15 February 1999

Mr James Catchpole
Inquiry Secretary
House of Representatives Standing Committee
on Aboriginal and Torres Strait Islander Affairs
Parliament House
CANBERRA ACT 2600

Dear Sir,

Re: Parliamentary Inquiry into the Reeves Report
on the Aboriginal Land Rights (Northern Territory) Act

I have your letter of 20 January 1999 inviting me to provide a submission to this inquiry.

Members of the Committee will appreciate that as the holder of judicial office it would be inappropriate for me to comment on any issues which are, or are likely to become, matters of political or ideological debate and accordingly I will confine my comments to those recommendations in the Reeves Report which touch directly upon the performance of the functions under the Land Rights Act of the Aboriginal Land Commissioner. In particular I specifically avoid making any comment on the recommendations concerning the intertidal zone, the seas and seabeds and the Conservation and NT Land Corporations. All of these are matters upon which I have either recently made determinations which are currently subject to review proceedings in the Federal Court or are the subject of current, as yet not concluded, hearings before me.

The Reeves Report recommends that s 50 (2A) (the sunset clause) be retained. I make no comment on that recommendation but in that which follows I will assume that the clause will remain in force in its present form.

1. <u>The early passage of the Aboriginal Land Rights (Northern Territory) Amendment Bill (No 2) 1997</u>.

I assume that, following the dissolution of Parliament prior to the 1998 election, this bill has lapsed. I do however support the thrust of the recommendation.
The effect of s 67A of the Land Rights Act is to prohibit the granting of any estate or interest in, or the reservation, dedication or setting aside of, land which is the subject of an application under s 50(1)(a) until the application has been finally disposed of. In its present form subsection (5) of s 67A specifies the four circumstances which indicate that a claim has been finally disposed of, namely:

a) the claim has been withdrawn;
b) the Governor-General has executed a deed of grant of the land;
c) the Commissioner has reported to the Minister that there are no traditional owners of the land;
d) the Minister has determined that he does not propose to recommend to the Governor-General that a grant be made of land recommended for grant by the Commissioner.

Subsections (2A), (2B), (2C) and (2D) of section 50 deal with circumstances in which the Commissioner is prevented from performing his functions under s 50(1)(a), however, that prohibition does not mean that the claim is "finally disposed of" in the sense defined by s 67A(5). The proposed amendment deals with circumstances that may arise under subsections (2A), (2B) and (2D) whereby the Commissioner is unable to perform any function in relation to an application which is not finally disposed of and thus continues to attract the prohibitions of s 67A. As the law stands at the moment there is no mechanism whereby that situation can be reversed other than by the voluntary withdrawal of the claim by the claimants.

There is however another similar problem that arises under s 50 (2C). That subsection deals with claims to alienated land in which all interests are held by or on behalf of Aboriginals. In such cases the Commissioner may not exercise any function in relation to the application unless the Aboriginals who hold the estate or interest have consented to the making of the application. The consent is not a pre-condition to the making of the application but rather to the performance of the Commissioner's functions under the Act. There have been cases in which land is held by or on behalf of Aboriginals who are not part of the claimant group and have declined to consent to the application being made. In such a case the making of the application enlivens the provisions of s 67A but in the absence of the required consent nothing further can be done. In effect, any Aboriginal land owner who may or may not be a traditional owner of the land would be unable to deal with his land in the event that an application is made in relation to his land. The remedy to the problem created by ss (2C) may have to involve giving the Commissioner power to determine that in the absence of the necessary consent the application is to be treated as being finally disposed of. Another possible solution may be to give the Commissioner power to dismiss an application in an appropriate case. This issue will be pursued in more detail in relation to the specific recommendation concerning the dismissal of applications.

2. <u>The Aboriginal Land Commissioner's functions be expanded to intervene by way of conciliation or mediation to assist in the settlement or disposal of land claims</u>.

