddleston and to some extent from Bill Harney. The Claimants Submissions on Traditional Aboriginal Ownership at fn 74 refer to other more general literature on such trading practices and trade routes.

141. There was also evidence of shared practices of ceremony and rituals, including from Basil Dodd and Tommy Dodd (Kimul), and from Glenys Newry (Yambarnyi/Ngamar and Bugurniny) who said she taught ‘law stuff’ to her son Richard Bloomer (Wujuman).
142. The evidence of the claimants generally clearly located the respective subgroups consistently along the river, on both its southern and northern sides, extending from the western end of the River where it enters the Joseph Bonaparte Gulf to its eastern end at the Wombungi Pastoral Station.
143. There were 21 claimants who gave evidence, comprising one or more members of each of the 9 subgroups, and 3 other senior Aboriginal men (including Bill Harney) who were not members of the collective claimant group, yet had ceremonial and other knowledge and a familiarity with the claim area by descent or by their ceremonial responsibilities. As is to be expected, some witnesses were more outgoing than others, and some more thoughtful. I am confident that each of their evidence was given honestly about matters within their particular knowledge.
144. The claimants, in their Submissions on Traditional Aboriginal Ownership at [2.4]–[2.5], identified the rough locations of the country of each of the nine subgroups or local descent groups, and the person or persons from the subgroup who gave evidence. It is a useful table to check that each of the nine subgroups associated themselves with the larger, collective group of claimants (as they did).
145. At the western extremity of the claim area, on the northern side of the river is the location of the Wakal Jinang (Group 2), and on the southern side is the Dalungagg group (Group 1). It is in that vicinity that there is a very wide expanse of river water (or estuarine water – to accommodate the suggested mouth of the river being much further to the east). Moving eastwards, but still in the western end of the river, on the north is the Madjalindi/Maranguname group (Group 5), and on the south and moving eastwards the Yambarnyi/Ngamar group (Group 3) and the Bugurniny group (Group 4).
146. The submission then describes the section ‘midway upstream to the eastern end of the claim area’: at [2.5]. It has on its northern and southern sides the Kimul (Group 6) then eastwards to the Kartinyen (Group 7) on both sides of the River, and most easterly on the northern side the Wagiman (Group 9) and facing them on the southern side the Wujuman group (Group 8).
147. The Northern Territory was critical of that graphical presentation, in effect because it presented a neat package of something which was in fact far from neat. I do not think that understandable criticism diminishes the general thrust of the presentation. It is consistent with the evidence of the individual witnesses, although the location of the areas of the nine subgroups was more amorphous than such a presentation might suggest. As I have noted there is a practical sense in treating the nine local descent groups or subgroups as one larger or collective claimant group (once the finding was made that the line of descent among the larger group or part of it was not exclusively patrilineal where the other boundaries of the claim area are the boundaries of the Daly River/Port Keats ALT and the Bradshaw Training Area).

148. It is not surprising to note that the Dalunggag subgroup is the same group as was recognised as Group 5 in the *Legune Report* referred to above, and the Kimul (there called Gimul) subgroup is the same as Group 6 also recognised in that Report, relating to the Gregory National Park Land Claim (No. 167) and the Victoria River Land Claim (No. 188). The Wagiman subgroup has been recognised as members of the Wagiman language group in the *Upper Daly Land Claim Report*.
149. In my view, it is appropriate to conclude that the collective group of claimants does comprise or is capable of comprising, the nine local descent groups or the nine subgroups as advanced, with the line of descent primarily by patrification but with additional lines of descent through mother's father and mother's father's father. The descent line is more liberal in some of the local descent groups than in others, extending to cognatic descent in the Wagiman local descent group, but the overall picture is that the claim group itself has the more general descent line extending beyond strict patrification.
150. To step back, that conclusion also reflects the practical reality: it is unlikely that, after such a time of disruption, and in relation to the claim area, each of the nine subgroups along the Fitzmaurice River would adhere to a rule of strict patrification. This is especially so in the face of the interests of the Daly River/Port Keats ALT along the northern boundary of the claim area and the interests of those under the Indigenous Land Use Agreement with the Commonwealth in relation to the Bradshaw Training Area along the southern boundary of the claim area.
151. It is worth noting that the Aboriginal Land Commissioner is not obliged to determine precise boundaries within a land claim. They may be flexible, and within the Indigenous communities themselves they need not serve any particular purpose: they may overlap; they may reflect areas of less common usage; they may evolve with the relationship between the several local descent groups. In the present circumstances, there has been no apparent need for the several local descent groups to define with any precision other than that imposed by general geographical features the exact extent of their respective historical interests.

3.3.2. The river: a 'hard boundary'?

152. Before turning to the relationship of that putative claim group to the claimed area, it is next necessary to refer to the contention of the Northern Territory that there is no full commonality between the nine local descent groups because the Fitzmaurice River itself operates as a 'hard boundary' and that the local descent groups on either side of the river 'would have had their backs to the river'. To a degree, I have addressed that issue above. It is extremely unlikely that the Indigenous communities on either side of the river had no activities involving the river beyond its banks (and in the case of the Daly River/Port Keats ALT community, the river for part of its course to the Joseph Bonaparte Gulf below the low water mark of the river, especially having regard to that ALT holding the area of the unnamed island). It is also equally unlikely that such Indigenous communities placed no significance on any features of the river in terms of Dreamings or other sites of significance.
153. Dr Avery during the concurrent evidence did not adhere forcefully to such a 'hard line' thesis. He acknowledged that Stanner in the 1930s did not adopt the 'hard line'

thesis and noted some transmission of ideas shared on either side of the river. He agreed that there was evidence of trade (*winan*) moving across the river, and of family crossings of the river, including for work on cattle stations and returning 'home' for breaks in that work. Part of that evidence was quite vivid, having regard to potential crocodile presence. There is evidence of crossing points, and routes to those crossing points consistent with an interactive exchange of social and ceremonial relations in groups on both sides of the river.

154. There is also clear evidence of the evolution of the Wakal Jinang on the southern side of the river in part becoming Jaminjung on the northern side of the river. The Kimul local descent group now identify interests on both sides of the river, albeit on the northern side of the river that interest runs into the area which is part of the area of the Daly River/Port Keats ALT. More generally, it was the consistent evidence of the witnesses that there was such a shared relationship. There was no direct Indigenous evidence to contradict that state of affairs or to challenge it.
155. That conclusion does not resolve the disputed issue about the extent of the land, or more accurately the waters of the river, in respect of which it has been shown that the claimants have the necessary relationship. That is discussed below.

3.3.3. Common spiritual affiliations and primary spiritual responsibility

156. It is also of course necessary to consider the other criteria for there being traditional Aboriginal ownership of the claim area, namely that the subgroups have common spiritual affiliations to a site or sites on the land, and so the subgroup is placed under a primary spiritual responsibility for that site and for the land.
157. I turn to the geographical extent of the established claim area.
158. In my view, it is appropriate to take the step of concluding that, where the relevant relationship is established, the interests of the claimants extend to the waters of the river and the underlying riverbed. It would be artificial to distinguish between the waters of the river and the riverbed itself where there are located sites in the river channel or Dreamings associated with the waters of the river or the river itself.
159. On the other hand, although the claimants' submission is that there is no known concept of 'terra nullius' known to their culture, it does not follow that where there are extensive stretches of water between the banks of the river, especially nearing the location where the river flows into the Joseph Bonaparte Gulf (up to about 14 kilometres or more during high tide), it should be routine to recommend the grant of the whole waters of the river and its bed in such areas. Where there is no evidence of access to or use of, or Dreaming stories about, parts of the river or its underlying beds, I do not think that the underlying submerged lands can be shown to be the land of traditional Aboriginal owners. I note that Professor Kaye provided the above estimate of distance.
160. I shall refer to this issue further after considering the evidence about the relationship of the claim group (as I have found it to be) to the claim area. In this consideration, as noted above, I have not placed weight on the supplementary material provided by the Claimants in the Claimants' Reply Submissions on Traditional Ownership of 28 July 2020.

161. In approaching this aspect of the issues, the nature of the area claimed is important. It is remote country, isolated and difficult to access. There are no towns or permanent settlements along or close by the river. Partly, that state of affairs is the consequence of pastoral settlements, and when acquired from the Bradshaw Station owners the Bradshaw Training Area.
162. It is not surprising that evidence of foraging, hunting and fishing in the river is mostly in the vicinity of tidal flats, creek inlets and billabongs. In the deeper waters, as Basil Dodd pointed out, it is necessary to go by boat having regard to the presence of crocodiles. The evidence identified a number of fishing locations, including Nyel, Fire Yard, Lobby Creek, Koolendong Billabong, 'Little Fitzmaurice', *Mayiwa* (site 52), *Miway*, *Jungawi* (site 55), *Numuny* (site 4a), *Jandalang* and a site through Madjalindi. There was really no evidence of hunting in the river itself, again through fear of crocodiles (as distinct from hunting near the river). There is no evidence of physical use of the deeper and wider sections of the river, save for the occasions of crossing the river.
163. Consequently, I do not consider that, simply because the claimants comprising the nine local descent groups occupied both sides of the river and in respect of the now limited but extensive claim area (effectively bounded by the area of the Daly River/ Port Keats ALT on the north and the Bradshaw Training Area on the south) continue to be the traditional Aboriginal owners of the claim area, it necessarily follows that all the waters of the river and the underlying bed of the River are part of their traditional land.
164. The refinement necessary to identify the traditional Aboriginal land in the circumstances will follow from, and be interrelated to, the analysis and findings about the claim group and hence each of the subgroups' relationships with the claimed area.
165. The position of the Northern Territory is that there would have to be evidence of sites and use below the low water mark to show that Aboriginal country extends below the low water mark. In my view that is an overstatement, but a useful starting point. On the other hand, I do not accept the claimants' suggestion of there having been a 50 to 50, or mid river split (because that was the arrangement when there were two of the nine estate groups facing each other across the river). It is also too simplistic and not based on the criteria specified in the ALRA. There was some evidence to that effect given by Mr Huddleston in relation to the facing Wagiman and Wujuman local descent groups, but in my view that was not shown to be founded upon Aboriginal tradition as defined in the ALRA.
166. I now turn to refer in more detail to the Dreamings and sites along the Fitzmaurice River and its banks, and in areas close by the banks.
167. There is clearly a Rainbow Serpent/Little Bat Dreaming in the Fitzmaurice River basin. It was referred to by Stanner. In fact, he recorded four versions of that story or myth, varying with the storyteller and the audience. The evidence shows topographic features of the landscape which relate to the story: the spearing of the Rainbow Serpent and the gushing from the wound as flowing waters to and in the river and the creation of a gorge in its upper reaches; the prolonged death throes reflected in the shape of the river and the gorges running into it; and the carvings and markings left on certain areas adjacent to the river. The claimants also, in submissions, tie the site *Dedeme* (Site

7), mid-river and just west of the unnamed island, to the Rainbow Serpent Dreaming. The evidence about *Dedeme* was somewhat vague, but identified it as a dangerous site of a whirlpool in the middle of the river. There was evidence of the Jinimin site (Site 54) involving some stone arrangements in the middle reach of the river on its northern side. There was evidence of depressions or waterholes and caves along the river where the Rainbow Serpent is said to have hidden. There was some evidence that the Jinimin shape is found in the typical nose shape of the Wagiman local descent group.

168. The Rainbow Serpent Dreaming is generally related to the river itself and its surrounds. On the evidence it is widely shared among the claim group, including both Murinpatha and Jaminjung language groups, and their evidence identified it as a shared heritage. The cave at *Jinimin* (Site 54) was obviously a significant record of cultural association with the area, including the river. It included *Kamengek* (a Rainbow and a man standing there), a stingray and other figures. Roger Waditj gave vivid evidence about that.
169. It is convenient to address the issues of having common spiritual affiliation to a site or sites and primary spiritual responsibility for the claimed area by moving from west to east. That follows the sequence in the Claimants' Submissions on Traditional Aboriginal Ownership.

Dalunggag (Group 1)

170. As noted, the Dalunggag (Group 1) is located as at the southern side of the river at its western extremity. Not surprisingly, it was recognised in the Legume Area Land Claim (without demur from the Northern Territory).
171. The principal witness was Amy Johnson. She clearly has a commitment to her country, and knowledge about it. She teaches her children about country including fishing and learning about bush tucker, and takes them to visit country. She teaches her children stories. She attends the annual culture camp held on the Bradshaw Training Area each year where cultural rules and dances and stories are taught. She has taken part in a site clearance over her country.
172. In addition to her evidence, Professor McWilliam received information from a deceased senior Dalunggag man Jerry Jones about sites and Dreamings on Dalunggag country. They are on the three islands between the Fitzmaurice River and the Victoria River: Quoin Island, Driftwood Island and Clump Island. Two of them are immediately adjacent to the southern side of the Fitzmaurice River. One is Gidigin (Site 11), the site of a Rock Wallaby Dreaming. It is about at the point where the Northern Territory posits as the mouth of the river. The second is Wanamarra (Site 16), the site of the Flying Fox Dreaming and the Dingo Dreaming.

Wakal Jinang (Group 2)

173. On the northern side of the river at its extreme western end, effectively facing Clump Island and then moving east (and including the unnamed island which is part of the area of the Daly River/Port Keats ALT), is the identified country of the Wakal Jinang (Group 2).

174. There were five members of this subgroup across two generations who gave evidence. It was consistent and coherent. It is not necessary to note it fully as there is not really a dispute about its status. Its southern area is the relevant area, abutting and into the river. It is clearly a vigorous society, with strong practices to maintain knowledge about country and to teach the younger members of the group about that knowledge.
175. As with the Dalunggag subgroup, but on the northern side, the claimed country for this subgroup then runs east to about where the Northern Territory locates the mouth of the river.
176. For present purposes, I note that the evidence included reference to seven sites of significance adjacent to, or in, the river itself.
177. At the eastern extremity is the site *Nanangurr* (Whale Flat) (Site 5) but not much was said about that. I have previously referred to the site *Dedeme* (Site 7) and a site related to the Rainbow Serpent Dreaming. Moving eastwards, there is a site *Minbiya* (or *Minbaya*) (Site 9) on the unnamed island, with a Water Buffalo Dreaming associated with it. In the inlet of the river running north-east and just east of that island is the site *Baya* (Site 10) associated with a Mullet Dreaming. In the river on its eastern side, and about the point where the Northern Territory locates the mouth of the river, is the site *Binbungu* (Site 13), associated with a Dolphin Dreaming, and just to its south towards the southern bank to the river lies the site *Burrbada* (Site 14) associated with the Black Whip Snake and Black Headed Python Dreamings.
178. Frank Jinjair was the representative of this local descent group who gave evidence. He said he was able to speak about his country, but not about other areas, although he had some knowledge of other areas nearby. He demonstrated a respect for customary principles by declining to speak in public about one site, a little inland from the river, and his evidence about *Dedeme* (which I have described above) was cautious in public session and more fulsome in a men's only session. I do not need to record the details.

Yambarnyi/Ngamar (Group 3) and Bugurniny (Group 4)

179. Moving east along the southern side of the River, the next subgroup areas are those of the Yambarnyi/Ngamar and the Bugurniny.
180. Principally evidence about this section of the claim area was given by Glenis Newry. Her evidence was supplemented by Frank Jinjair, of the Wakal Jinang, as he had familiarity with much of the relevant area. He was careful to point out that he is not the 'owner' of this area.
181. Glenis Newry spoke of her upbringing in the language of the area, through an old man Dinung and others. She described dancing and women's ceremonies in the vicinity and elsewhere, and including women from other subgroups. She has attended the culture camps on the Bradshaw Training Area, shared with some of the other subgroups. Her evidence, as with others, indicated a considerable sharing of learning experiences and meetings about country and tradition with those from other subgroups. She had a close relationship with Tommy Dodd, Basil Dodd and Richard Bloomer in that context.

182. One site she referred to is *Ngmarr* (Site 17) on an inlet from the river running south. It is associated with Red Plains Kangaroo Dreaming. There are further sites on the Sites and Dreamings Map of *Wanamarra* (Site 16), also on a separate inlet from the river running south and associated with the Flying Fox and Dingo Dreamings, and *Yambarnyi* (Site 18) associated with the Dingo Dreaming.

Maranguname/Madjalindi (Group 5)

183. On the northern side of the River, and east of the Wakal Jinang group area is the Maranguname/Madjalindi (Group 5). In this instance, much of the evidence was accepted as demonstrating traditional Aboriginal ownership of the area of the subgroup, although there was an issue about its precise composition.
184. As to that area of dispute, I accept from the whole of the evidence that the subgroup membership extends beyond Thathath, and includes descendants of or through Walain and Peter Walanh, and of or through Kidalu including Kulawurruk and to Roger Waditj and Maurice as a current elder of the subgroup. The evidence of Majella Chula supports that conclusion.
185. As with the other subgroups on the northern side of the river, their country extended from the river itself inland into (and is part of) the Daly River/Port Keats ALT area. That is entirely natural: the converse – a narrow area of claimed land adjacent to the area of the Daly River/Port Keats ALT area but with traditional owners unrelated to any of the persons for whose benefit that Aboriginal Land Trust was granted – would be remarkable.
186. Majella Chula confirmed her relationship with her country, and was familiar with its totems and its features. She visits many places in the area, and there are family camps on many of those places. She spoke about many sites of significance in the country of her subgroup, including close to the river: the sites *Dulud* (Site 22) related to the Snake, Yam, and Black Headed Python Dreamings and *Wanmarr* (Site 40) related to the Spur Winged Plover Dreaming, and to *Burlanga* (Site 34) and *Gunbidga* (Site 44). Bartholomew (Barty) Bainimbi gave similar evidence. Several persons have names reflecting the names of significant sites. Roger Waditj also gave evidence of this area. It is his mother's country, so he said his rights on it were confined. He described being taught by his mother about the Dreaming slated to that part of the claim area.
187. Both Majella Chula and Roger Waditj gave clear evidence about a number of the Dreamings related to the country in her subgroup country and about the totems of the country.
188. She also gave evidence of taking part in a site visit by boat from *Ngagarra* (Site 25) with others and when they were taught about their country and places and totems. She, in turn, has sought to educate her children about those things, including about a lightning place *Guyen* (Site 38). Roger Waditj also gave evidence of that educational responsibility.
189. The country encompassed by Groups 4, 5 and 6 is extensive. The section of the river to which it related runs a considerable distance eastwards from the sites *Binbungu* (Site 13) and *Burrbada* (Site 14): that is, from about the location of the mouth of the river as proposed by the Northern Territory. It encompasses a section of the river

which is quite wide (sometimes a few kilometres, judging from the scale on the Sites and Dreamings Map) but with inlets flowing both north and south. From the site *Ngaringnarri* (Site 21), the river narrows considerably and remains relatively narrow from that point over a further very considerable distance until it reaches the Wombungi Pastoral Lease (the eastern extremity of the claim area).