Whilst I support the idea that the Commissioner should in an appropriate case be able to intervene by way of conciliation or mediation it would to some extent be contrary to the accepted principles of alternative dispute resolution for the person who has acted as conciliator or mediator to later act as the decision maker in the event that the conciliation or mediation does not result in a resolution of the matter in dispute. If such a function is to be given to the Commissioner it should only be exercised in cases where all parties agree and the Act should specifically state that the exercise of

such function will not affect the power of the Commissioner to exercise all other statutory functions in relation to the particular application.

3. The Aboriginal Land Commissioner's functions be expanded to make findings and recommendations under s 50(1) (a) (ii) of the Act by consent.

I support this recommendation. If parties are able to consent to relevant findings and recommendations being made by the Commissioner, the time and cost of a hearing and the preparation of a report would be saved. In such a case the Minister, if so minded, would be in a position to recommend a grant without having to seek an amendment to schedule 1 as happens at present when agreement is reached without an inquiry and report from the Commissioner.

4. The Aboriginal Land Commissioner's functions be expanded to dismiss a land claim subject to such an order not taking effect under s 67 A(5) until all parties have exercised their right to challenge it.

I support the recommendation. Section 67A (5) would of course also require amendment to include the dismissal of an application as one of the circumstances amounting to the final disposal of the claim.

Unless the Commissioner has power to make an order which has the effect of finally disposing of a claim, in cases in which a finding is made that claimed land is not available to be claimed their may still remain a question as to whether the claim has been finally disposed of. It may well be argued that an application relating to a claim to land which is not available for claim is not an application of the type referred to in s 50(1)(a) but in the absence of a specific provision along the lines of the recommendation, there would be some doubt about the matter and a person dealing with the land owner may well be at risk.

Circumstances in which the power to dismiss a claim could be invoked would include such matters as the land not being available for claim, the claimants not being Aboriginals, a repeat claim where the claimants are unable to satisfy the criteria of s 50 (2B), and applications to which s 50 (2C) applies to which appropriate consent has not been given.

5. The Aboriginal Land Commissioner's functions be expanded to specify in s 51 of the Act a range of measures to reduce formalities and improve efficiencies in the land claim process.

I have no quarrel with this recommendation but it is probably unnecessary. Over the years the land claim process has adopted many of the characteristics of adversary litigation. This is understandable due to the requirement that the Commissioner be a Judge and the almost inevitable involvement of lawyers to represent parties. Furthermore, the fact that the process has been subject to the provisions of the Administrative Decisions (Judicial Review) Act has meant that there is a need to ensure that inquiries are conducted in an open and fair manner. Different Commissioners have adopted varying degrees of formality in the conduct of inquiries but for my own part I have preferred a less formal approach and I do not think that any amendment to s 51 is required to permit this to continue. Indeed, since of the

commencement of my current term as Commissioner I have adopted a pro-active approach to a number of applications in which I have initiated my own inquiries as to the status and tenure history of claimed land where I have had some reservation as to its availability to be claimed.

6. Sections 50 (1)(a)(ii) and 50 (3) be amended to provide that the Aboriginal Land Commissioner shall, in making his report and recommendations to the Minister have regard to all of the matters set out in s 50 (3).

There is perhaps some looseness in the language used in s 50 (1)(a)(ii) in that no direction is given as to the principles which are to control the Commissioner in determining whether or not to recommend the granting of land. As the making of recommendations is a function of the Commissioner, there is no doubt that he is required to have regard to the principles set out in s 50 (4) but s 50 (3), insofar as it requires the Commissioner to have regard to the strength or otherwise of the traditional attachment by the claimants to the land claimed, is expressed to apply only to the making of a report as distinct from making recommendations. Whilst it is true that s 50 (1)(a)(ii) appears to distinguish between a report to the Minister and the Commissioner's recommendations there can be little doubt that the intention of s 50 (3) is that the strength of attachment is a matter which could influence the decision whether or not to recommend a grant. In my view the matters for comment set out in s 50 (3) should be regarded as being for the assistance of the Minister in deciding whether to recommend to the Governor-General that a grant of land be made. Perhaps the only amendment required is to add in s 50 (3) after the word "report" the words " and recommendations".

7. A settlement conference be convened by the Aboriginal Land Commissioner in an attempt to settle as many of the outstanding land claims as possible (including sea closure applications).