190. It is convenient at this point to indicate that, having regard to all the evidence about the relationship of the several subgroups with the river and sites on it or in its vicinity and activities carried out from its banks, I am satisfied that the traditional Aboriginal ownership of the river extending eastwards from the site *Ngaringnarri* (Site 21) extends across the banks of the river to include its waters and the underlying base of the river itself. It is not therefore so necessary to focus on particular sites of significance and their relationship with the river as I have done thus far.
191. That conclusion is reinforced by the evidence of Majella Chula and Marita Anne Ngagarra that Madjalindi country extends across the river and includes the river itself. The site *Ngagarra* (Site 25) appears to be on the river but towards its western side.
192. I will return to the issue of the extent of the established Aboriginal ownership of the river banks west of the site *Ngaringnarri* (Site 21) later in this Report.

Kimul (Group 6)

193. Kimul (Gimul) (Group 6) is a clearly established group. It is common ground that, on the southern side of the river, the Kimul have primary spiritual responsibility for that country.
194. In my view, that extends to the part of Kimul country below the low water mark on the northern side of the river (noting that the area granted to the Daly River/Port Keats ALT extends to the low water mark where the waters are tidal).
195. That responsibility is under the management of the Dodd family. It is the country of Amy Johnson and her family. It is a group recognised also in the *Legune Report* already referred to. The evidence showed strong familiarity with the country and its features, knowledge of common spiritual affiliations with a number of sites on the country and of Dreamings associated with it. It is sufficient to note the evidence of Basil Dodd about the extent of Kimul country, about the Dreamings, including the story of the Rainbow Serpent and the Little Bat at *Jinimin* (Site 54) and as they travel along the river, including where the Serpent was speared at *Mayiwa* (Site 52). His evidence was complemented by that of Amy Johnson, Joy Raymond Kathleen Carlton (especially concerning the site *Gimul* (Site 53), Tommy Dodd Jnr, and Roger Wadij.

Kartinyen (Group 7)

196. Kartinyen (Group 7) has country further to the east and on both sides of the river. The evidence was given by Thecla Nayeri and Rollo Barry. The group provides evidence of a strong patrifilial model of succession, but having accommodated the children of Thecla Nayeri who have a non-indigenous father.

197. Rollo Barry (who has also given evidence in another land claim on behalf of the Kartinyen subgroup) explained the process of knowing about the country, using it and, during the restricted men's only evidence, more specifically things about it. It is not necessary to record the detail of that evidence. Clearly the group has primary spiritual responsibility for certain sites on the country.
198. Thecla Nayeri also gave evidence which supports the existence of primary spiritual responsibility for sites on the country, including responsibility satisfied by visits to sites on the country, cultural clearances, participating on the annual culture camps, and educating the younger generations.

Wujuman (Group 8)

199. The most easterly of the subgroups on the southern side of the river is the Wujuman group (Group 8).
200. Richard Bloomer, who gave evidence, described it as Wombungi country, by reference to the adjoining pastoral lease. Bill Harney described Richard Bloomer as the person holding the songs of the country, and having familiarity with all the significant features of the country. Bill Harney, although not a Wujuman person, also demonstrated an extensive knowledge of its Dreaming stories. Richard Bloomer described how he had acquired his knowledge of the country and its customs and rules. He gave evidence of ceremonies, and their organisation. His wife Glenis Newry also gave evidence of how she maintains a knowledge of the country and respect for it, and she referred to the 'law stuff' that the men engage in, including with men of other subgroups (including Tommy Dodd and Basil Dodd).

Wagiman (Group 9)

201. The northern side of the river in the same area, extending roughly to the Wombungi Pastoral lease, is that of the Wagiman (Group 9).
202. As noted earlier in this Report, the Wagiman subgroup is seen more as a language grouping, as recognised in other Land Claim Reports.
203. It has a cognatic line of descent.
204. The principal witness for this subgroup was Jabulgari George Jnr Huddleston. He explained well the Rainbow Serpent mythology in relation to the gorge country of Kartinyen and Laurie Creek, as *Jinimin* and the creative force in shaping the landscape. The spear thrown into the country split the land and formed the gorge, and the Bat was then found in that area. He was taught that by his elders and he educates others including his family about that knowledge, and the relationship between Wagiman and Wujuman.
205. In open evidence he described the preservation of singing and head wetting and the consequences of non-compliance. He described bush medicine to treat illnesses. He described trade between subgroups, and outside. He described some ceremonial matters in closed evidence.

3.4. CONCLUSION AND RECOMMENDATION

206. Overall, there is a clear picture of the nine subgroups, which together comprise the collective claimant group, each having a series of common spiritual affiliations to sites on the claim area, and which then place each of those subgroups under a primary spiritual responsibility for their respective sites and the surrounding area, including the claim area.
207. As I observed at the commencement of this part of the Report, that conclusion is hardly surprising having regard to the fact that some of the subgroups are part of the persons for whose benefit the Daly River/Port Keats ALT was established when the ALRA was enacted. In the same vein, to the southern side of the river the area now occupied as the Bradshaw Training Area has been acknowledged by the Indigenous Land Use Agreement and by the activities permitted from time to time under that Agreement to recognise certain of the subgroups as having been the traditional owners of that country.
208. There is ample evidence of such attachments to various parts of the claim area by visits, hunting, fishing and camping on country, by having and sharing Dreaming stories in relation to the claim area often extending along the river and through the several areas of the subgroups or small local descent groups, and by respecting their cultural laws and customs and seeking to pass on to younger generations those laws and customs. In such a remote area, and so difficult to access, that strength of the evidence is fortifying.
209. That material, in my view, demonstrates a strong attachment by each of the subgroups, and by the claim group as a whole, to their country. Certain witnesses demonstrated more than others the strength of that attachment, particularly Jabulgari George Jnr Huddleston and Maxine Carlton.
210. There was no issue about the separate criterion of the subgroups each having the right to forage over the claim area.
211. That conclusion is subject to the issue I have yet to resolve: namely, whether the claimants have traditional Aboriginal ownership of the waters of the river west of the site *Ngaringnarri* (Site 21) and to the extreme western end of the river where it flows into the Joseph Bonaparte Gulf, and to the underlying bed of the river. As I have found, there is evidence which I have accepted to support that conclusion east of the site.
212. I have remarked that it is very unlikely as a matter of fact that the low water mark of the northern bank of the river in its tidal reaches marks a hard line beyond which the beds and banks of the Fitzmaurice River were of no significance to, and were not used by, the traditional Aboriginal owners. The evidence does not support that. There are sites and Dreamings which extend beyond that line. That is equally true of the southern side of the river, extending from the high water mark and beyond the low water mark of tidal waters.
213. On the other hand, there is little evidence of use and occupation of the river where its width is extensive and where the waters are permanent even though tidal. Even though there are crossing points, mainly they are in the eastern section of the river. There is some evidence of fishing in the river, although it is not extensive and does not indicate general fishing usage of the waters of the river across and at its wider points. There are other factors such as the location of the unnamed island, part of the

land granted to the Daly River/Port Keats ALT. The inlets of the river, including the sites and Dreamings which are located adjacent to, or in, them, and the location of the sites *Dedeme* (Site 7) and further east *Bimbunga* (Site 13) and *Burrbada* (Site 14) where the river narrows to a significant degree all suggest that there was no such hard line, and do not justify the very firm line proposed by the Northern Territory beyond the low water mark, and for much of the northern banks of the river not at all because the Daly River/Port Keats ALT land extends to the low water mark.

214. On the material available, I conclude that not all of the western section of the river has been shown to be owned by the claimants or by any other Aboriginal persons. It is necessary to draw a line which reflects the various concerns referred to. There is no science in drawing that line. It will be artificial in the sense that it is not a matter the claimants, in times before pastoral settlement, would have specifically addressed. Of course, it will be based on the definition of 'traditional Aboriginal owners' in the ALRA.
215. In my view, moving from west to east, that line should be drawn on the northern side of the river by a line 300 metres south of the low water mark of the river, but cutting across each inlet of the river. The line should then extend roughly southwards to the western side of the site *Dedeme* (Site 7) at about 300 metres west of that site and extend around that site on its southern side at a distance of 300 metres and then extend roughly eastwards as it approaches the western end of the unnamed island (part of Northern Territory Portion 1637) and should also run around the southern side of that island, still at a distance 300 metres south of the low water mark and continue east from the eastern side of that island towards the site *Yangalda* (Site 12). In that way, the waters and underlying bed between the island and the unnamed island will be included in the recommended grant of land, unless (as I have speculated) they are already included in the area of the Daly River/Port Keats ALT. That line will then go south from a point 300 metres west of the site *Binbunu* (Site 13) to a point 300 metres north of the low water line on the southern bank of the river and 300 metres west of site *Burrbada* (Site 14). It will then run west along that line (300 metres east of the southern low water mark of the southern bank to the Joseph Bonaparte Gulf).
216. I have included the waters around the site *Dedeme* (Site 7) because it was clearly recognised within the mythology of the claim group. The evidence indicates that it is recognised as a dangerous site where the traditional Aboriginal owners should not go because of the perilous waters, but in terms of the definition of 'traditional Aboriginal owners' in section 3 of the ALRA, it is a place for which the claim group has a primary spiritual responsibility. There was no evidence that there is foraging over that specific area of the site, but I consider that that arm of the definition is not intended to require foraging over each and every metre of claimed land, but rather over its general area. In any claim there may be areas where the geography makes access for foraging difficult. Indeed, no such submission was put by the Northern Territory.
217. I have not compared precisely the extent to which the grant of land to the Daly River/Port Keats ALT includes the waters within the inlets, but obviously to that extent the line to be drawn must be adjusted.
218. That addresses the waters and underlying beds west of the approximate line where the Northern Territory says is the 'geographical mouth' of the river. I consider the evidence is sufficient to show that the traditional Aboriginal owners are entitled to the available beds and banks of the river for a significant distance east and west of that point.

219. A similar approach is to be taken to the waters in the river east of the line between *Binbunu* (Site 13) and *Burrbada* (Site 14).
220. A line is to be drawn running north-south about 300 metres east of those sites, and then 300 metres south of its northernmost point running east at 300 metres south of the low water line of the northern bank and running to a point 300 metres west of the site *Ngaringnarri* (Site 21), then turning to run south to a point 300 metres north of the southern low water mark of the river bank, and then running west again along the line 300 metres north of the low water line along the southern bank of the River to the north-south line to the east of the sites *Binbunu* (Site 13) and *Burrbada* (Site 14).
221. That line does not deviate into the two significant inlets along that southern part of the riverbank which include respectively *Ngmarr* (Site 17) and *Wanamarra* (Site 16) as it runs west, but there is a straight line and 300 metres north of and across the mouths of those 2 inlets.
222. As I have said, there is no science in the selection of the 300 metre line. As I have concluded that the traditional Aboriginal owners did access and use the waters of the river below the low water mark in its tidal section, it was necessary to select a line. The line chosen simply represents what is probably the extent to which the traditional Aboriginal owners would have extended that usage, having regard to the limited evidence on the topic.
223. Subject to that restriction or limitation confining the area to be recommended, I recommend to the Minister the grant of the claimed area to the claimants, who comprise the nine smaller subgroups of local descent groups referred to.
224. As was common ground, there has been no precise survey of the claim areas, so the recommendation is expressed in general terms only.
225. I have dealt with the only main issue relating to the membership of the claim group comprising the nine local descent groups. There is no need to refer in detail to the issue as to their composition. That detail is found in the Genealogies of 30 August 2018 (Exhibit A4(A)), and in the Claimants' Personal Particulars as revised, and including in relation to the Wagiman people (Exhibits A5(A) and A7). A list of the claimants is annexed to this Report as Annexure D.

4. DETRIMENT AND PATTERNS OF LAND USAGE

226. It is of little surprise that there was considerable agreement between the parties about the relevant matters, or the established principles for the content of this Report. Such differences as existed were really matters of emphasis, in particular as to the extent to which it is appropriate for the Aboriginal Land Commissioner to comment in the Report upon the significance of particular aspects of detriment or patterns of land usage, and to comment to the Minister upon factors which might be relevant to the Minister in the consideration of whether to make a grant of the claimed area (to the extent that there is a recommendation that it be granted to a Land Trust on behalf of the traditional owners) under section 11 of the ALRA.
227. What is perfectly plain is first that it is for the Commissioner to make a recommendation to the Minister to make a grant of the area claimed, or part of it, if satisfied that there are traditional owners of that land without taking into account any matters of detriment or patterns of land usage. Second, it is for the Minister to make the decision under section 11 of the ALRA in the light of such a report of the Commissioner having regard to the detriment and patterns of land usage which are specified in the report. The High Court in *R v Toohey; Ex parte Meneling Station Pty Ltd* (1982) 158 CLR 327; HCA 69 (*Meneling Station case*) explained those separate functions clearly.
228. Section 50(3)(b) of the ALRA requires the Commissioner to report on the detriment to persons or communities, including other Aboriginal groups, that might accrue if the claim were acceded in whole or in part. The concept of ‘detriment’ is not defined. It is to be given its ordinary meaning, namely ‘harm or damage’. That has been the case since the first report of Toohey J as the Aboriginal Land Commissioner in the *Borroloola Land Claim Report No. 1* (3 March 1978) at [174]. The Northern Territory also emphasised the use of the word ‘might’, as it argued that its use contemplated possible future detriment.
229. I proceed, in accordance with the submission of the Northern Territory, on the basis that assertions of detriment may relate to matters which existed at the time of the application under section 50(1)(a) of the ALRA, or matters which arose after the application. It will include detriment which was or may have been anticipated when a particular interest in adjoining land or a relevant activity was first undertaken or continued, or perhaps merely be still under planning. That is not to indicate to the Minister that such timing considerations may not be relevant to any decision to be made under section 11 of the ALRA. When exercising the discretion under that section, the Minister may be inclined to discount the significance of detriment which a particular person or community has elected to experience or to be exposed to with knowledge of the application having been made, or the Inquiry into the application having commenced.
230. In that context, one particular aspect of detriment to both amateur and commercial fishers should be noted. I have referred to the *Blue Mud Bay* decision above. It is fair to say that, until that decision (or more accurately, until the proceeding was commenced which gave rise to that decision), it was generally thought that the public right to navigate and fish in coastal tidal waters and in the tidal waters of rivers may not or would not be affected by any grant of land to its traditional owners under the ALRA. That decision altered that position. I have discussed that decision in more detail in the recent *Legune Report*.

231. Section 50(3)(c) of the ALRA also requires the Commissioner to comment on the effect which acceding to the claim in whole or in part would have on existing or proposed patterns of land usage in the region.
232. As in the *Legune Report*, I may not accept one element of the general submissions of the Northern Territory on this topic. In its submissions of 24 April 2020, the Northern Territory submits that, because the Commissioner's 'comment function' is separate from the section 50(1) function, once a recommendation for a grant is made:
- ...the Commissioner has no discretion as to, and must cease to guide or direct, an outcome and must simply provide the Minister with information based on an assessment of the evidence... [and is] confined to "comment" i.e. describe, assess and evaluate the factual evidence, remarking upon and describing his views of its effect as to the nature and degree of the detriment, the potential for it to be experienced, and the factors bearing on the fulfilment or alleviation of that potential.
233. Of course, it is not the function of the Commissioner to direct an outcome of the Minister's discretion. But, given the text of sections 50(1) and 50(3) any sharp and explicit line drawn so as to limit the 'comment' function is not apparent. Further, to the extent that it is said that the Commissioner may not address the evidence to assess the significance of a particular claimed detriment, or to explain the evidence about how a particular detriment might be alleviated consistent with a grant of the claimed land, I do not go that far. Indeed, if the entirety of that paragraph of the Northern Territory submission is read, it may not be saying that the Commissioner would be acting improperly to comment upon such matters. In the *Legune Report*, I noted the observation of Gibbs CJ in the *Meneling Station case* at CLR 333 that the comment of the Commissioner could extend to that which would be likely to assist the Minister in deciding whether or not to act on the recommendation. Ultimately, as the discretion is that of the Minister under section 11 of the ALRA, if there is any dispute about where the 'comment' line is to be drawn, it probably does not matter.
234. I accept the submission of the Northern Territory that its role is to put forward detriment information on behalf of all Territorians, both Aboriginal and non-Aboriginal so as to assist the Commissioner in the comment to the Minister under section 50(3)(b) and (c) of the ALRA so that the Minister is able to make an informed decision.
235. There was, not surprisingly, quite substantial evidence and submissions on each suggested topic of detriment, and in some instances its amelioration. I will refer to that material as necessary in considering the specific detriment topics identified by the Northern Territory. The respective submissions of the Northern Territory and the NLC on behalf of the claimants followed that same general sequence. I have treated some topics specified by the Northern Territory compendiously. As well as the evidence adduced on behalf of the Northern Territory and from the claimants, there were separate written submissions from the Commonwealth and from the Amateur Fishermen's Association of the Northern Territory (AFANT) by its counsel, and detailed evidence from its Executive Officer Mr David Ciaravolo, and evidence from Ms Katherine Winchester, Chief Executive of the Northern Territory Seafood Council (NTSC).
236. The evidence of detriment was largely given as common evidence in relation to this land claim and to the land claims the subject of the *Legune Report*. To a significant degree, the conclusions in this Report reflect the conclusions in the *Legune Report*.

4.1. MINERAL TITLES

237. The statement of Alan Holland, Director, Mineral Titles within the Mines Division of the Northern Territory Department of Primary Industry and Resources (DPIR) identified five Exploration Licence Applications adjacent to or on the area claimed. It is understandable why they were raised at an early stage of the evidence, but the concern about them is not warranted.
238. As the claimants submitted, the evidence shows that four of those applications relate to area within the Daly River/Port Keats ALT area. I do not see how the grant of the area claimed could in any meaningful way adversely affect those interests.
239. The remaining Exploration Licence EL 26788 relates to an area on the northern side of Fitzmaurice River, at its western end within the tidal reach of the river. For the reasons already given, the Daly River/Port Keats ALT area extends to the low water mark of the river, so it appears that the whole or almost the whole of the area of that Exploration Licence is not within the area claimed. The evidence does not suggest that in any material way how the grant of the area claimed would or could realistically impair the operations or activities of the holder of, or the applicant for, that Exploration Licence.
240. Consequently, I do not consider that there is shown to be any relevant detriment requiring comment in the Report to the Minister.
241. I have addressed more fully in the *Legune Report* the status of exploration licences. In brief, Part IV of the ALRA addresses 'Mining'. That Part of the ALRA together with sections 66 and 70(2) preserves the rights of an existing Exploration Licence holder in the event of a grant. Part IV prescribes the procedure to be followed for the grant of a fresh Exploration Licence if there is a grant of the claimed area or part of it. As the ALRA provides for that procedure, the need to follow the procedure is not itself a detriment in respect of any future application for an Exploration Licence over the area claimed. And if the present status of the current applicants for a relevant Exploration Licence is that the application itself has not yet been granted, in any event section 40 of the ALRA in Part IV requires the consent of the NLC as the relevant Land Council, as the applications in any event relate to Aboriginal land as defined, held by the Daly River/Port Keats ALT.

4.2. WATER GAUGING STATIONS

242. The relevant evidence was given by Simon Cruickshank, the Acting Deputy Executive Director in the Water Resources Division of the Department of Environment and Natural Resources of the Northern Territory (DENR) and by Gary Willis, Hydrographer in DENR.
243. There is a water gauging station located on the northern bank of the Fitzmaurice River upstream of the confluence of Alligator Creek, and so beyond the tidal influence of the river. That gauging station has not been in use since November 1986, and its essential instrumentation has been removed. There are no present plans to re-activate it.

244. There is no evidence to suggest that its location or extent, or the access to it, impaired in any meaningful way the enjoyment by the Aboriginal persons living near or passing through that area or the enjoyment or practice of their traditional laws or customs.
245. The Northern Territory points out that there is some possibility of that gauging station being re-activated or of other gauging stations being established on the area claimed (although there is no circumstance suggested which might make either of those events a realistic prospect in the foreseeable future). If such an event were to occur, obviously the Northern Territory would require access to the gauging station or stations for installation, maintenance and monitoring operations. In such an event, section 14(1) and sections 70(2A)(e)-(h) of the ALRA ensure that the necessary access will exist. The Northern Territory in its written submissions of 24 April 2020 at [54] fn 25 refers to 8 previous reports of the Aboriginal Land Commissioner between 1982 and 1993 where that has been said, commencing with the *Daly River (Malak Malak) Land Claim Report No. 13* (12 March 1982), with Justice Toohey as Commissioner at [325]–[327]. That view would suggest that the understandable point of the Northern Territory in this respect would not warrant the Minister declining a grant of the recommended claim area as the Northern Territory could access the granted area in any event for such purposes.
246. The Northern Territory also pointed out that section 6 of the *Aboriginal Land Act 1978* (NT) also would enable the relevant Minister to authorise entry to the claimed area for such purposes.
247. The claimants accepted that position in their written submission.
248. The submissions also address the possible payment of rent to the relevant Land Trust in the event of a grant of the claimed area or part of it, and in the event that there was a need for re-activation or establishment of a gauging station or stations in the future. That possibility could arise, and rental be payable under section 15 of the ALRA because the activity of gauging stations would not, at least at first impression, be for a community purpose as defined in section 3(1) of the ALRA. I agree with the Northern Territory that, in that event, the rental payment would constitute a relevant detriment.
249. That prospect, on the evidence, is a remote one. In addition, any rental payment would likely be nominal, assuming the chosen site or sites were small and did not affect in any meaningful way the enjoyment of the rights of the traditional owners. There is no evidence to suggest the circumstances would be otherwise. And in any event, it is accepted that access to any gauging station could be authorised by the relevant Minister of the Northern Territory.
250. In the event of a grant of the area claimed or part of it, I consider that there might be a detriment to the Northern Territory by any obligation to pay rent to the relevant Land Trust in the event of the re-establishment of the existing gauging station or the establishment of any further gauging stations on the area claimed. However, on the evidence, there is no reason to expect that the need for such a gauging station or stations will arise in the foreseeable future, and there is no reason to think that the amount of any such rental would be significant.

4.3. PETROLEUM TITLES

251. Victoria Jackson, Executive Director, Energy, in the DPIR identified five petroleum applications and interests under the *Petroleum Act 1984* (NT) which, she said, were in or adjacent to the area claimed, and also six pipeline interests under the *Petroleum (Submerged Lands) Act 1981* (NT) in or adjacent to the area claimed.
252. However, her description of four of the five petroleum applications and interests indicates that their location is outside the area claimed. The claimants also say, consistent with that, that upon examination of the map as Attachment B to her written statement (Exhibit NT 11) it is apparent that none of those ‘petroleum titles’ (using the shorthand description of them collectively as used by the Northern Territory in its heading to the relevant section of its written submissions) lies within the claimed area or abuts it. The remaining Petroleum Exploration Permit is also said to be located to the seaward side of the area claimed to the west, and was due to expire on 14 December 2017.
253. There are six pipeline interests which are described, and can be seen from Attachment C to Ms Jackson’s written statement to be located away from the area claimed (whether or not they are fairly described as adjacent to it). There are also two other pipeline interests which are depicted in Attachment D to her statement and are not within the claimed area.
254. Ms Jackson says that, nevertheless, petroleum interest holders may need to use the area claimed to access or transport a petroleum resource, petroleum infrastructure, or to conduct environmental studies, including sampling and geophysical surveys. Paragraphs [8] to [11] of her written statement expand on that proposition.
255. In my view, whilst as a matter of generality her propositions in that regard are understandable, they are purely speculative in relation to this particular area claimed. Ms Jackson agreed in her evidence that there was little or no prospect of any pipeline crossing the area claimed. There are already existing facilities – a treatment plant and pipelines – located within the Daly River/Port Keats ALT area. She did not identify any feature of the geography of the area claimed which might have significance. The terms of the grant for the Bradshaw Training Area effectively preclude there being any petroleum interest there.
256. Consequently, I record my view that the prospect of the area claimed, if granted, having any detrimental impact upon the grant of any future petroleum interest is so slight as to be discounted. Existing petroleum interests are already accommodated by agreements with the relevant Land Trust.

4.4. PASTORAL INTERESTS AND NON-PASTORAL USE OF PASTORAL LAND

257. I note that the current lessees of the Wombungi Pastoral Lease did not choose to participate in the Inquiry, and made no submission concerning detriment. They purchased Wombungi Station in 1995. They operate it as a pastoral lease as required under the *Pastoral Land Act 1992* (NT).

258. Tania Moloney, Director Pastoral Lease Administration within DENR has pointed out that the lessees, like all pastoral lessees, have the right to graze and water cattle on land adjoining waterways pursuant to the Water Act 1992 (NT), including taking water for domestic purposes, for stock grazing, to muster straying stock, and for personal recreational purposes. They also may wish to access the banks of the Fitzmaurice River to control feral animals and weeds. Finally, Ms Moloney refers to the possibility that the lessees, like other pastoral lessees, may at some future time wish to diversify the activities on the lease to include tourism, fishing tours, and the like.
259. In this instance, those concerns are largely speculative. The Northern Territory, quite properly in its written reply, says that the detriment is likely to be ‘minimal’.
260. The area claimed is downstream of the Wombungi Pastoral Lease, and the lessees have first access to the waters of the Fitzmaurice River upstream of the area claimed as it passes through their leased area. There is but a small section of the area claimed which meets with the pastoral lease, at a narrow gorge not suitable for stock access. The lessees have expressed no concern about the matters which Ms Moloney has referred to. They are likely to be familiar with the need to enter agreements with traditional owners of land granted under the ALRA. They have such an agreement with the Upper Daly Aboriginal Land Trust for grazing their cattle on those lands. They share a significant boundary with the Daly River/Port Keats ALT.
261. As noted, section 50(3)(b) requires this Report to include comment on any detriment that might result if the claim were acceded to. I do not consider that the Commissioner is required to adopt an unrealistic approach to that function, to speculate about what might or might not come to pass at some distant future time, or to record and comment about the remotest possibility of detriment, however unlikely that is. The section requires a sensible assessment of detriment and potential detriment to be made. That is then the foundation for the Minister to address the exercise of the discretion which section 11 of the ALRA requires.
262. In the particular circumstances, in my view there is no realistic prospect of the lessees of the Wombungi Pastoral Lease experiencing detriment if the area claimed were to be granted. Such access to the small exposure of their lease to the area claimed as they might want would be adequately protected by their rights under the Water Act 1992 (NT) and the Pastoral Land Act 1992 (NT): see section 70(2A)(h) of the ALRA.

4.5. PUBLIC ACCESS TO CROWN LAND

263. It is accepted that members of the public generally have a privilege to access and enjoy Crown land unless restricted or prohibited by statute or regulation: see *State of Western Australia v Manado* (2020) 270 CLR 81; HCA 9. That decision concerned the validity of section 14 of the *Titles (Validation) and Native Title (Effect of Past Acts) Act 1995* (WA), which was enacted in reliance on section 212(2) of the *Native Title Act 1993* (Cth). Section 13 of the *Validation (Native Title) Act 1994* (NT) (the NT Validation Act) is to the same effect.

264. There is a dispute between the Northern Territory and the claimants about the applicability of that decision to the grant of land under the ALRA, including (as here) the prospective grant of such land.
265. The Northern Territory, by reference to the ‘confirmation’ notion says that there is therefore a privilege of that character which pre-existed the NT Validation Act. That Act commenced on 10 March 1998. It is said that there was, at the time, no relevant positive statute or regulation prohibiting access to and enjoyment of the area claimed by the public, although there were some specific activities proscribed. The effect of a grant of the claimed land, it is said, would therefore inhibit the enjoyment of that privilege. It would be a relevant detriment.
266. The claimants’ response is to emphasise the statements of Nettle J at HCA [38], [39] and [41] in that decision that there was no legally enforceable right except for access for navigation and fishing, but in effect a tacit revocable permission to access and enjoy the foreshore except as otherwise proscribed.
267. I accept that submission, but in my view the removal of that privilege by the grant of the area claimed may amount to a relevant detriment, depending upon the particular circumstances. Consequently, for the purposes of section 50(3)(b) of the ALRA and subject to the alternative contention of the claimants, it is necessary to comment upon such detriment. The issue of impairment of fishing rights is addressed under a separate heading.
268. The alternative response of the claimants is to point to section 13(2) of the NT Validation Act which provides that the confirmation of existing access provided by section 13(1) of that Act ‘does not affect any conferral of land or waters, under a law that confers benefits only on Aboriginal peoples’. Having regard to the beneficial nature of the ALRA, it is said to follow that that ‘conferral’ in section 13(2) should include the whole process provided for under the ALRA for the grant of land to traditional owners including any such process (such as the current application) which may take place after 1998 and result in the recommendation for a grant of the claimed land.
269. I do not take that additional step. The proper construction of section 13(2) of the NT Validation Act is to give effect to existing conferrals of land under legislation such as the ALRA, rather than to extend to any prospective conferral of land. That would be consistent with the plan for section 50(3)(b) and section 11 of the ALRA that the Minister, at the time of making the decision whether to act on the recommendation of an Aboriginal Land Commissioner to grant certain land to its traditional owners, should have regard to the consequences to others of adopting that course.
270. Accordingly, I regard the existence of the tacit public right to access and enjoy unalienated Crown lands, and its possible impairment by the grant of the area claimed or part of it, as a matter of possible detriment which should be inquired into.
271. Particular categories of the public with specific activities already in relation to the area claimed, or with reasonable and realistic expectations of undertaking such activities in relation to the area claimed are separately addressed, under the headings of Tourism, Commercial Fishing, and Recreational Fishing.

272. Beyond those activities, there was no evidence identified by the Northern Territory, nor so far as I could discern any relevant evidence, which suggested that members of the public have accessed the area claimed or have any reasonable and realistic expectations of so doing. That is hardly surprising. It is remote and rugged country.
273. I do not consider that the making of a grant of the claimed land would or might cause any real detriment to the public by impairing access to the area claimed, save for the detriment which is discussed in the immediately following sections of this Report.

4.6. TOURISM

274. This heading encompasses consideration of the position of tour operators and of those who participate in tours conducted by tour operators.
275. The relevant evidence was given primarily by Valerie Smith, General Manager, Destination Development in the Northern Territory Department of Tourism and Culture. That evidence was complemented by evidence from Ian Curnow, Director of Fisheries and General Manager, Fisheries and Product Integrity, of the DPIR, and by David Ciaravolo of AFANT. I have also had regard to the Recreational Fishing Development Plan 2012–2022 of the Northern Territory, about which Ms Smith spoke.
276. I note that there may be an overlap between this topic and recreational fishing, to the extent that recreational fishing is part of a package for fishing tours organised by a tour operator.
277. The evidence is clear that, as a general proposition, tourism is a significant present and prospective contributor to the economy of the Northern Territory. It also shows that ‘expedition cruising’ is and will be an important element of its tourism activities. There has been only one cruise operator which, to date, has used the Fitzmaurice River for a commercial cruise. That cruise operator did not choose to participate in the Inquiry. There have also been a few fishing tour operators using the waters of the Fitzmaurice River from time to time. It can also be noted with confidence that cultural tourism, involving Aboriginal communities and access to Aboriginal land is and will continue to be an important element of the tourism activities promoted by the Northern Territory.
278. In those circumstances, there might be some detriment if cruise tour operators are unable to get permission to operate cruises in the Fitzmaurice River, or if they are obliged to enter into agreement with the traditional owners for access to the river by payment of a fee. There is little but speculation to say that the need to negotiate with the Aboriginal traditional owners for the entitlement to bring cruises into Aboriginal lands might have the consequence that visitors to the Northern Territory might choose to spend their money elsewhere than in the Northern Territory or indeed in Australia. It is commonplace and inherent in cruising operations that access fees are paid, whether for access to particular places or for berthing. The payment of fees for such access is both routine and accepted. Indeed, the Recreational Fishing Development Plan explains that the drawcard of paid cruising for fishing and other activities provides an impetus for regional development, including on Aboriginal land. I also find it difficult to accept that other Aboriginal tourism operators would feel disadvantaged by having to seek permission from the traditional owners to access the Fitzmaurice River, or to pay a fee for being able to do so.

279. In my view, there might be a notional detriment to the tourism industry, in particular cruise operators, if access to the area claimed were only by permission of the traditional owners and required a negotiated agreement with them for such access. At present such access is not charged for. But that detriment is minimal. First because access to the Fitzmaurice River for tourism activities is quite uncommon. And second because it is commonplace for tourism cruise operators to negotiate with the traditional owners for such access, and there is no evidence to suggest that the activities of the operators in the past have been impeded in any meaningful way.
280. In those circumstances, although it is of course a matter for the Minister, the Minister might consider that the detriment is of little import in making a decision whether or not to grant the area claimed or part of it to the traditional owners. The Minister might also think that the benefits in terms of regional development might outweigh any such slight detriment.

4.7. COMMERCIAL FISHING

281. Mr Curnow's evidence was directed largely to this topic. In addition, as noted, Ms Winchester of the NTSC gave evidence on the topic of detriment in this context.
282. Mr Curnow's qualifications and experience are extensive. His responsibilities include the management and licensing of fisheries, strategic policy and planning for the ecologically sustainable development of fisheries resources and promoting the optimum utilisation of aquatic resources. He has also been the lead for the Northern Territory in negotiations to address and resolve 'fishing access issues' following the *Blue Mud Bay* decision. It is noted that seven agreements have been reached between the Northern Territory and the NLC on behalf of the relevant traditional owners for access to waters above the low water mark on other Aboriginal lands for other fishers.
283. If the evidence of Mr Curnow were considered in relation to the area claimed only, accompanied by the evidence of Ms Winchester, it is clear that the commercial fishing activities in the Fitzmaurice River are relatively insignificant in relation to the overall commercial fishing in the Northern Territory. To close the claim area to commercial fishing would constitute but a small displacement. There is only one significant commercial fisher using the Fitzmaurice River, and that fisher also operates in other areas.
284. There are commercially viable barramundi and king threadfin fish stock in the Fitzmaurice River. Consequently, it would appear to be the case that the grant of the area claimed might close the access of commercial fishers to the river, or require the commercial fishers to negotiate with the traditional owners to secure continuing access for their commercial fishing activities, and in the meantime the small numbers of commercial fishers who might want to fish in the Fitzmaurice River might be put in a state of uncertainty about their commercial fishing investment.
285. There was some suggestion that there is also a viable commercial mud crab fishery in the Fitzmaurice River, but the clear evidence of Mr Curnow was that there was no significant mud crab commercial fishing in that regard. That fishing activity is focussed principally on the Gulf of Carpentaria and nearer to Darwin. It is apparent, as Ms Winchester agreed, that this is really because of the remoteness of the area and the logistical difficulties.