There is very limited scope for the Aboriginal Land Commissioner to facilitate the settlement of a claim. This can only be done by the voluntary agreement of the claimants and the relevant government. However, some initiatives can be taken by the Commissioner to bring the parties together and this has been achieved in a number of instances since my appointment in March 1998. I do not think any legislative intervention is required. In recent times both the land councils and the governments (Federal and Territory) have demonstrated a willingness to negotiate. To some extent I, as Commissioner, have been able to facilitate the commencement of negotiations but I do not see it as the Commissioner's role to influence their outcome. The question of outstanding sea closure claims (which are made under Territory law and not under the Land Rights Act) is a matter for the Northern Territory government and, if necessary, Parliament to attend to.

8. If the Minister is minded to entertain an application to amend schedule 1 to bring further land under the Act, a standard approach be adopted, involving the Aboriginal Land Commissioner inquiring as to such proposals.

The usual circumstance giving rise to an amendment of schedule 1 is an agreement between the relevant land council and the NT government that the land be brought under the Act. Often such an agreement represents a compromise which has been

reached after extended negotiation. In such circumstances there is no need for the Aboriginal Land Commissioner to become involved.

The functions of the Commissioner include the function "to advise the Minister in connexion with any other matter relevant to the operation of the Act that is referred to the Commissioner by the Minister" (s 50 (1)(d)) and "to advise the Minister and the Administrator of the Northern Territory in connexion with any other matter relating to land in the Northern Territory that is referred to the Commissioner with the concurrence of the Administrator" (s 50 (1)(e)). I am not certain as to whether these functions have ever been activated but they do provide a convenient legislative basis upon which to enlist the assistance of the Commissioner in relation to matters such as the consideration of a proposal to amend schedule 1 in circumstances where the parties are unable to reach agreement. This power could be called in aid even in respect of land which was not the subject of an application at the time the sunset clause took effect. In the first instance it would always be for the Minister to decide whether to seek the Commissioner's advice but if such a decision is made there would appear to be an adequate legislative basis to do so.

9. A special allocation of resources to ensure that the land claims process is completed within two or three years.

At the present time there appears to be no problem with the resources available to the Office of the Aboriginal Land Commissioner but it has become apparent that the Northern Land Council does not currently have the necessary financial and human resources to ensure that all of its outstanding claims could be presented within the preferred time frame. I would support any decision to make resources available to facilitate the prompt hearing of all unresolved claims.

Although it may only be of marginal relevance to the Committee's terms of reference, I attach to this submission a report which I made to Senator Herron on 21 October 1998. It will be observed, from the covering letter, that the report is intended to be read in conjunction with my 1998 annual report and from the first paragraph, that the report was made upon my own initiative pursuant to s 61 (2) of the Land Rights Act. Senator Herron has given his approval for this material to be made available to the Committee.

Since the report was prepared a number of further developments have taken place and in order to assist the Committee I will identify them.

a) Paragraph 6: Applications for judicial review of my decisions have now been made to the Federal Court. I understand that the Full Court will deal with both applications in May 1999.
b) Paragraph 7: The hearing of the matter referred to is expected to conclude in the second week in March 1999. It is likely that a decision will be given by the end of April 1999.
c) Paragraph 12: It is likely that application No 66 (Mittiebah Reserve), No 122 (Kakadu (Jim Jim) area) and No 155 (Wulna (NT portion 2001)) can be resolved without a formal hearing. It is anticipated that more information will be available by the first week in March 1999. My decision in application No 73 (Newcastle Waters area) is not being contested by way of an application for judicial review.

d) Schedule 2: Application 136 (Note 4) Urrpantyenye (Repeat) claim and application 158 (Note 5) Innesvale claim are now the subject of proposed amendments to schedule 1 (Aboriginal Land Rights (Northern Territory) Amendment Bill (No 1) 1998).

e) Schedule 3: It is now clear that the land claimed in application No 122 (Kakadu (Jim Jim) area) is available for claim.