286. In the circumstances, I report that the grant of the area claimed might produce a detriment to the commercial fisher who presently operates in the Fitzmaurice River and other commercial fishers who occasionally choose to do so. That is confined to fishing for barramundi and king threadfin fish. The detriment might be that the traditional owners refuse to allow access to the area at all. That is unlikely. The much more probable consequence is that the traditional owners will negotiate with the commercial fishers who seek access to the Fitzmaurice River for their operations, and reach an agreement which is mutually satisfactory to each side for the payment of a fee for such access. There is no reason to think that the negotiated fee would be unreasonable.
287. In those circumstances, the Minister might consider that the detriment, having been acknowledged, should not impede the grant of the area claimed or part of it.
288. I shall address the issue of cumulative detriment below.

4.8. RECREATIONAL FISHING

289. This topic was largely addressed by Mr Curnow and by Mr Ciaravolo of AFANT. There were written submissions from AFANT including submissions in response to those of the claimants on this topic, and of course the extensive written submissions of the Northern Territory including its reply submissions.
290. As a starting point, and as noted earlier in this Report, I accept that the public right to navigate and fish over tidal waters at the coast and in tidal river waters was largely assumed to continue, notwithstanding the grant of coastal land and land abutting a tidal river under the ALRA to its traditional owners, until the Blue Mud Bay decision. That position seems to have been assumed in reports of the Aboriginal Land Commissioner from time to time up to 2008. That appears in the *Ngaliwurru/Nungali (Fitzroy Pastoral Lease) Land Claim (No. 137) and Victoria River (Beds and Banks) Land Claim (No. 140) Report No. 47* (22 December 1993) per Gray J at [6.10.6]; *Upper Roper River Land Claims comprising Mataranka Area (NT Portion 916) Land Claim (No. 129), Western Roper River (Beds and Banks) Land Claim (No. 141), Roper Valley Area Land Claim (No. 164) and Elsey Region Land Claim (No. 245) Report No. 68* (24 March 2004) per Olney J at [60]; and *Lorella Region Land Claim (No. 199) and Maria Island Region Land Claim (No. 198) Report No. 63* (18 June 2002) per Olney J at [90].
291. The evidence clearly shows a not insignificant amount of recreational fishing in the Fitzmaurice River, although the data is to a large extent run with the fishing practices in the Victoria River and the Keep River to the south and west of the Fitzmaurice River. As the AFANT Primary Submission pointed out, the Survey of Recreational Fishing in the Northern Territory 2009-2010 (an annexure to one of the statements of Mr Curnow) showed about 3000 fisher days per year for the general area.
292. To the extent that there is, and will be in the future, recreational fishing in the Fitzmaurice River, and there is a grant of the area claimed, clearly there will be a detriment to those fishers because, at one extreme, they may no longer access the

fishing areas without the consent of the traditional owners. They will have to seek alternative fishing sources, with some inconvenience and disruption, and perhaps sources that are not as bountiful.

293. Although it was suggested in the evidence of Mr Curnow as a possibility, there is not sufficient evidence to be satisfied that the diversion of fishing from the general area (and even more forcefully it can be said from the Fitzmaurice River) would be likely to result in a meaningful dilution of fishing stocks in other areas.
294. The evidence included material concerning how that detriment to recreational fishers might be eliminated or reduced in the event of a grant of the area claimed. Mr Bowden from the NLC gave evidence about the process of developing such a scheme. Primarily, that was by a fishing permit system. The claimants referred to steps taken to date by the NLC on their behalf and on behalf of other traditional owners to develop such a system. Mr Ciaravolo in his evidence agreed that such a system, if it were efficient, adaptable to particular needs and not expensive could largely alleviate the detriment. He doubted that such a system could be produced and operate effectively.
295. The preference of AFANT is for the area claimed to be declared an open area under section 11 of the *Aboriginal Land Act 1978* (NT). The effect of such a declaration would be to permit access to the area claimed in an unrestricted manner. Effectively, that would negate much of the benefit of recognising the claimants as traditional owners of the area claimed, and make it merely a token grant.
296. However, the Minister may consider it desirable, before making a grant of the claimed land, to be satisfied that there is in place a suitable permit system for fishing access for recreational fishers. Such a system should be electronic, easily and readily accessible and able to accommodate a range of fishing plans – from day fishing to longer terms up to an annual fishing permit, and to accommodate families and the like, and of course at a fee scale which was satisfactory. Such systems are routine in other areas, including access to national parks in many States and Territories.
297. The Minister may well consider that, apart from the fees which might be charged, there would be little disadvantage to recreational fishers to procure such a permit, so the only real detriment (or change from the present unrestricted access) is the payment of a fee for the benefit of the traditional owners. Such a system may also have to accommodate the exclusion of places of particular significance to the traditional owners from permitted access. The fees so recovered, in relation to areas of particular Aboriginal Land Trusts would then be available to the traditional owners for their social and economic needs and activities.
298. Alternatively, the Minister might consider that, as has occurred in relation to some other areas of Land Trusts, the Northern Territory and the traditional Aboriginal owners (or, until a grant, the NLC on behalf of the traditional owners) should be left to negotiate access agreements for purposes which include recreational fishing. Mr Curnow gave evidence of some such agreements. If that course were taken, then it would mean that a grant of the area claimed or part of it would be made, leaving the Northern Territory and the traditional owners through the NLC to negotiate the terms of access for a range of activities.

4.9. CUMULATIVE DETRIMENT

299. I have addressed this topic at some length in the last subheading of the Detriment chapter of the *Legune Report*. It is less significant to this claim, simply because the degree of recreational fishing in the Fitzmaurice River is much less than the Victoria River or the Keep River. Indeed, it is difficult to accept that, even if there is in the future following a grant, no access for recreational fishers in the Fitzmaurice River, the diversion of fishing activities would really make any real difference to the pressure on other fisheries. Of course, if there is a fishing permit system, that issue goes away.
300. I have also commented in the *Legune Report* that the closure of any particular fisheries has not been shown to have produced a measurable shift to other fisheries with a detrimental pressure on their stocks. The impact of the closure of fisheries by DPIR for reasons unrelated to the grant of lands to traditional owners under the ALRA is likely to be equally, if not more, significant to fishery stock pressure. The evidence does not explain how that factor is taken into account in the general proposition put by Mr Curnow. It does not explain the significance of the six agreements with Land Trusts for recreational fishing access which DPIR has negotiated.
301. In its submissions, the Northern Territory also referred to the evidence of Mr Sarib in his second statement. He indicates the extent to which the coastal waters of the Northern Territory may be the subject of grants to traditional owners under the ALRA. It is self-evident that, as each claim to coastal land and to the low water mark is the subject of a grant under the ALRA, so there is less coastline available to other members of the public, except with the agreement of the traditional owners. That exposes one reason as to why there may be some doubt that a Territory wide analysis of cumulative detriment is appropriate for the purposes of a particular Land Claim Report.
302. The Commonwealth, when it enacted the ALRA, may have had knowledge of the extent to which coastal and tidal river waters might be the subject of grants under the ALRA. Indeed, Part 1 of Schedule 1 to the ALRA by itself effected or enabled extensive grants including over coastal areas. It is hard to see then than it was contemplated that, at a certain tipping point, the Minister was empowered to make a judgment along the lines of 'enough is enough' so as to retain an overall sort of balance between Aboriginal coastal lands and other coastal lands available for recreational fishers. That would mean that the claims under the ALRA which happened to be heard earlier than others, or where there is a recommendation by the Aboriginal Land Commissioner to make a grant which happen to be considered by the Minister earlier than others, the earlier claims or recommendations should have greater prospects of the Minister deciding that a grant of the claimed area should be made. The ALRA has no content which would suggest such a legislative intention.
303. Finally, I observe that there is also some scope for uncertainty that the cumulative detriment by reference to Territory wide considerations is mandated, or authorised, by the ALRA. It is not necessary to take that matter further in this Report.
304. In relation to the Fitzmaurice River, and in particular the area claimed, there was no additional evidence to suggest that recreational fishing gave rise to benefits to other groups, such as tourist charter operators, supporting facilities or the like. Its geography explains why that is so.

4.10. BRADSHAW TRAINING AREA

305. Initially there was some concern on the part of the Commonwealth that it might suffer some loss of, or restriction of, access to the area claimed and surrounding areas for the purpose of training exercises and bushfire management, and some uncertainty about the capacity to reach future agreements as appropriate relating to those matters.
306. There is currently an Indigenous Land Use Agreement of 16 July 2003 covering a range of topics of mutual significance to the Department of Defence and to the traditional Aboriginal owners. It is extensive both in the topics it covers and the term it relates to. It is not necessary to record its details. In the light of that Indigenous Land Use Agreement, the issue of detriment is not contentious.
307. The Commonwealth and the claimants have subscribed to the position that it would be sufficient to report that there is sound reason to expect that, in the event of a grant of the claimed area or some part of the claimed area, in due course the claimants and the Commonwealth would be able to reach agreement on measures to address that detriment.
308. I so report. The Minister will not have to balance any detriment to the Commonwealth in the scales when considering whether to make a grant of the area claimed or part of it.

4.11. OTHER ABORIGINAL INTERESTS

309. Section 50(3)(a) of the ALRA requires comment on the number of Aboriginals with traditional attachments to the area claimed who would be advantaged by the grant and the nature and extent of the advantage to those Aboriginals if the area claimed were granted in whole or in part.
310. As my consideration of the traditional ownership indicates, the NLC has estimated that across the nine family groups there are some 845 claimants, including 410 Wagiman claimants. I mention the Wagiman claimants separately, because of the strong challenge to their status by the Northern Territory. In addition, those with genealogical connections more distant than to include them in the claimants, those who have connections to the area claimed through conception, place of birth or dreaming affiliation, those who have a strong historical connection to the area claimed in other ways such as living or working in the area claimed or proximate to it, and those who are married to or are children of the claimants would also benefit by the grant of the area claimed.
311. It is clear that the area claimed is but a small part of the traditional lands of the several claimant families or groups. As I have found, their attachment to the area claimed (with the qualifications earlier noted) is strong and continuing. The Indigenous Land Use Agreement with the Commonwealth in relation to the Bradshaw Training Area shows by its terms the desire to maintain and continue their traditional practices and to manage and develop their lands. There was no suggestion in the submissions that the claimants were not genuine in their beliefs or their asserted connection to the area claimed. The fact that the Bradshaw Training Area, adjacent to the southern bank of the Fitzmaurice River, is not available for claim under the ALRA

probably means that the area claimed, albeit relatively small, would be an important recognition of the traditional ownership of the claimants, and would signal formal and significant recognition of their strong and meaningful relationship to their country.

4.12. EXISTING OR PROPOSED PATTERNS OF LAND USE

312. Section 50(3)(c) of the ALRA requires comment about the effect of a grant of the area claimed on the existing or proposed patterns of land use in the region.
313. Given the nature of the area claimed – a fairly narrow strip of riverbank and riverbed in very remote country – there was no evidence of any significant existing or proposed patterns of land use, beyond pastoral usage and that of the Bradshaw Training Area. The discussion about detriment in relation to those areas indicates they are unlikely to be affected by the grant of the area claimed. There is also no suggestion that the Daly River/Port Keats ALT activities would be impaired in any way by the grant of the claimed land. I have also noted the same in relation to the Wombungi Pastoral Lease.
314. At a wider regional level, the pattern of land usage is apparently stable. The Northern Territory has not submitted that the wider regional patterns of land usage would be impacted in any way by the grant of the claimed land. It has pointed out in its Reply Submissions that the area claimed is some 274 square kilometres, and at the seaward end has an extensive face into the Bonaparte Gulf, but that did not contradict the claimants' assertion that the grant of the area claimed would not in any meaningful way affect existing and prospective patterns of land use in the region.
315. In my view there would be no relevant effect on existing or prospective patterns of land use in the region if the area claimed were to be the subject of a grant to the traditional owners.

5. CONCLUSION

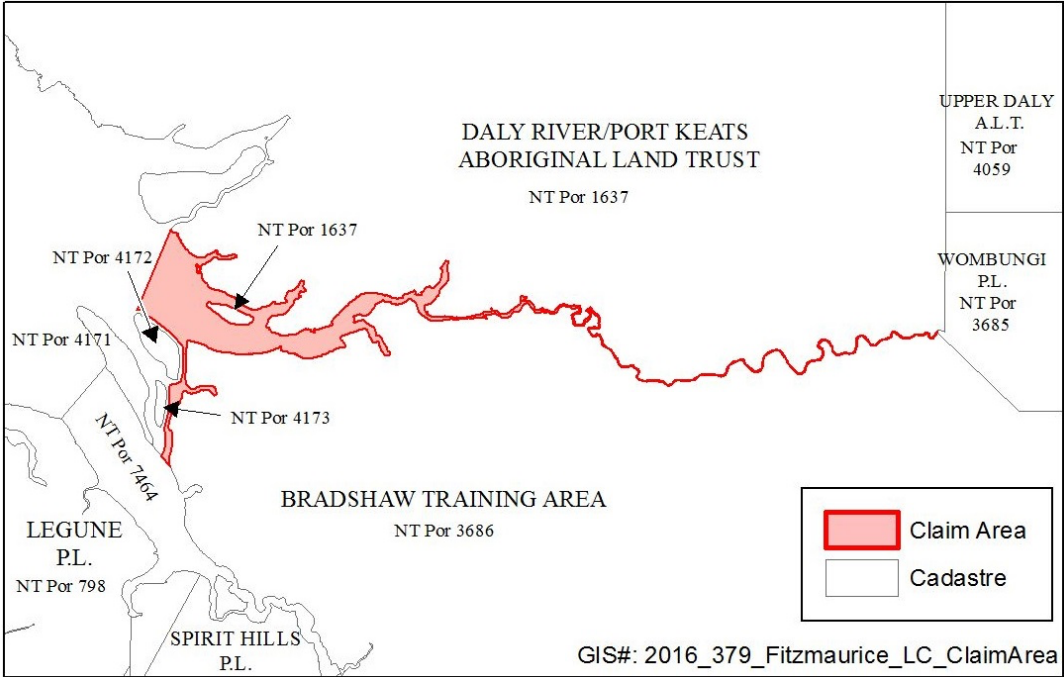
316. In accordance with my functions contained in section 50 of the ALRA, I have inquired into the Fitzmaurice LC application made by the NLC on behalf of Aboriginals claiming to have a traditional land claim to an area of land, being unalienated Crown land. I have ascertained that those Aboriginals are the traditional owners of that land, except to the extent set out at [206]–[225] above.
317. I have found that the claimants constitute 9 subgroups or smaller local descent groups that are linked by shared traditions and social relations centred around the Fitzmaurice River. Those subgroups are the Dalunggag, Wakal Jinang, Yambarnyi/Ngamar, Bugurniny, Maranguname/Madjalindi, Kimul, Kartinyen, Wujuman, and Wagiman. The subgroups have common spiritual affiliations to sites on the claimed land, being affiliations that place them under a primary spiritual responsibility for the relevant sites and land.
318. It was not contentious that each of the subgroups, and in turn the claimants as a whole, are also entitled by Aboriginal tradition to forage as of right over that land.
319. There is a significant amount of evidence relating to the attachment of the claimants to their country. It manifests itself through visits, hunting, fishing and camping, retaining and passing on knowledge of Dreamings in relation to the river, and through respect of cultural laws and customs.
320. I have emphasised how, despite the remoteness of the claim area, that attachment is strong, and have so reported in accordance with section 50(3) of the ALRA. I have also noted, as prescribed by section 50(3)(a) of the ALRA, that the number of people who would benefit from a grant is voluminous. This is particularly so due to the size of the claimant group. It is not unreasonable to conclude that many other people, through various connections to the local descent groups and the claim area, would benefit from a grant of land.
321. I have also found however that the traditional ownership claimed does not cover the full extent of the claim area, particularly the wider and permanently inundated stretches of the river to the west. I have made a detailed recommendation, at [206]–[225], of where the line between the area recommended and not recommended for grant should be drawn. As I there noted that line is, historically speaking, artificial to some extent: however it is on the evidence that I make that finding.
322. It should be noted, for clarity's sake, that that conclusion does not exclude any of the subgroups from my finding that there are traditional owners of the remainder of the claim area so described. That is to say that all of the named subgroups comprise local descent groups as advanced, and have common spiritual affiliations that place those subgroups under a primary spiritual responsibility for discrete portions of the Fitzmaurice River that are included in the recommendation to grant.
323. A list of the presently identified claimants, as they belong to each subgroup, is contained at Annexure D to this Report. It obviously should not be considered to be a fixed list, however that is a matter for the NLC in the context of its functions under the ALRA.

324. I have also had regard and commented upon submissions relating to sections 50(3)(b) and 50(3)(c), that is, matters of detriment and effects on patterns of land usage. In accordance with the established principles explored above, it is for the Minister to consider those matters in deciding whether to make a grant of land trust as a result of this Report.
325. For the sake of completeness, I again note that there is no need for me to comment upon sections 50(3)(d) and 50(4) in respect of the Fitzmaurice LC.

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**ANNEXURE C: MAP FROM ANTHROPOLOGIST’S REPORT
DATED JUNE 2017 BY ANDREW MCWILLIAM AND
JOHN LAURENCE AT [1.1]**



Source: Northern Land Council

ANNEXURE D: LIST OF CLAIMANTS

Dalungagg (Group 1)

Name

Ganggina (deceased)	Roseanne Ngarrjinthug Jinjair
Sam Ngailulu (deceased)	Christina Jenhmele Jinjair
Johnson Kingunggarri (deceased)	Slyvia Gidehnu Jinjair
Polly Wandanga (deceased)	Geraldine Brandy
Sarah Bitting Yetbarriya	Noelene Benning
Bobby Bitting Bubindja (deceased)	Cheryl Cox
Nancy Bitting Wajaying	Helena Cox
Amy Long-Johnson Wirrini	Gilbert Cox
Ruby Thorrbiliny (deceased)	Paul Cox
Peggy Jalul (deceased)	Eric Cox
Charcoal Ngamiyin (deceased)	Edmond Cox
Roy Ngainbag (deceased)	Thalia Wetria
Doris Kwetjil (deceased)	Divina Wetria
Isa Pretlove Winggal Jargutjing (deceased)	Ashley Bernard/Dixon
Monica Bernard	Kyle Bernard/Dixon
George Jinjair Ngaynbay/Ngunbuk/Ngailulu (deceased)	Tyisha Bernard/Dixon
Daisy Pretlove	Zarima Bernard/Dixon
Madeleine Brockman	Lyndon Brandy
Jonah Johnson	Joeline Brandy
Susan Johnson	Rosita Brandy
Cheryl Johnson	Sally Brandy
Grant Johnson	William Bending
Kieran Johnson	Jordan Bending
Dominique Bitting	Jessica Bending
Georgie Bitting	Robert Bending
Joseph Bitting	Brett Bending
Stephen Bitting	Alisha Bending
Rosemary Bitting (deceased)	Izalia Cox
Ernest Bitting	Tashaya Cox
Joanne Bitting	Emily Cox
Helena Bitting	Kitanah Fox
Gordon Bitting	Ezraya Cox
Jason Bitting	Ezra Cox
Mark Bitting	Lorry Cox
Helena Anne Bernard	Tyrone Cox
Patrick Bernard (deceased)	Heze Cox
Sebastian Nganbag Jinjair	Shante Cox
Lucia Thorrbiliny Jinjair	D'Andre Cox
Christopher Ngaminyin Jinjair	Camilo Cox
Roy Nguthul Jinjair	Eric Jnr Cox
Geraldine (Tayah) Cox	Gilbert Cox
Kassaria Cox	Edmond Jnr Cox
Ava Curtin	Rayne Curtin

Wakal Jinang (Group 2)

Name

Lewen (deceased)	Dooley Simon
Miller Gungin (deceased)	Angelina
Mungarr (The Packsaddle) (deceased)	Cassandra Grace Jinjair Wandanga
Munthungun (deceased)	Biddy Jinjair Mubukiny
Frank Jinjair Dimgek	Annette Jinjair Dirrirrbi
Biddly Elizabeth “Gypsy” Simon	Patrick Jinjair Kumbulinkan
Phillip Friday Jinjair Dedemarr/Dadama	Damion Jinjair Wulungurru
Benedict Kelly Jinjair Kikiminy	Leanne Jinjair Nuthunduth
Harry Jinjair Kurnuwa	Kelvin/Calvin Jinjair Ngologanda
Lewin Jabiru (deceased)	Cecily Jinjair Barrimarreni
Rebecca Kuradi (deceased)	Rapellya Jinjair
Major Raymond Migaminy (deceased)	Claire Jinjair
Gerard Philip Jinjair Ngurruwilin (deceased)	Julie Jinjair
David John Jinjair Munthungun (deceased)	Jilian Jinjair
Morris/Maurice Simon	Lazarus Jinjair
Maureen Simon	Paul (aka Freddy) Jinjair
Mary Simon	Rebecca Jinjair
May Simon	Richard Jinjair
Wendy Simon	Don Jinjair
Vincent Minbiya	Moses Jinjair Lajaminy
Luke Jinjair Kamangan	Matthew Jinjair Karringgulkul
Paul Anthony Jinjair Gubanyarr	Wilfred Raymond
Marie/Marcia Jinjair Gonmangurr	Jayice Raymond
Theresa Jinjair Dirrarrin	Elvin Raymond
Bernadette Jinjair Niminyjik	Mainda Jinjair
Henry Thomas Jinjair Nimarti	Brian Jinjair
Anthony Thomas Jinjair Dapanh	Francella Jinjair
Janie Jinjair	Jacob Jinjair
Susan Raymond	Sophia Simon
Raylene Raymond	Malcom Simon
Joy Raymond	Veronic Simon
Warren Raymond	Bevan Simon
Bernadette Simon	Michael
Marcus Simon	Mary Carmel

Yambarnyi/Ngamar (Group 3)

Name

Yambarnyi (deceased)
Kangginang (deceased)
Nganaiya (deceased)
Kunyerr (deceased)
Jabiru Labanganyburru (deceased)
Joe Bradshaw Wipawk (deceased)
Sydney Juluwarl (deceased)
Christopher (deceased)
Banjo Kathu (deceased)
Mick Dirrngith (deceased)
Billy Dinung (deceased)
Henry Carlton (deceased)
Dodger Carlton (deceased)
Light Balgarri (deceased)
Sandy Kundun (deceased)
Doris Kwetjil (deceased)
Pauline Galbat
Maxine Carlton
Thomas Carlton
Barry Carlton
Gllensice Carlton-Smith
Colin Carlton
Trevor Carlton
David Carlton
Steve Carlton
Kenny Carlton
Sarah Bitting Yetbarriya
Joe Bitting (deceased)
Nancy Bitting Wanjaying
Bobby Bubindja

Eileen Huddleston Tervguman (deceased)
Ernest Bobby
Rosemary Bobby
Mara Jawamarria (deceased)
Eric Kathu
David Newry
Katrina Gilbert
Celina Gilbert
Edward Huddleston
Camilla Huddleston
Wilma Huddleston
Brian Huddleston
Alex Kunoth
Leroy
Rhys
Kieran
Jelicka
Jezaelin Sultan
Shannon
Errol
Edmond
Tye
Tennielle
Jeffery Newry
Georgina Newry
Glenis Newry
Angela Newry
Rosemary Newry
Gloria Gilbert

Bugurniny (Group 4)

Name

Nguluwamu (deceased)	Leonard
Billy Dinung (deceased)	Aron (deceased)
Pauline Galbat	Shane
David Newry	Robert
Jeffery Newry	Samson Jnr
Georgina Newry	Nora
Glenis Newry	Sophiana
Angela Newry	Bronwyn Newry
Rosemary Newry	Dorielle Newry (deceased)
Gloria Gilbert	Lyle Newry
Katrina Gilbert	Dwayne
Celina Gilbert	Corthian
Vincent	Heisha
Desesuie	Quintain
Laetta	Buanta (deceased)
Sophia (deceased)	Alicia
Gema	Liam
David Jnr	Jayla
Chorliene	Dorisha
Jeffery Jnr	Richard
Kayla	Dudley

Madjalindi (Group 5)

Name

Kumbithkar (deceased)	Maragret Muyuwa (deceased)
Thathath (deceased)	Tony Paul Kumbithka/Keringbo
Walain (deceased)	Bernard Djubin
Kidalu (deceased)	Ronnie Carlton (deceased)
Numungarri (deceased)	Teddy Carlton
Kanggal (deceased)	Veronica Dumu (deceased)
Paininbi (deceased)	Theresa Dumu
Kerinbu/Paynimbi (deceased)	Phillipa Wanmarr
Tjeninin (deceased)	Dominic
Peter Walain Naidjin (deceased)	Barbara Anne
Wandjarr (deceased)	Wayne Joseph
Marimi (deceased)	Robert
Wierri (deceased)	Josie Jones
Mamgaiwu (deceased)	Joe Lewis (deceased)
Tommy Kulawurruk (deceased)	Donald (deceased)
Sandy Labirr (deceased)	Rosemary
Albert Wurumadji (deceased)	Maxie
Bungledoona (deceased)	Sarah
Tim Mudbirr (deceased)	Richard
Vincent Kulimbin/Keringbo (deceased)	Rodney Raymond (deceased)
Kwiyen (deceased)	Jane Raymond
Elizabeth Mignonette Jemen (deceased)	Keith Campbell
John Walain Ngarinngari/Ngamama (deceased)	Julie Newry Bilminja
Patricia Karuwi (deceased)	Kathleen Binbirrij
Karingari (deceased)	Mutpirr
Karingari (2)	Tilmarr
Maurice Nama/ Kahki/Bianimbi/Kulawurruk	Clara Magagan (deceased)
Mabel Thainorung	Blue Bob Gulimbin (deceased)
Daisy Barry Binbirridj	Marjella Pinbilith/Binbirridj
Daisy Kunyimi (deceased)	Marcia Jinginin
Elsie Gerawungga (deceased)	Marita Nagara
Smiler Underwood (deceased)	Barty Paiynimbi
Violet Majawug (deceased)	Simon Peter Kumbithka/Keringbo
Finnegan Quilty (deceased)	

Kimul (Group 6)

Name

Marang (deceased)
Maudie Nganakin (deceased)
Kalgan (deceased)
Gilgbarriya (deceased)
Mundicap (deceased)
Bugun (deceased)
Harry Yilyiyili (deceased)
Nanakin (deceased)
Polly Kalkandayi (deceased)
George Ngurrany (deceased)
Polly Wandanga (deceased)
Tommy Dodd Snr (deceased)
Lilly James Dilmariya (deceased)
Nora Galiarn (deceased)
Larry Bulwarduj Darrangayigarr (deceased)
Emu (deceased)
Maggie Marralam (deceased)
Polly Gubungga (deceased)
Ruby Banymarr (deceased)
Rosie Long Ganbunin (deceased)
Dinal McDonald Kalingun (deceased)
Nugget Raymond Marang (deceased)
Doris Janyjuny (deceased)
Tarpot Ngamunung (deceased)
Albert Balanji (deceased)
Sarah Biting Yetbarriya
Joe Biting (deceased)
Nancy Biting Wanjaying
Bobby Bugindja
Tommy Dodd Jnr Bungun Narrguname
Kathleen Dodd Mayiwa
Basil Dodd
May Dodd Gubungga
Lisa Campbell
Charlie James
Rodger James
Sammy Freddy
Isabelle James
Lynette James
Ian James (deceased)
Eileen Huddleston
July Blutcher (deceased)
Margaret
Celestine Dodd
Suzanne Dodd
Janice Dodd

Deborah Dodd
Gladys Dodd
Mary Mackillop Dodd
Loretta Dodd
Bernadette Dodd
Leslie John Dodd
Jonathan Dodd
Jonas Johnson
Susan Little/Graser
Cheryl Johnson
Grant Hayley
Kieran Hayley
Danika Hayley
Linton Raymond Marang
Edward Huddleston
Camilla Huddleston
Wilma Huddleston
Brian Huddleston
Aaron Hector
Anne Marie Hector
Bernard Hector
Wesley Hector
Leone Long (deceased)
Damien Tyson (deceased)
Dennis (deceased)
Steven
Annelle
Darryl
Clarke
Renelle Lewis (deceased)
Junior Smiler
Michael
Reggie
Matthew
Diane
Francis
Joanne McDonald
Simon McDonald
Judy McDonald
Entina McDonald
Olga McDonald
Katey McDonald
Jaylene McDonald
Shirly Nipper (deceased)
Amy Long-Johnson Wirrini
Colene Long

Myrtle Long
David Long
Leslie Long (deceased)
Allan McDonald (deceased)
Phillip McDonald (deceased)
Donald McDonald
Jamie McDonald
Frankie McDonald (deceased)
Margaret McDonald
Betty McDonald
Rita McDonald
Lisa McDonald (deceased)
Shirley McDonald
Scotty Raymond Mundicap
Nancy Rayond
Joy Ramond
Celine Raymond (deceased)
Pauline Raymond
Anthony Raymond
Gordon Raymond
Kevin Raymond
Susan Raymond
Raylene Raymond
Joy Raymond
Warren Raymond
David Allyson
Theresa Allyson Walinya
Maxy Allyson
Kenny Allyson
May Rosas
Ernest Bobby
Rosemary Bobby
Cathy Berry
Patrick Carlton
Annistacia Carlton
Terrance Carlton
Clifford Carlton
Suzanne Carlton
Linton Carlton

Leslie Dodd
Kiyra Anzac
Kenesley Anzac
Andrew Jnr Anzac
Dion Anzac
Lucas Anzac
Greg Raymond
Scottrina Raymond
Lloyd Raymond
Roslyn Raymond
Roberta Hector
Raymond Hector
Alyson Hector
Hayden Hector
Janelle Hector
Joanne Raymond
Caroline Hector
Adrian Hector
Nigel Hector
Tray Tray Raymond
Trent Raymond
Courtney Raymond
Dianna Raymond
Clayden Hector
Lincoln Hector
Matthew Gundasi
Miriam Gundasi
Thomas Gundasi
Soma
Jocelyn Liddle
Sophia
Sharon
Rhonda
June
Julie Anne
Renae Curry
Roberta
Dawson Opsy

Kartinyen (Group 7)

Name

Pumurla (deceased)
Babinybuga (deceased)
Captain Waditj
Dick Waditj (deceased)
Robin Waditj (deceased)
Rupert Waditj (deceased)
Rusty Waditj (deceased)
Rolo Barry Waditj
Rita Waditj (Long)
Rebecca Kumba Palampa
Rebecca Parinda Palany
Kundu Merrinja (deceased)
Bidijin Ajak Jrribirrij
Stephen Kundu (deceased)
Patrick Fraser Ngulunung (deceased)
Peggy Bujij
Gardburr Gardburr (deceased)
Munggun (deceased)
Peter Namarrak
John Waditj
Daniel Waditj
Tony Waditj
Kevin Waditj
Pauline Waditj
Jennifer Waditj
Jack Waditj
Roger Waditj
John Paul Waditj
Moses Waditj
Jacob Waditj
Amy Waditj
Sandra Waditj
Chrisala Waditj
Jill Waditj
Michael Waditj
Sylvia Waditj
Lisa Waditj
Dennis Waditj
Barbara Waditj
Jimmy Waditj
Unknown male Waditj (Deceased)
Michael Waditj
Jacob Long
Jimmy Long
Estelle Long
Francis Long (deceased)

Raymond Long
Trevor Burraw
Lawrie Corrigan
Basil Corrigan
Arthur Corrigan
Eileen Corrigan
Bessie Corrigan
Kym Hartee
Shane Hartee
Beverly Hartee
Lee Hartee
Bruce Berry
Steve Berry
Charmaine Berry
Jaydin Berry
Lee Berry
Brian Long
Tony Long Mingin
Dominique Long
Dennis Long
Lulu Ajak
Sandy Ajak
Clancy Ajak
David Ajak
Ranken Ajak
Michael Kundu
Paul Kundu
Frieda Kundu
Imelda Kundu
Denise Kundu
Gulajgi Gulajgi (deceased)
Nora Ijibun
Doreen Mulitja
Patrick Fraser (deceased)
Pippin Bero
Ted Boy (deceased)
Don Liddy (deceased)
Willy (deceased)
Lena Chalalo (deceased)
Jessie Yibubu (deceased)
Doris (deceased)
Claria (deceased)
Thecla Nayeri
Vincent (deceased)
Therese Pamula (deceased)
Leon Pungilly

Rosa Long
Edward Laurie
Pamela Liddy
Tony Kumii
Terry Liddy
Gracie Huddleston (deceased)
Daphne Huddleston
Tracey Huddleston (deceased)
Paddy Huddleston (deceased)
Susan Fraser-Little
Doreen Long
Stan Long

Lesley Long
Jessilyn Pungilly
Kaylene Pungilly
Patrice Huddleston
Donovan Huddleston
Jasman Huddleston
Paul Huddleston Mirrin
Terry Huddleston Kiwardi
Simon Huddleston Imimimh
Shiree Huddleston (deceased)
Charlene Huddleston

Wujuman (Group 8)

Name

Wajibatburru (deceased)
Karrinngayi (deceased)
Sambo Yimbirrornma (deceased)
Bloomer Burrinjitj (deceased)
Mick Manyi (deceased)
Ruby Gingirr (deceased)
Mona Banderson (deceased)
Billy Bloomer (creased)
Richard (Reggie) Bloomer Banggurdu
Sheila
Terrene Bloomer-Darby
Bronwyn Newry
Dorielle Newry (deceased)
Lyle Newry

Wagiman (Group 9)

Name

George Snr Huddleston Jabulgari (deceased)
Robert Huddleston Kimbitjika (deceased)
Paddy Huddleston Benburr (deceased)
Mick Huddleston Bay Bay (deceased)
Teresa Huddleston/Banderson Muyuwa
Jabulgari George Jnr Huddleston
Joe Huddleston Kalwaying (deceased)
Nellie Huddleston Janungman
Camile Huddleston
Eddie Huddleston
Brian Huddleston
Wilma Huddleston
Merica Huddleston Wolamo
Victor Huddleston Jimigurru (deceased)
Leanne Morgan
Mary-Anne Morgan
Jonison Bradshaw
Jackie McDonald
Coraline Sandra Huddleston
Paddy Huddleston (deceased)
Georgina Huddleston (deceased)
Katinyan Daphne Huddleston
Veronica Huddleston
Clayton Huddleston
Rhiannon Huddleston
Dennis Gayaso Widpinyungu
Fred (Freddy) Muggleton Beru
Arther Muggleton
Keith Muggleton (deceased)
Yvonne Muggleton
Josephine Muggleton
Verona Huddleston Yalyimpu
Reggie Huddleston Kayja
Patrick Huddleston Kalambara
Brenda Huddleston Ngulgurdi
Wendy Huddleston Nugunyuk
George Jnr (3) Huddleston Mamuyuk (deceased)
Leanne Huddleston Majiwan
Doris Huddleston Margayan
Jefferey Yates Kapuya
Cedric Huddleston Jatparr
Noni George Huddleston Igondongbu
Rick Quan
Dyvonne
Jeffrey
Sheree