I trust that the foregoing will be of assistance to the Committee and if there is any other matter upon which the Committee feels I can provide further information I will be pleased to respond.

Yours sincerely,

H.W Olney
Aboriginal Land Commissioner.

21 October 1998

Judges' Chambers
Federal Court of Australia
450 Little Bourke Street
MELBOURNE VIC 3000

Senator the Hon John Herron
Minister for Aboriginal and Torres Strait
Islander Affairs,
Parliament House
CANBERRA ACT 2600

Dear Minister,

I forward herewith a report which is intended, in conjunction with my 1998 Annual Report, to provide you with an up-to-date assessment of the present state of the land claim process under the Aboriginal Land Rights (Northern Territory) Act 1976.

Please advise if you require further information on any aspect of the report.

Yours sincerely,

H.W. Olney
Aboriginal Land Commissioner

ABORIGINAL LAND RIGHTS (NORTHERN TERRITORY) ACT 1976

REPORT TO THE MINISTER FOR ABORIGINAL AND TORRES STRAIT ISLANDER AFFAIRS BY THE ABORIGINAL LAND COMMISSIONER (JUSTICE H.W. OLNEY) PURSUANT TO SECTION 61(2)

1. Section 61(2) of the Aboriginal Land Rights (Northern Territory) Act 1976 (the Land Rights Act) provides, inter alia, that a Commissioner may furnish to the Minister, in addition to reports required to be furnished, such other reports as the Commissioner thinks fit. This report is furnished pursuant to that authority.

2. In the Annual Report of the Aboriginal Land Commissioner for the year ending 30 June 1998 (the 1998 Annual Report) reference is made in paragraph 33 to an audit of all unresolved applications which I had undertaken and to my intention to submit a comprehensive report thereon upon completion of the audit. I have now completed the audit and submit this report on its outcome.

3. As some of the recommendations contained in the review of the Land Rights Act prepared by Mr John Reeves QC (the Reeves report) would, if implemented, have an effect on the future operations of the Aboriginal Land Commissioner, it is thought that the Minister will be interested to have detailed information in relation to both the present state of affairs and the likely outcome if those recommendations are put into effect.

4. Apart from suggested amendments to the Land Rights Act to which reference is made later, the Reeves report refers to the desirability of settling outstanding claims as soon as possible, preferably within 2 or 3 years, and suggests that this could be achieved by the adoption of a number of strategies including

legislative intervention and settlement of claims by agreement. Some of the information set out in this report may assist in assessing the extent to which the suggested strategies would help achieve the preferred outcome.

5. The unresolved applications to which my attention has been directed are those identified in Tables 7 and 8 of the appendix to the 1998 Annual Report. The summary in paragraph 30 of that report shows the number of applications in each category to be:

Table 7:	Applications to which s 50(2B) applies (repeat claims)	6
Table 8:	Other applications in respect of which no inquiry has commenced	108
	Total applications in Tables 7 and 8	114

There are in fact 109 applications referred to in Table 8. Application No 111 (Alligator Rivers Area III (Gimbat and Goodparla)) has been partly dealt with and reported on and thus also appears in Table 1. To avoid double counting application No 111 was not included in the total in Table 8. It follows that this report deals with a total of 115 applications.

6. In paragraph 24 of the 1998 Annual Report reference is made to the preliminary issues as to jurisdiction which had been raised in relation to claims to land vested in the Conservation Land Corporation and the Northern Territory Land Corporation. I have now determined that land vested in each of those authorities is not land which can be the subject of an application under s 50 (1)(a) of the Land Rights Act and accordingly that I have no function to perform under s 50 (1)(a) in relation thereto. It is likely that my determinations will be the subject of applications for judicial review and possibly appeals to the High Court.

7. As reported in paragraph 25 of the 1998 Annual Report the question of whether claims can be made to the intertidal zone (i.e. land between the high watermark and the low watermark) and to the sea and seabed will also be the

subject of a preliminary hearing. A hearing for the purpose of testing this issue is now scheduled for the week commencing 7 December 1998.