Maxine
Bianca
Latisha Hyde
Timia Hyde
Wyria Campbell
Jessica Corrigan
Zadkira
Memphis
Terrence
Simone Huddleston
Rebecca Huddleston Muyuwa
Gary Huddleston
Damien Huddleston Julun
Alistair Huddleston Baybay
Amelia Huddleston
Victor Jnr Huddleston
Wilton Huddleston
Paul Miriyn
Derek Thompson Kiwadi (deceased)
Charmaine Thompson Imayma
Cherie Thompson Kunbitabita
Sharleen Thompson Ngaguna
Patricia Huddleston
Donovan Huddleston
Jasmine Huddleston
Antoine Huddleston
Clancy Markham
Josephine Markham
Nick Markham
Timothy
Kalisha Muggleton
Shakima Muggleton
Sophie Muggleton
Jordan Muggleton
Sherrie Ann Lee
Rebecca Huddleston
Damian Huddleston
Alistair Huddleston
Josephine Huddleston
Betty Anne Huddleston
Dwayne Allingale
Denzel Allingale
Malachi Allingale
Tamara Allingale
George Allingale Junjun
Felicia Allingale

Therese Huddleston
Jodie Huddleston
Jane Huddleston
Sheena
Dominic
Gracie
Chantelle
Abraham
Calvin

Kerin
Bethany
Amos
Brain
Amelia
Anna
Carissa
Elijah

ANNEXURE E: PROCEDURAL MATTERS

1. Legal representatives

Party	Names
Claimants	Mr P Willis SC, and Mr D Avery and Ms M Hunt (Northern Land Council)
Northern Territory Government	Mr T Pauling QC, Mr P Walsh of counsel, Mr T Anderson of counsel, and Ms K Gatis and Ms Z Spencer (Solicitor for the Northern Territory)
Commonwealth of Australia, Department of Defence	Mr R Levy of counsel and Ms D Boyce (Australian Government Solicitor)
Amateur Fisherman's Association NT	Mr B Torgan (Ward Keller)
NT Seafood Council	Ms K Winchester

2. Anthropologists

Party	Names
Claimants	Mr J Lawrence (Northern Land Council), Professor A McWilliam
Northern Territory Government	Dr J Avery

3. List of witnesses – Traditional Aboriginal Ownership

Party	Names
Amy Johnson	Tommy Dodd Jnr Bugun
Maxine Carlton	Kathleen Carlton Mayiwa
Frank Jinjair	Basil Dodd
Benedict Kelly Jinjair	Nancy Raymond
Luke Jinjair	Joy Raymond
Paul Jinjair	Thecla Nayeri
Marie Jinjair	Richard Bloomer
Glenis Newry	Jabulgari George Jnr Huddleston
Majella Chula	Roger Waditj
Marita Anne Ngagarra	Rollo Barry
Barty (Bartholomew Barnaby) Bainimbi	Bill Harney

4. List of witnesses – Detriment

Party	Names (Position)
Northern Land Council	Mr Kane Bowden (Permits Manager)
Northern Territory Government	Ms Valerie Smith (Department of Tourism and Culture), Mr Ian Curnow (NT Fisheries, Department of Primary Industry and Resources), Ms Victoria Jackson (Department of Primary Industry and Resources), Ms Tania Moloney (Department of Environment and Natural Resources)
Amateur Fishermen’s Association NT	Mr David Ciaravolo (Chief Executive Officer)
NT Seafood Council	Ms Katherine Winchester (Chief Executive Officer)

5. List of witnesses – Jurisdictional evidence (‘mouth of the river’ issue)

Names
Professor Stuart Kaye
Mr Mark Alcock (Geoscience Australia)
Mr Robert Sarib (Acting Surveyor-General of the NT)
Mr Simon Watkinson (Northern Land Council)

6. Exhibits

Exhibit Ref.	Tendering party
A	Tendered on behalf of the claimants
NT	Tendered on behalf of the Northern Territory
R	Tendered on behalf of persons or entities claiming detriment
CW	Tendered on behalf of the Commonwealth Department of Defence

Access to exhibits marked ‘R’ is restricted by direction of the Aboriginal Land Commissioner.

No.	Restricted	Title of exhibit
A1		Submission on Status of Land Claims dated 13 June 2017 with attachments, together with letter dated 17 July 2017 from the Northern Land Council, with attachment.
A2	R	Anthropologist’s Report dated June 2017 by Andrew McWilliam and John Laurence including Annexure 3, ‘On Aboriginal Religion’ by W.E.H. Stanner, June 1961 in Oceania
A2(A)	R	Supplementary Amendments to Anthropologists’ Report dated 5 June 2017, dated 28 August 2017
A3	R	Site Register and Sites and Dreamings Map dated 7 June 2017, including attachments, prepared by Andrew McWilliam and John Laurence
MFI A3(F)	R	Sites map dated 12 February 2020 adopted by Professor McWilliam identifying sites referred to by claimants
A3(A)	R	Supplementary sites map (A3 format) by Andrew McWilliam, John Laurence and Watkinson

No.	Restricted	Title of exhibit
A3(B)	R	Sites and Dreamings map – includes additional sites (large format) – by Andrew McWilliam, John Laurence and Watkinson
A3(C)	R	Site Register with supplementary sites by Andrew McWilliam and John Laurence
A3(D)	R	Sites and Dreamings Map dated 31 August 2018
A3(E)	R	Sites Map dated 31 August 2018
A4	R	Genealogies dated 6 June 2017, prepared by Andrew McWilliam and John Laurence
A4(A)	R	Genealogies dated 30 August 2018 in substitution of exhibit A4
A4(B)		Upper Daly Repeat Land Claim - Genealogy 1
A4(C)	R	Genealogies Addendum, Group 9 – Wagiman, Prepared on behalf of the claimants by John Laurence, Andrew McWilliam, Helen Haritos, Jitendra Kumerage and Gareth Lewis, dated November 2018
A5	R	Claimant's personal particulars dated 6 June 2017 prepared by Andrew McWilliam and John Laurence
A5(A)	R	Updated claimant's personal particulars dated 30 August 2018 prepared by Andrew McWilliam and John Laurence
A5(B)		Addendum, Claimants' Personal Particulars, Group 9 – Wagiman, Prepared on behalf of the claimants by John Laurence, Andrew McWilliam, Helen Haritos, Jitendra Kumerage and Gareth Lewis, dated 30 November 2018
A6	R	Document entitled CP5505 of NT Portions 7463 and 7464 Certified on 5 November 2015 with amendments of 30 September 2016 and 10 July 2017
A7	R	Updated claimants' personal particulars dated 13 September 2017 prepared by Andrew McWilliam and John Laurence
A8		Map AUS 725 (Amended)
A9		Kaye - Figure 10 Adjusted
A10		Kaye - Figure 11 Adjusted
A11		Map of Australia – Straight baselines and some bay closing lines
A12		Map - Fitzmaurice River Landward Extent
A13		Alcock - Figure 2 Adjusted
A14		Alcock Figure 4 Adjusted
A15		Alcock Figure 9 Adjusted
A16		Resume of Simon Watkinson
A17		AUS 725 Tidal Map (large size)
A18		AUS 316 Tidal Map
A19		International Hydrographic Organisation Regulations for International charts and Chart Specifications, September 2013
MFI A20		Witness statement of David Avery dated 22 September 2017 with annexures

No.	Restricted	Title of exhibit
A21		Photograph of the ship bearing the name ‘Caledonian Sky’
A22		Pp31 – 60 of the transcript of evidence of David Ciaravolo given in the Legune / Gregory Inquiry dated 9 August 2017
A23		Intertidal Extents Model Product Description dated 1 June 2016
A24		Remote Sensing of Environment dated 2017
A25		Map entitled “Sea Country Access Arrangements in the Northern Land Council Region”
A26		NLC Information Sheet Access to Tidal Waters on Aboriginal Land Dated 15 November 2017
A27		Public Notice published in the Northern Territory News of 17 December 2017 entitled ‘Access to Tidal Waters on Aboriginal Land in the NLC Region’
A28		Six redacted settlement deeds with accompanying licence agreements between the Northern Territory, the NLC and the Daly River/Port Keats Aboriginal Land Trust – Anson Bay area; Daly River/Port Keats Aboriginal Land Trust – Port Keats area; Malak Malak Aboriginal Land Trust; Narwinbi, Wurralibi and Wurralibi (No. 2) Aboriginal Land Trusts; Arnhem Land Aboriginal Land Trust – Nhulunbuy area; Arnhem Land Aboriginal Land Trust – Murganella area
A29		Recreational Fishing Development Plan 2012 to 2022 of the Northern Territory Government published in November 2012
A30		Map entitled “New Commercial Barramundi Fishery Closure Lines” published by the Northern Territory in 2013
A31		Document entitled “‘Million Dollar Fish’ Industry Fact Sheet published by Tourism Northern Territory 2017
A32		Northern Territory Seafood Council document “NT Barramundi Fishery” presented at a meeting in Maningrida in February 2018.
A33		Statement of Kane Bowden dated 20 May 2018
A34		Supplementary Anthropology Submissions on Behalf of the Claimants by Dr McWilliam dated 27 January 2019
A35		Response to Expert Report on the “Assessment of Traditional Evidence to date presented in the Inquiry”, by Professor Andrew McWilliam, dated 3 June 2019
A36		Flight notes – Fitzmaurice River Bed and Banks Land Claim Field Surveys, by Andrew McWilliam (undated)
A37		Pages of Federal Court transcript of Ward v Western Australia, 1 September 1997, pp 2921-2922
NT1		Statement of Stuart Kaye and annexures dated 2 November 2017
NT2		Statement of Gary Willis dated 20 October 2017
NT3		Statement of Robert Sarib dated 8 September 2017

No.	Restricted	Title of exhibit
NT4		Statement of Valerie Smith dated 29 September 2017
NT5		Statement of Allan Holland dated 4 October 2017
NT6		Statement of Simon Cruickshank dated 20 October 2017
NT7		Statement Robert Ian Sarib dated 9 November 2017 excluding paragraphs 28-44
MFI NT8		Three photographs produced by Ms Maloney
NT8		Map of indicative boundaries in relation to Fitzmaurice River Land Claim
NT9		Statement of Ian Curnow dated 26 October 2017 and its annexures
NT10		Statement of Tania Maloney dated 28 September 2017
NT11		Statement of Victoria Jackson dated 5 October 2017
NT12		Letter from the Northern Territory Government dated 7 November 2017; Letter from the Northern Territory Government dated 19 January 2018 including the memorandum of discussions between Dr Avery and Prof. McWilliam; and letter from the Northern Territory Government dated 22 January 2018
NT13		Media Release entitled Blue Mud Bay Waiver Extension dated 15 November 2018
NT14		Media Release entitled Intertidal Zone Permit Waiver Extended for Six Months dated 4 December 2018
NT15		Comments on “Flight notes Fitzmaurice River Bed and Banks Land Claim Field Surveys”, by Dr John Avery, dated 15 April 2019
NT 16		Expert report by Dr John Avery dated 19 December 2019 entitled Corrected expert report regarding “Assessment of Traditional Evidence to date presented in the Inquiry”
NT17		Curriculum Vitae of Dr John Avery, February 2020
R1		Statement of Katherine Winchester dated 11 August 2017
R2		Statement of David Ciaravolo dated 11 September 2017
R3		Statement of Katherine Winchester dated 20 June 2018
CW1		Statement of Mark Alcock together with annexures dated 18 January 2018
CW2		Map – Fitzmaurice low tide overview Figure 12
CW3		Map – Victoria River low tide overview Figure 13
CW4		Map – Keep River low tide overview Figure 14
CW5		Outline of detriment issues by the Commonwealth Department of Defence dated 19 October 2017

ANNEXURE F: REASONS FOR RULING – GREGORY NATIONAL PARK / VICTORIA RIVER LAND CLAIM (NO. 167), LEGUNE AREA LAND CLAIM (NO. 188), FITZMAURICE RIVER REGION LAND CLAIM (NO. 189)

1. This ruling relates to the second of two issues concerning the geographical extent of the claims in each of the Legune Area Land Claim (No. 188) and the Gregory National Park/Victoria River Land Claim (No. 167), which were heard together, and the Fitzmaurice River Region Land Claim (No. 189). For convenience, I will call the two claims heard together the Legune LC and the other the Fitzmaurice LC. The particular issue relates to the geographical extent of the ‘beds and banks’ parts of the claimed areas.
2. It is an Annexure to the reports in relation to each of those land claims.
3. I have referred in each report to the first issue which arose in the course of each Inquiry about the geographical extent of the each of the land claims. In each instance, the Commonwealth and the Northern Territory argued that the claim as expressed was limited in its geographical extent by the use of the expression ‘mouth of the river’ or a like wording in each of the land claim applications. The geographical extent of the claim, by the use of such words, relevantly was said to be restricted to waters in the rivers landward of the ‘mouths’ of the three rivers, that is the Victoria River and the Keep River within the Legune LC and the Fitzmaurice River in the Fitzmaurice LC, as identified in the evidence called by the Northern Territory, and relied on by the Commonwealth. That line for each river was said to exclude inlets and estuaries. In each case it was at a line across the relevant watercourse some distance inland of the line drawn by the claimants in the marked area in the map as part of their original claims. In the case of the Fitzmaurice LC, that was a considerable distance inland from the area of that land claim as indicated by the rough map depicting its area. As indicated in the body of this report, I have rejected that contention in each instance.
4. That evidence as to where to locate the mouth of a river was given by Professor Stuart Kaye, a barrister and Director, Australian National Centre for Ocean Resources and Security, Innovation Campus, University of Wollongong. He said he was engaged to advise as to the legal principles arising from case law as to how to determine the location of a river mouth. He also was asked to apply those principles to identifying the location of the mouth of the Fitzmaurice River. In a proceeding in an Australian Court, that material would probably not have been admissible, although it may have been accepted as a submission. Nothing turns on that. For the purposes of this Inquiry, his written statement and his oral evidence was received. It provided an interesting and informative analysis of relevant judicial decisions, and how they might be applied to identifying the mouth of the river.
5. The Commonwealth called evidence from Mark Alcock, Director of the Maritime Jurisdiction Advice Section of Geoscience Australia. He has a Bachelor of Applied Science (Geology) and has a Graduate Diploma in Legal Studies (Environmental Law). He described his role as to determine at common law the location of the three rivers: the Fitzmaurice River, the Victoria River and the Keep River on the basis of the legal principles established by Professor Kaye. That is obviously, more accurately, to determine at common law the location of the mouth of the three rivers, as that is what

he set out to do, and what Professor Kaye had addressed. He explained that Geoscience Australia and its antecedents have had the responsibility of determining the location of the territorial sea baseline and other geographic features relevant to offshore boundaries or boundaries over which the Australian Government has an interest.

6. The Northern Territory also called Robert Sarib, then Acting Surveyor-General of the Northern Territory. He is a licensed surveyor. His role is to provide advice to the Northern Territory Government relating to land survey boundaries and administration. He was asked by the Northern Territory to provide a statement in relation to the mouth of the Fitzmaurice River. His process included identification of, and reference to the earliest survey journals.
7. I note that Gary Willis, Hydrographer in the Water Resources Division of the Department of Environment and Natural Resources of the Northern Territory also gave evidence by a written statement. He identified a gauging station on the Fitzmaurice River at a site chosen to be just above the tidal reach of the sea upriver. It is also just upstream of the point where Alligator Creek flows into the northern side of the river. His evidence did not touch on the location of the mouth of the river.
8. As noted in the Report, in respect of the first issue (identifying the area claimed in the initial application), it was then argued that the use of the words ‘mouth of the river’ in the initial application in each instance must have meant what those witnesses said was its mouth, rather than what was evident from the entirety of the application itself, including the rough map attached to and part of the original application. Put another way, that argument was: you have used the term ‘mouth’ of the river; we have said what is meant by ‘mouth’ of the river; therefore your claim is confined by our definition of that term and our identification of its location, rather than what you might have actually meant to convey by that term. I have rejected that contention.
9. The second issue was that each of the land claims, to the extent that they covered river waters seaward of the lines said to represent the mouths of the three rivers as identified by the three witness’ evidence (excluding Mr Willis), could not succeed because each of the claims was not to that extent made over unalienated Crown land in the Northern Territory. In short, it was said, such waters in the three rivers were beyond the jurisdiction of the Aboriginal Land Commissioner (the Commissioner) to recommend a grant of that part of the claim areas because the waters in each of those three watercourses – using a neutral term – downstream from the defined and identified ‘mouth’ of each river was not over unalienated Crown land, and was not Crown Land, as those terms are defined in section 3 of the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) (ALRA). Relevantly, section 50(1)(a)(i) of the ALRA requires an application to have been made by Aboriginals claiming to have a traditional land claim to an area of land being unalienated Crown land, and the inquiry and report of the Commissioner to the Minister must be in relation to that land.
10. I reject the proposition put forward by the Commonwealth and the Northern Territory. The conclusion I have reached is that the land claimed (subject to the proper construction of the particular claims) in each of the land claims is not confined within the limits proposed as the ‘mouths’ of the three rivers by the evidence relied on by the Commonwealth and of the Northern Territory.

11. These are the reasons for that decision.
12. The instrument establishing the Northern Territory as part of South Australia set the western boundary of the Northern Territory as so much of the Colony formerly part of New South Wales as lies:

between the 129th and 138th degrees of east longitude together with the bays and gulfs therein, and all and every the Islands adjacent to any part of the mainland ...

See Letters Patent dated 6 July 1863, issued pursuant to section 2 of the *Australian Colonies Act 1861* (Imp), received by the Governor of South Australia on 9 September 1863. Relevantly, in the relevant geographical area being the south eastern area of the Joseph Bonaparte Gulf where the three rivers flow into that Gulf, the boundary of the Northern Territory is as described. There is nothing in either the *Northern Territory Surrender Act 1907* (SA) or the *Northern Territory Acceptance Act 1910* (Cth) (NT Acceptance Act) to change that position. In sections 5 and 4 of the respective Acts, the same description is used as in the Letters Patent.
13. It has been decided in the High Court decision in *Risk v Northern Territory of Australia* [2002] HCA 23; (2002) 210 CLR 392 (Risk HC) that, despite that description, the term ‘land in the Northern Territory’ used in the definition of Crown Land in section 3 of the ALRA does not extend below the low water mark of the coast. Land seaward of the low water mark is not ‘land in the Northern Territory’ and so cannot be unalienated Crown land available to be claimed under the ALRA.
14. The decision in Risk HC was said by the Commonwealth and by the Northern Territory to be a decision which effectively concludes the current issue in their favour. It is said that Risk HC must be taken as prohibiting claims ‘to seabed in estuaries, inlets or arms of the sea regardless of whether or not the seabed is within a bay or gulf or can be said to be “landward of the low water mark of the coast” [a passage from the submission of the claimants] (i.e. the estuary mouth)’: see [62] of the written submission of the Commonwealth of 29 May 2018.
15. Of course, I must apply the decision of the High Court if it has that effect. It is therefore necessary to consider it carefully.
16. The High Court unanimously dismissed an appeal from the Full Court of the Federal Court of Australia. The plurality judgement (Gleeson CJ, Gaudron, Kirby and Hayne JJ) at [1] identified the central question in the appeal as being whether the seabed of bays or gulfs within the limits of the Northern Territory can be the subject of claim under the ALRA. Their Honours answered that question in the negative. Separate concurring judgements were delivered by McHugh, Gummow and Callinan JJ.
17. The issue in that case arose from the description of the claimed land as being ‘[a]ll that land in the Northern Territory of Australia which is adjacent to, and seawards of the low water mark of the seacoast of the mainland’ where the Adelaide River runs into the sea and seawards of the low water mark of the seacoast of the mainland and a line across the points between the eastern and western banks of the Adelaide River where those banks meet the low water mark of ‘the seacoast of the mainland’: see the plurality judgment at [2]. On the northern side of the Adelaide River there had already been a grant of Aboriginal land under the ALRA to the traditional owners to

that point, that is to the point where the northern bank of the Adelaide River met the seacoast. Paragraph [1] of the plurality judgment says that ‘The seabed of bays and gulfs within the limits of the Northern Territory cannot be the subject of a claim under the Land Rights Act’.

18. The description of the issue by the plurality indicates that the issue the Court addressed was to waters seaward of the low water mark, both along the coast and seawards of a line adjoining the headlands where the Adelaide River flowed into the sea.
19. To determine the significance of the decision in Risk HC to the current issue, it is noteworthy that the plurality at [8] observed of the land grants made under section 10 of the ALRA and scheduled under Schedule 1 to the ALRA:

Most of the areas in Sched 1 are on the mainland; some, however, relate to islands – the Arnhem Land Islands, Bathurst Island and Melville Island. Some of the mainland areas abut the coast and include rivers that enter the sea at the coast. There are therefore some parts of those areas that would be inundated permanently.

20. That general observation also indicates that the focus of the Court in Risk HC was not upon the issue which presently arises, but more generally upon the availability of lands seaward of the low water mark from the coastline to be the subject of a grant under the ALRA. It is consistent with that understanding that the High Court did not need to query the fact that the ALRA in Schedule 1 uses the description of a straight line across ‘rivers, streams and estuaries’ that intersect the coast to define the area of a number of land grants made under section 10 as follows:

... a straight line joining the seaward extremity of each of the opposite banks of each of all intersecting rivers, streams and estuaries [intersecting the coast] so that the aforesaid boundary line shall follow that part [at] low water mark of each of the aforesaid intersecting, rivers, streams and estuaries.

21. Counsel for the claimants in each of the Legune LC and the Fitzmaurice LC pointed out that such a description appears in the boundaries of the grants known as the Arnhem Land (Islands) land grant, the Arnhem Land (Mainland) land grant, the Bathurst Island land grant, the Daly River land grant, the Melville Island land grant, and the Wagait land grant.
22. It is also indicative of the issue being addressed by the High Court that at [19] it focussed also on section 73(1)(d) of the ALRA providing for the Northern Territory to make laws ‘regulating or prohibiting the entry of persons into, or controlling fishing or other activities in, waters of the sea, including waters of the territorial sea of Australia, adjoining, and within 2 kilometres of Aboriginal land’.
23. The plurality at [20] remarked that the two features of the ALRA noted are the only explicit reference in the ALRA to ‘the sea or waters of the sea’.
24. As has arisen here, the Court then turned to the question of what constitutes ‘land in the Northern Territory’. In the case of Risk HC, at the Inquiry stage the Commissioner had not specifically addressed that issue, as the focus turned to whether the bed of any bays or gulfs of the mainland and of adjacent islands is ‘land in the Northern Territory’. Their Honours addressed the more general issue first.

25. It is not necessary to refer in detail to the sequential analysis of the plurality at [22]. Their Honours noted the terms of the NT Acceptance Act by which the Commonwealth assumed responsibility for the Territory from South Australia. From the definition of the Northern Territory in that enactment, the comment was made that the geographical limits of the Northern Territory ordinarily end at the low water mark: at [24], but so that within those limits there will be areas that are permanently inundated, and on the other hand there is no seabed within the Northern Territory, only the inter-tidal zone on the coast. Those observations were made in part because the NT Acceptance Act had defined the Northern Territory by specified latitude and longitudes, and had said that within that area it included ‘the bays and gulfs therein’.
26. The plurality said at [25] that there are at least three reasons why the ALRA referring to ‘land in the Northern Territory’ did not mean or include the seabed of bays or gulfs. First, there were textual indications in the ALRA itself. Second, that the nature of the interest which is granted to a Land Trust under the ALRA made such a meaning unlikely. And third, that the relevant extrinsic material and the legislative history behind the ALRA supported that conclusion. Those three matters were then addressed in detail.
27. In my view, the following section of the plurality judgment discussing those reasons does not indicate that the present issue was specifically a matter of decision, or indeed consideration. It is not necessary to refer sequentially to those reasons in detail. The reference to the extrinsic material included the Aboriginal Land Rights Commission Reports and the Aboriginal Land (Northern Territory) Bill 1975. They both referred to the prospect of Aboriginal land extending to two kilometres seaward of the low tide line of coastal waters. As is apparent, that was not provided for in the ALRA. That is, the fact that despite those references, the ALRA did not so provide was an indication that the ALRA gave a more confined meaning to the term ‘land in the Northern Territory’ than had been expressed in the NT Acceptance Act.
28. There is in the judgment of McHugh J a similar focus on the distinction between ‘land’ as ‘that solid portion of the earth’s surface above the low water mark of the sea surrounding the Northern Territory’, and the seabed: see at [60] and at [67]. And at [61], his Honour preserved that distinction between land on the one hand and waters of the sea and the seabed below the low water mark on the other.
29. Gummow J reached a similar conclusion. His Honour added at [94]:

It should be added that nothing decided by this litigation denies the efficacy of grants under the Act in respect of areas including rivers and estuaries. The determination by the Commissioner was not directed to such matters.
30. Callinan J also in a separate judgment reached the same conclusion. His Honour noted that the territorial limits of the Northern Territory extend to include bays and gulfs, by reason of the Letters Patent dated 6 July 1863 issued pursuant to section 2 of the *Australian Colonies Act 1861* (Imp), but that definition of the Northern Territory was not absorbed by the ALRA, which had a more confined concept of ‘land in the Northern Territory’. That more confined concept did not extend to ‘the claiming and granting of title to seawaters or the seabed beneath them’: see at [128].

31. Consequently, I do not accept the primary contention of the Commonwealth and of the Northern Territory that the decision in Risk HC necessarily determines that the 'land in the Northern Territory' available for claim does not include the waters of the three rivers landward of the coastal low tide line. In particular, I reject the proposition that the waters and beds and banks of the three rivers where they are seaward of the point where the 'mouth' of each river has been fixed (by the evidence adduced by the Northern Territory referred to above) is excluded from 'land in the Northern Territory' as that term is used in the ALRA. The extent of the proposed exclusion includes waters in the three rivers which ultimately run into the sea and which are landward of the coastal low water line and the line drawn across headlands, including the exclusion of estuarine waters.
32. As the High Court in Risk HC said, the critical question is the meaning of the term 'land in the Northern Territory' in the ALRA. It does not include the bays and gulfs which might otherwise have been included, as the bays and gulfs within the latitude and longitude limits of the Northern Territory at the time of the original establishment of the Northern Territory and at the time of the NT Acceptance Act were by the relevant instruments included in the Northern Territory.
33. It is useful to recall the decision of the High Court in *New South Wales v Commonwealth* [1975] HCA 58; (1975) 135 CLR 337 (Seas and Submerged Lands case). It decided that the boundaries of the former colonies of Australia ended at the low water mark and that the colonies had no sovereign or proprietary interest in the territorial sea of Australia or in the seabed underlying the territorial sea seaward of the low water mark. The low water mark is the mean low water mark, excluding the highest and lowest monthly tides, and is not fixed by reference to the Lowest Astronomical Tide: see *Yarmirr v Northern Territory* (1998) 82 FCR 533.
34. In the well-known Blue Mud Bay case: *Northern Territory v Arnhem Land Aboriginal Land Trust* [2008] HCA 29; (2008) 236 CLR 24, the High Court decided that a fishing licence issued by the Northern Territory did not authorise the holder of the licence to fish in waters above or landward of the low water mark where there had been a grant of land to the Yolngu People under the ALRA (of course, through a Land Trust) which extended to the low watermark.
35. So the starting point for considering the proposition of the Commonwealth and of the Northern Territory is that 'land' under the ALRA includes or may include tidally affected areas, or the inter-tidal zone – the area of land between the high water mark and the low water mark along the coast line.
36. It is appropriate to recall that, in the reports in relation to the Legune LC and the Fitzmaurice LC, I have rejected the argument of the Commonwealth and of the Northern Territory that the use of the words 'mouth of the river' in the applications themselves either necessarily or actually confined the area claimed to that in the three rivers landward of the 'mouth' of each of the rivers as fixed by the expert evidence called by the Commonwealth and the Northern Territory. I have found, to the contrary, that the areas claimed included sections of the three rivers to the point where, in common parlance, they flowed into the Joseph Bonaparte Gulf.

37. As I have concluded in the Legune LC that there are traditional Aboriginal owners over the claimed area, including the beds and banks of the Keep River and of the Victoria River, the factual criteria for traditional Aboriginal ownership of those parts of the two rivers has been made out. Why then should there be an intention that no recommendation could be made, and no grant made, over those parts of the rivers and their banks, including their estuarine waters? As I noted, the Northern Territory until after the close of final submissions also accepted that there are traditional owners of the claimed areas, including the areas of the Victoria River and the Keep River which it now says are beyond the reach of the ALRA. In the case of the Fitzmaurice LC, I have also concluded that there are traditional owners of at least part of the areas of the Fitzmaurice River which it is said are beyond the reach of the ALRA. The fact that the relationship of Aboriginal traditional ownership exists is itself a good reason why the ALRA should not be so construed as to exclude it from the reach of the ALRA itself.
38. But, it was contended, the mouths of the three rivers were as fixed by that evidence so that the 'land in the Northern Territory' in the ALRA excluded those sections of the three rivers seaward of their defined 'mouth' in each instance. They were described as arms of the sea, or as estuaries, or as inlets of the sea so that they were excluded from the expression 'land in the Northern Territory' in the ALRA. As was accepted in the course of submissions, the consequence is that the areas of water extending inland some considerable distance from the Joseph Bonaparte Gulf, and being the tidal sections or much of the tidal sections of the Victoria River, the Keep River and the Fitzmaurice River, are either not part of the Northern Territory at any time from the original instrument establishing the Northern Territory, or are areas of the Northern Territory excluded from the expression 'land in the Northern Territory' in the ALRA. That would be equally true of other parts of the Northern Territory where extensive river systems flow into the sea.
39. Neither of those propositions can be discerned from, or supported by, the decision in Risk HC.
40. In short, in my view, the meaning of the term 'land in the Northern Territory' used in the definition of 'Crown land', in the context of the ALRA as a whole is not limited by the imposition of a definition of 'river mouth' or 'mouth of a river' by that evidence, and does not necessarily exclude waters, including estuarine waters, landward of the low water mark along the coast where the waters of a river flow into the sea. It then becomes a matter of evidence in each case as to whether estuarine waters and waters adjacent to tidal and mangrove flats within the low water mark of the coastline and across facing headlands or other physical features delineating the coastline are shown to be part of the land in the Northern Territory which has traditional Aboriginal owners. Obviously, the character of the estuarine and like waters, including whether they are always underwater at low tide and the character of the water flow in the vicinity will be relevant to whether the necessary ownership is established.

41. The ALRA in its terms and in the light of its background is clearly beneficial legislation. It is intended that, where there is unalienated Crown land in the Northern Territory, that land may be granted to the traditional Aboriginal owners. Part II provides for the establishment of Land Trusts to hold land for the traditional Aboriginals and to have ongoing responsibility for it. Its focus is the definition of ‘traditional Aboriginal owners’ in relation to land in section 3 of the ALRA as meaning:
- a local descent group of Aboriginals who:
 - (a) have common spiritual affiliations to a site on the land, being affiliations that place the group under a primary spiritual responsibility for that site and for the land; and
 - (b) are entitled by Aboriginal tradition to forage as of right over that land.
42. The effect of the ALRA was that, upon the establishment of the appropriate Land Trusts, very significant areas of Crown land in the Northern Territory were granted to Land Trusts by their scheduling under Schedule 1 to the ALRA pursuant to section 10 of the ALRA. Section 4 of the ALRA requires the Land Trusts to hold the land for the traditional Aboriginal owners. Many of those initial grants took effect upon the commencement of the ALRA. A number of those grants set out in Part 1 of Schedule 1 to the ALRA included the waters of rivers, streams and estuaries. I shall refer to those grants later in these reasons in more detail. That is referred to in Risk HC.
43. In addition, in respect of areas other than those originally scheduled, there was provision for claims to be made to the Commissioner under s 50 of the ALRA, and for the Commissioner after conducting an inquiry to report to the Minister whether there are traditional Aboriginal owners of the claimed areas. The focus of such claims is upon there being traditional Aboriginal owners of the claimed area of land in the Northern Territory, and relevantly that the claimed land be unalienated Crown land. The Minister may then make a decision under section 11 of the ALRA to recommend the Governor-General grant that area of land to a relevant Land Trust on behalf of the traditional Aboriginal owners. In making that decision, the Minister is obliged to have regard to the detriment which may be experienced by third party interests in the event of a grant. The topic of detriment is a matter upon which the Commissioner is obliged to report when making a recommendation to the Minister, by reason of section 50(3)(b) of the ALRA. The decision is then implemented, if it is to make a grant of the land to the traditional owners, by the Governor-General executing and delivering a deed of grant of an estate in fee simple to the relevant Land Trust.
44. These claims arise under the procedure provided by section 50 of the ALRA.
45. There is nothing in the ALRA itself which might indicate that any narrow view of the expression ‘land in the Northern Territory’ in the definition of ‘Crown Land’ in section 3 of the ALRA should be taken. It would be surprising if areas of land which customarily have been regarded as land in the Northern Territory and in relation to which there are shown to have been traditional Aboriginal owners should not be eligible for possible grant under the ALRA because of some more confined concept of ‘land in the Northern Territory’. The use of the word ‘customarily’ is not derived from the ALRA itself, and is not a term of art. It is intended to convey that which is according to common usage. The reasoning in Risk HC is based on factors that relate to waters seaward of the low water mark along the coast.

46. The point is well illustrated by the fact that neither the Northern Territory nor the Commonwealth initially resisted the proposition that the claimed area in the Legune LC was available for claim. The Northern Territory specifically accepted that that was the case. That position therefore included that those two land claims extended roughly to the line across the outermost land features at the openings of the Keep River and the Victoria River respectively as they flow into the Joseph Bonaparte Gulf. The more restrictive position was taken only after the completion of the evidence in the Inquiry in the Legune LC, and as a result of the point being taken in the Fitzmaurice LC, which was heard after the Legune LC. Up to that point in time, as is recorded in the report on the Legune LC, the Northern Territory had accepted that there were traditional Aboriginal owners of the whole of the claimed areas, including over the tidal waters of the Keep River and the Victoria River inland of the low water mark across the opposing headlands as nominated by the NLC.
47. I note that, in 1978, section 3A(1) of the ALRA was inserted to provide:
- ... the application of this Act in relation to Crown land extends to Crown land that is vested in the Northern Territory.
48. I do not consider that that subsection throws any particular light on resolution of the current issue. It might suggest that there is ‘land in the Northern Territory’ that is Crown land that is not vested in the Northern Territory, but in the Commonwealth. If that is correct, then it might follow that the waters of the three rivers that are seawards of the ‘mouth’ of each of the rivers (as identified in the submissions of the Commonwealth and of the Northern Territory) but are within the inlets or estuaries of those three rivers are land in the Northern Territory but remain vested in the Commonwealth and remain available for grant. That was not a position put by any party. I do not need to refer to that provision further in these reasons for ruling. It was enacted roughly about the same time as the *Northern Territory (Self-Government) Act 1978* (Cth).
49. It is necessary to say something about the evidence of the witnesses on the topic.
50. Professor Stuart Kaye is an academic lawyer who obviously has a special knowledge of maritime law. It is a little difficult to draw the line between what he said by way of evidence legitimately within his area of expertise, and what he said (no doubt in an informed way) about the jurisdictional boundaries of the Northern Territory and/or the proper construction of the ALRA. On those latter two aspects, what he said strictly speaking should be regarded as a matter of submission. Indeed, although his evidence extended over a range of international jurisdictions, ultimately he said that his research established principles for determining the location of a river mouth, and then for applying those principles to the physical geography of the Fitzmaurice River principally and also of the Victoria River and of the Keep River. He then left the task of identifying the ‘mouth’ of each of the three rivers, by reference to those principles, to others.
51. The location of the three river mouths having regard to their physical geography was more precisely done by Mark Alcock of Geoscience Australia and Robert Sarib, an experienced surveyor. Each of them in essence made their analysis and formed their opinions by reference to the principles identified by Professor Kaye. I have no reason to doubt their qualifications or the genuineness of the analysis they carried out.