8. The ultimate effect of any decision on the legal issues referred to in paragraphs 6 and 7 will however be foreclosed in the event that the Land Rights Act is amended to give effect to certain recommendations of the Reeves report. The relevant recommendations, which appear at pages XX and XXI of the Synopsis, and which also deal with claims to the beds and banks of rivers, are:

BANKS AND BEDS OF RIVERS

- The land claims to the banks and beds of rivers that fall wholly within other land that is claimable, should be granted without further delay and expense.

- The Land Rights Act should be amended to prevent land claims to the banks and beds of rivers that form the boundary between land that is available for claim and that which is not or that comprise a strip of land between two areas of land that are not available for claim.

INTERTIDAL ZONE

- The Land Rights Act should be amended to provide that the areas of the Northern Territory on the seaward side of the high watermark, that are not already Aboriginal land under the Act, are not available for claim under the Act.

SEAS AND SEABEDS

- The expression 'low watermark' should be defined in s 3 of the land Rights Act to mean the mean low watermark.

- The Land Rights Act should be amended to provide that the areas of the Northern Territory on the seaward side of the (mean) low watermark on land granted to an Aboriginal Land Trust under the Act, and on the seaward side of the high watermark of all other land in the Northern Territory (including the sea bed under the Northern Territory's territorial waters), should not be available for claim under the Act.

CONSERVATION LAND CORPORATION NORTHERN TERRITORY LAND CORPORATION LAND

- The Land Rights Act should be amended to put it beyond doubt that lands held by the Conservation Land Corporation or the Northern Territory Land Corporation are not available for claim under the Act.

9. In order to provide an indication of the effect on the land claim process of adopting these recommendations a series of schedules has been prepared in which the 115 applications referred to in paragraph 5 have been classified

according to their currently known status. The basis of each classification and the number of applications falling within each are as follows:

Schedule No	Classification	No of applications
1.	Applications which involve claims to the bed and banks of rivers, the intertidal zone, the sea and seabed and to land vested in the Conservation Land Corporation or the Northern Territory Land Corporation but do not include other land	70
2.	Applications related to claims now the subject of an inquiry or report	12
3.	Applications about which there is doubt as to the status of the claimed land or relating to land in respect of which the Commissioner is not authorised to commence an inquiry	8
4.	Applications relating to claims which are said to have been settled or are the subject of settlement negotiations	4
5.	Other unresolved applications	21
	TOTAL NO OF APPLICATIONS CONSIDERED	115

10. Schedule 1 identifies claims which would not proceed in the event that of the recommendations referred to in paragraph 8 are implemented. These applications relate only to claims falling exclusively within one or more of the categories in question. There are other applications which include claims of this nature as well as claims to other land and they are dealt with in schedule 5.

11. Schedule 2 identifies applications which are in one way or another dependent upon or connected with claims which have already been reported on (but are not yet "finally disposed" of in the sense referred to in s 67A(5) of the Land Rights Act) or which are under consideration by my predecessor Justice Gray. There are 4 types of such applications. First, applications in which the findings and recommendations in the Kenbi (Cox Peninsula) claim will have considerable influence. It may be reasonably anticipated that once the Kenbi (Cox Peninsula) claim is finalised and reported on these claims could be resolved by negotiation; second, there are applications which are likely to be similarly affected by the findings and recommendations in the Wangkangurru claim. The latest information available indicates that the Central Land

Council and the Northern Territory Parks and Wild Life Commission are presently engaged in discussions which could resolve not only the Wangkangurru claim but also the other Simpson Desert claims; third, there are a number of "supplementary" applications which relate to claims Justice Gray was dealing with at the time the "sunset clause" (s 50(2A)) took effect. These claims are related to precisely the same land as the corresponding primary applications and presumably were made in an effort to ensure that a "repeat claim" could be made in the event of the primary claim not being successful. The fourth category is application No 157 (Alcoota) to which specific reference is made in paragraph 19.