52. Fundamentally, however, I do not think their evidence, as a matter of proper legal principle, informs the correct construction of the ALRA or the proper understanding of the 1863 Letters Patent establishing the Northern Territory, or the proper construction of the NT Acceptance Act.
53. First, and obviously, none of the three relevant witnesses recognised that the issue is one of statutory construction. It has been assumed, both in the instructions recorded and in their responses, that ‘land in the Northern Territory’ is defined as land upstream from the mouth of the three rivers. It is not. Indeed, as noted Mr Alcock sought to apply Professor Kaye’s legal principles about the location of the mouths of the rivers ‘at common law’.
54. Hence, Professor Kaye referred to Australian statutes in which the term ‘mouth of the river’ appears, principally section 7 of the *Seas and Submerged Land (Territorial Sea Baseline) Proclamation 2016* (Cth), which provides the effective coastline from which Australia’s territorial sea is measured. Although generally the term refers to the straight line drawn across two points on the low water lines of the banks of the river, there are exceptions. He treats the primary rules as applicable to show the significance of the mouth of the river. But he acknowledges that the territorial sea baseline on the eastern side of the Joseph Bonaparte Gulf is not determined that way, apparently due to the coastline having large indentations and being fringed with islands. Then despite that, he asserts that is ‘not relevant to determining the mouth of the Fitzmaurice River’. It may not be, but it may well be a signal about the practical way to determine the land in the Northern Territory to which the ALRA applies. The estuarine waters within the territorial sea, bounded as they are by the relevant geographical features (noted below), should be available for claim if there are Aboriginal persons who can establish the specified criteria for traditional ownership of those waters.
55. Professor Kaye then refers under the heading ‘Australian Common Law’ to a series of cases. I do not think that analysis is helpful, as it does not involve consideration of the relevant provisions of the ALRA or of the Letters Patent establishing the Northern Territory as part of South Australia, and of the subsequent legislation when it was transferred to the Commonwealth. Perhaps that is most obvious by his reference to *Simlesa v Perry* [2003] NTSC 85. I can only think that its reference indicates an advocacy role to support a premise. In that case, the appellants’ convictions for commercial net fishing in a river were set aside, but in particular circumstances. They were fishing in an area known as Perekary Creek on Bathurst Island. It was unlawful to fish for barramundi in that way in a river, as defined in Clause 4 of the *Barramundi Fishery Management Plan* made under the *Fisheries Act 1988* (NT). The finding was that the fishing took place in an armlet of the sea running inland in a narrow channel where seawater flows in and out according to the tide rather than in the tidal estuary of a river. It had not been shown that at that point there was ‘a body of water, whether fresh or brackish that seasonally or consistently flows into the sea ...’. That was the relevant part of the definition of ‘river’ in the Plan. It may be noted that the judge compared that situation with a tidal estuary of a river.
56. There was an appeal from that decision: *Perry v Simlesa* [2004] NTCA 2. The appeal was allowed and the convictions restored (Mildren J, with Thomas and Bailey JJ agreeing). While the decision of Angel J was reversed, the reasoning is neutral in relation to the construction of the ALRA. The express legislative provisions are of

course different and more specific. His Honour regarded the words ‘tidal arm’ in the definition of ‘river’ as meaning a tidal arm of the sea rather than an arm of the river subject to tidal waters, and so extending the definition of river: at [13].

57. I also do not consider that the analysis of overseas common law jurisdictions by Professor Kaye is of any real assistance for the same reasons. Indeed, there is an apparent element of practical judgment in the outcome of some of the cases referred to. That may be seen, for example, in *Post Office v Estuary Radio Ltd* [1968] 2 QB 740, the prosecution of a ‘pirate’ radio station in the Thames Estuary. The practical answer was that the prosecution could succeed because the Thames estuary was within the territorial sea baseline. The extent of the Clyde estuary was considered in *Western Ferries (Clyde) Ltd v The Commissioner for Her Majesty’s Revenue and Customs* [2011] UKFTT 243 (TC). There was a definition of ‘transitional waters’ in the relevant Directive. Professor Kaye drew from that case a recognition that estuarine waters are distinct from river waters. It is clear that any such distinction was a consequence of the issues in the case and consideration of the relevant Directive.
58. It can be seen that there was derived from that case, and other cases, an asserted distinction between riverine waters and estuarine waters, and the proposition that estuaries are seen as inlets of the sea while rivers ‘are associated with the land’. Then the step is taken of saying that what is regarded as an inlet of the sea will not be within a river and will be seaward of the mouth of the river.
59. I am not of the view that that analysis is directly relevant to the construction of the expression ‘land in the Northern Territory’ in the ALRA. I do not consider that that is a correct starting point for the constructional exercise.
60. The position of the mouth of the Fitzmaurice River was then located by Professor Kaye as upstream of Clump Island, and discounting Clump Island as one of the headlands of the Fitzmaurice River. It is not clear from his earlier analysis why that is a critical step as he appears to have already determined that the waters to the east of the line from the northern tip of Clump Island and slightly east of north to the mangrove area adjacent to the Whale Flat area better fitted the description of an estuary. His reasoning is that the waters in the vicinity of Clump Island are relatively deep and have the geographical name of Keyling Inlet – indicative, he says, of being an arm of the sea. The use of the name of that stretch of water extending some distance upstream (it is not clear on the evidence where the extent of Keyling Inlet upstream reaches – on the map prepared by Mr Alcock which is included as Appendix 1 to this Annexure the words Keyling Inlet extend roughly along the upper boundary of Clump Island). Professor Kaye also says that it is significant that Clump Island is separated from the mainland by ‘relatively deep water and that it is named Gunn Channel [the extended stretch of water which, as discussed in the report is coloured in the map prepared by Mr Laurence, but is not apparently included in the original application]’. The point where he then locates the mouth of the river is some 2 ½ kilometres upstream from the northern tip of Clump Island. The significance of the names used as an aid to the construction of the term ‘land in the Northern Territory’ was not earlier discussed by him or referred to in any of the cases. He makes no reference to the territorial sea baseline in his reference to the physical features or names on which he drew his conclusion.

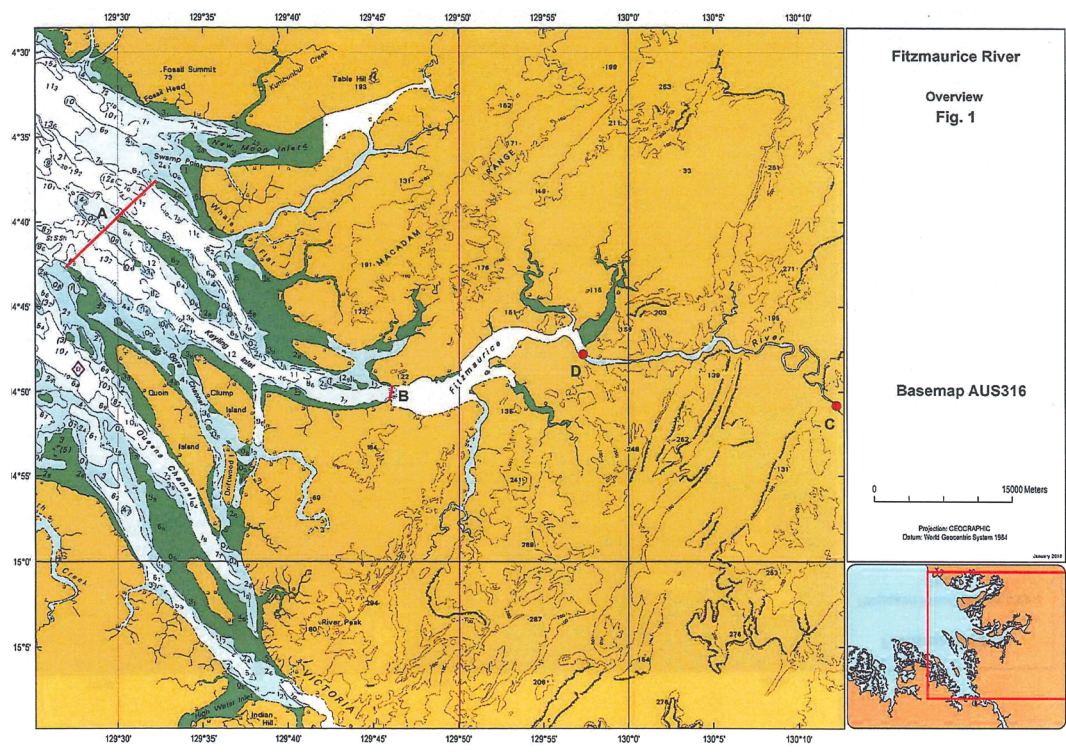
61. Mr Alcock also clearly started, and finished, by identifying what he said was the mouth of the Fitzmaurice River. In reaching his conclusion on that point, he recognised the need to consider the particular circumstances of each river, and the unique geography of the Australian continent. He notes a distinction between estuaries and rivers, based on what he says is an authoritative text; the *1997 National Land and Water Resources Audit*. It distinguished seven categories of wetland ecosystems, including riverine area (rivers and streams) and estuarine areas (including deltas, tidal marshes and mangrove swamps).
62. His assessment of the Fitzmaurice River is best understood by reference to the Overview map which is Figure 1 attached to his written statement, and is Appendix 1 to this Annexure. The tidal reach up the Fitzmaurice River is a bit less than 100 km and the same applies to the Keep River. The tidal reach up the Victoria River is some 250 km. On that map, point D is the location of the gauging station referred to by Mr Willis. Between points C and D, Mr Alcott says that the river has ‘normal characteristics so its mouth must be seaward of point C’. He then assesses the river between points D and B. He notes the widening of the ‘estuary and that the banks show evidence of the significance of tidal flows, so that ‘the estuary is dominated by the sea’. His reasoning at this point is confusing or erroneous: he refers to the analysis by Professor Kaye of the Perekary Creek in *Simlesa v Perry* (above) to conclude that this section of the river/estuary has the characteristics of a creek for the seven months of the dry season when freshwater flows are negligible. I have sought to explain why that decision depended on the terms of the relevant Direction and the particular circumstances. The approach of Mr Alcock really does not relate to the construction of the term ‘land in the Northern Territory’ in the ALRA. Nevertheless, he then concludes that the mouth of the river is at point B rather than point D because of the constriction of the Eastern Branch of the Macadam Range at that point from the north, and the character of the river behind it (to the east), and that adopting point D would be inconsistent with Australia’s practice in identifying river mouths for the purposes of Article 9 of the *United Nations Convention on the Law of the Sea* (UNCLOS). Again, the focus is not a constructional one. His conclusion also in fact disregards the fact that, as he notes, Australia has declared a straight baseline closing the Southern Joseph Bonaparte Gulf that is some distance seaward of the estuary; he has chosen to adopt a different baseline to support his conclusion.
63. I note also that Mr Alcock is somewhat critical of the conclusion of Mr Sarib, although he reaches the same point for the mouth of the river, as he does not adequately identify all of the relevant factors. Mr Sarib’s evidence is discussed below.
64. Perhaps in a more expansive way, Mr Alcock also comments at [58] that ‘Modern Australian boundaries are now much more likely to follow function and policy imperatives with different treatment of the same geographic area for different sectors’. For instance, an estuary may be treated as part of a river for one purpose, but part of the sea for another. In my view that is the task which none of the three principal witnesses on the location of the ‘mouth of the river’ undertook: the meaning of the words ‘land in the Northern Territory’ in the ALRA.
65. Mr Sarib started his consideration of the location of the mouth of the Fitzmaurice River in a different way, by a historical investigation of how the Fitzmaurice River was discovered and named. I have referred to that in the introduction to the Report

concerning the Fitzmaurice LC. Apart from his reference to the primary material (Stokes' journal of the 1839 exploration) to locate what he decided was the mouth of the river, he also referred to the Northern Territory Barramundi Fishing Management Plan for the definitions of 'river' and 'mouth of a river', the UNCLOS, and the tidal glossary of the Australian Hydrographic Service, Department of Defence. There are other recent record systems to which he also refers.

66. The task of identifying the extent of the land in the Northern Territory in the vicinity of where the Fitzmaurice River (and the Victoria River and the Keep River) flow into the sea is informed first by the Letters Patent referred to. The Northern Territory then comprised the south eastern corner of the Joseph Bonaparte Gulf including its bays and gulfs. The decision in Risk HC decided that 'land in the Northern Territory' in the ALRA was more restricted, to the low water line along the coast. There are clear and sensible reasons for that conclusion, including having regard to the suggestion in the Woodward report that waters beyond the low water line might be included in areas which might be the subject of a grant under the ALRA. The geography in the vicinity of the area claimed (as hatched in Annexures 1 and 2 to the Fitzmaurice LC report) is clearly inside both the territorial sea base line in the south eastern corner of the Gulf, and adjacent to areas which are clearly within the scope of the 'land in the Northern Territory' – that includes Quoin Island, Clump Island and Driftwood Island (but for their alienation), the north western section of the Bradshaw Training Area, which extends to and is across the narrow but deep channel adjacent to Clump Island, and the south western section of the Daly River/Port Keats Aboriginal Land Trust area, which includes the Western Section of the Macadam range and the flatter areas along the coast including Whale Flat and the mangrove areas. Both the northern corner of the Bradshaw Training Area and the southern corner of the Land Trust land have boundaries which about the water flow to the Gulf inside the territorial sea base line and the rough line of the coast in that section of the Gulf. Given the beneficial purpose of the ALRA, it is appropriate in the absence of any contra-indication in the ALRA, to treat the waters with the areas in issue, as claimed, as available for claim. It is not necessary to determine the full extent of the 'land in the Northern Territory' save for the purposes of the Legune LC and the Fitzmaurice LC.
67. It is of course necessary to consider the evidence to decide whether the claimants have shown that they are the traditional owners of all the areas claimed, including the waters downstream from what the evidence referred to identifies and the mouths of the three rivers.
68. I note that evidence contrary to the evidence of Messrs Alcock and Sarib was given by Simon Watkinson, Senior Geographic Information Systems Officer of the Northern Land Council. I do not need to decide whether his critique of that evidence is valid. It was given on the assumption that the correct starting point for the Inquiry in each of the Legune LC and the Fitzmaurice LC about the location of the mouths of the three rivers, as described by Professor Kaye and then as interpreted by Mr Alcock and Mr Sarib, sets the boundary of 'land in the Northern Territory' in the ALRA, rather than focusing on the words of the ALRA as considered by Risk HC. The focus on some contemporary geographical concept for identifying the mouths of rivers is reflected in the submission by the Commonwealth that Mr Watkinson failed to 'apply modern practice' to identifying the mouths of the three rivers: written submission of 29 May 2018 at [26].

69. Their view is not explicit in any part of any relevant legislative background to either of those Acts, or to the making of the Letters Patent. Indeed, in the case of the Letters Patent, there was no federation of the Australian Colonies. That description was carried through in the transfer of the Northern Territory. The expression ‘land in the Northern Territory’ at least as used in the ALRA does not invite the subtleties of distinguishing between rivers and estuaries, and rivers and inlets of the sea: those distinctions are not expressed when they would involve a complex and serrated coastline of the Northern Territory for the purposes of the ALRA. Nor does such a construction accommodate the possibility of a claim extending into Crown land that is not vested in the Northern Territory, as apparently contemplated by section 3A(1) of the ALRA introduced about the time of independence granted to the Northern Territory, because such land would necessarily be excluded from any potential claim.
70. The distinction between waters in rivers on the one hand and waters in estuaries on the other, drawn by the Northern Territory and the Commonwealth, may not accommodate the particular evidence of traditional ownership in these land claims. It has no foundation in the ALRA or the relevant constructional aids. Indeed, as noted above, Gummow J at [94] in *Risk HC* specifically allowed for there being circumstances, if supported by evidence, where the grant under the ALRA could be in respect of areas including rivers and estuaries.
71. I do not think it is correct (as the Commonwealth submits) that Gummow J there drew a ‘constructional distinction between the claims process ... and the scheduling of Aboriginal reserves which may be bound by closing lines across estuaries’ in its written submission at [59]. In effect, as [66] of that submission contends, that submission involves an extension of the geographical reference to ‘bays and gulfs’ as used in the Letters Patent and in the NT Acceptance Act and by the High Court in *Risk HC* to a ‘bay, gulf, inlet, estuary or watercourse’. That extension effectively puts any river and its beds and banks to the extent of the tidal inflow in rivers at the mean low tide as being excluded from the description of ‘land in the Northern Territory’ under the ALRA. In my view the proper distinction is not between claims over the seabed, which it may be accepted are not contemplated (for present purposes), and claims the landward side of the low water line upstream in rivers and streams, including estuaries. The sharp line which the Commonwealth says is drawn between rivers and their waters and beds and banks above their ‘mouths’ (as the Commonwealth defines them) and by way of contrast the waters in rivers and their beds and banks below that line and in estuaries is not drawn in the reasons of the High Court in *Risk HC*.
72. The submission of the Northern Territory was along similar lines to that of the Commonwealth. That includes the proposition that the ‘land in the Northern Territory’ in the ALRA is confined so as to exclude the rivers and the beds and banks of rivers which flow into the sea, beyond the ‘mouths’ of all those rivers as it now defines them. It starts by the assertion that the claims ‘entirely depend’ on the terms ‘river’ and ‘estuary’ being interchangeable in the ALRA: at [1]. But those words are not in the definition of Crown land in the ALRA. The analysis of the Reports of the Aboriginal Land Rights Commission focuses on a ‘buffer zone’ being 2 kilometres seaward from the coastline as broadly understood.
73. Accordingly, in the reports concerning both the Legune LC and the Fitzmaurice LC it has been necessary to consider in detail the evidence upon which traditional Aboriginal ownership is claimed up to the points specified in the respective applications.

Appendix 1 to Annexure F



Source: Statement of Mark Alcock dated 20 January 2018, p 11