12. Schedule 3 identifies applications that relate to claims about which there is doubt concerning the status of the claimed land or in respect of which the Commissioner is not authorised to commence an inquiry. As a result of land tenure information that has been made available there is some doubt in relation to applications No 66 (Mittiebah Reserve), No 122 (Kakadu (Jim Jim) Area) and No 155 (Wulna (NT portion 2001)). I have advised the relevant parties that I propose to conduct a preliminary inquiry in relation to each of these matters to determine the status of the claimed land. The hearings of the preliminary issues have been tentatively scheduled for the first week in February 1999. Application No 241 (Belyuen Area) appears to relate only to a public road and if this is the case, irrespective of any findings that may result from an inquiry, the Minister would be unable to recommend a grant of title (Land Rights Act s 11 (3)). Further information is being sought as to the status of the claimed land. In the case of application No 73 (Newcastle Waters Area) my ruling that the claim has been withdrawn may be contested by way of an application for judicial review. I should emphasise that the classification of the applications referred to in schedule 3 is only tentative and represents my own assessment based on the presently available information. Further information and the outcome of the preliminary inquiries mentioned above may warrant reclassification of some of these applications.

13. Schedule 4 identifies applications which are said to be the subject of settlement agreements or negotiations. The information on which this

classification is based has been provided by either or both of the relevant land councils and the Solicitor for the Northern Territory. I am not aware of the nature of any of the settlement proposals nor of the progress made in any negotiations. It is possible that settlement negotiations are proceeding in relation to other claims about which the Commissioner's office has not been informed. There is of course no obligation to inform the Commissioner of such negotiations.

14. Schedule 5 refers to the remaining unresolved applications. These are commented on in detail in paragraphs 15 and 16. The comments are my own, based upon my understanding of the nature of the claims and on information informally conveyed to me by interested parties and may need to be revised in the event of further information becoming available.

15. Having regard to the information presently available and my own assessment of the likely course to be followed in relation to some of the applications referred to in schedule 5, if:

i) the recommendations of the Reeves report quoted in paragraph 8 are implemented;

ii) the applications referred to in schedule 2 are capable of resolution upon conclusion of the relevant primary applications; and

iii) the settlements and settlement negotiations in relation to claims referred to in schedule 4 are satisfactorily concluded;

it is possible that the only substantial applications which will require an inquiry and report by the Commissioner pursuant to s 50(1)(a) are the following:

i) <u>Application No 71: Maria Island and Limmen Bight River</u>

On the assumption that the bed and banks of Limmen Bight River will not be available for claim, it will be necessary for the applicants to first satisfy the provisions of s 50(2B) in relation to the claim to Maria Island before an inquiry can be undertaken.

ii) <u>Application No 128: Upper Daly (Repeat</u>)

Subject to the applicants being able to satisfy the provisions of s 50(2B), the claim may be ready for hearing in 1999.

iii) Application No 151: Yirwalalay, and

iv) Application No 176: Part of Dry Creek Stock Route

The land claimed in application No 151 surrounds the Bradshaw defence facility. The land claimed in application No 176 is a stock route of the type referred to in s 50(2E). There has been a suggestion that settlement negotiations are in progress but this has not been confirmed. Unless settled, it is likely that an inquiry will be required.

v) Application No 159: Urapunga

It is anticipated that an inquiry will commence in the second half of 1999.

vi) Application No 161: Barrow Creek

An inquiry is scheduled to commence in April 1999.

vii) Application No 166: Brunette Downs Area

No information is available as to the applicants' intentions. The claim is to a significant area of land (596 ha.) and it may be assumed that it will be proceeded with.

If any of the assumptions referred to above prove to be unfounded then the conclusions expressed will have to be adjusted accordingly.

16. The remaining applications which appear in schedule 5 are not thought likely to require any inquiry and report. The basis upon which this opinion has been formed is explained in the following particulars:

i) Application No 64: Frances Well – The claim originally included several areas of stock route. At the time of the "red areas" settlement the claim was partially withdrawn but three separate portions remain under claim. All but an irregular area of about 63.5 ha. are on a stock route. The size of the area and its location would suggest that the cost of mounting a full inquiry may not be justified.

ii) Application No 93: Ngombur (Repeat) – The application (which is a repeat claim) was lodged in 1984 by a private firm of solicitors who have taken no further action and upon inquiry have said that they are unable to make contact with their client. The whole of the land is now within Kakadu National Park. There may be some doubt as to the

availability of the land for claim and in any event the applicants will have to first satisfy the requirements of s 50(2B).

iii) Application No 106: Crown Hill (Repeat) – The area claimed is very small, 26.25 ha. It is part of the former Mount Allan pastoral lease, all of which (apart from this small area) was the subject of a grant of Aboriginal title in 1988. The size and location of the land suggest that a negotiated settlement should be possible.

iv) Application No 115: Waramunga/Wakaya – This is a repeat claim and is referred to in detail in paragraph 18.

v) Application No 120: Wakaya/Alyawarre No 2 – This claim is also discussed in paragraph 18.

vi) Application No 125: Kybrook – There is a dispute between the Commonwealth and the Northern Land Council as to whether or not this claim has been withdrawn. In any event, title has been transferred to the Pine Creek Aboriginal Advancement Association Inc. If the claim was not withdrawn there may be some doubt as to the validity of the transfer.

vii) Application No 129: Mataranka Area (NT portion 916) – This small area was recommended for grant in the report on the Mataranka Land Claim. As part of a settlement agreement the claim was withdrawn after the recommendation was made but before any grant of title. Subsequently a new application was made. The land is adjacent to the Elsey pastoral lease in respect of which a recommendation for grant has recently been made. It is reasonable to expect that the claim could be settled by negotiation.

viii) Application No 130: Waramungu/Wakaya – This claim is also discussed in paragraph 18.

ix) Application No 165: Wollogorang Area – Only a very small area (5960 sq. metres) is claimed. The land is entirely surrounded by the Wollogorang pastoral lease. The cost of mounting a full inquiry may not be justified.

x) Application No 179: Kakadu Region – The claim includes land surrounded by the Kakadu National Park and the adjacent intertidal zone. The status of the claimed land is being investigated.

xi) Application No 180: Myra Falls – The claim is to a small area surrounded by Kakadu National Park. The status of the claimed land is being investigated.

xii) Application No 180: Mgungara – Only a very small area (approx 28 ha.) in the bed of Dashwood Creek is claimed. This would probably be caught by the bed and banks recommendation if it is implemented.

xiii) Application No 245: Elsey Region – The claim includes the bed and banks of part of the Roper River, a road and the old Elsey homestead. The status of the road and the homestead site is being investigated. As the land is surrounded by the Elsey pastoral lease (which has recently been recommended for grant) it is reasonable to expect that the claim could be settled by negotiation.

xiv) Application No 249: Avon Downs Region - Two small areas of 1 ha. 1128 sq. metres and 1780 sq. metres respectively are claimed. The land is close to the Barkly Highway, surrounded by the Avon Downs pastoral lease. The cost of mounting a full inquiry may not be justified.

17. Application No 54 (Beetaloo) was made on 18 September 1980. The claim relates to the Beetaloo pastoral lease (PL 640) which is said to be alienated Crown land in which "all the estates and interests are held for and on behalf of Aboriginal people by Bagot's Executor and Trustee Company Limited". On 17 November 1982 the then Commissioner (Kearney J) commenced a preliminary inquiry relating to jurisdictional issues. Further hearings were held on 7 April 1983, 15 July 1985, 15 September 1983 and 1 May 1984. The only matter of substance to be dealt with on those occasions had to do with the ownership of the property. This was a complicated matter involving the validity of the will of a former owner and other legal issues. Subsequent Commissioners (including myself in 1991) became involved in trying to press the matter but the net result has been that no progress has been made. Since the matter first came under consideration the Land Rights Act has been amended by the addition of s 50(2C). The most recent action appears to be a letter written to Senator Herron on 20 April 1998 by Cridlands, the solicitors for the current owners of the lease. It would seem that in the absence of the

consent required by s 50 (2C) the Commissioner is prohibited from exercising or continuing to exercise any function in relation to the application. The amendment to the Land Rights Act suggested by Cridlands in their letter of 20 April 1998 is supported by the Reeves report (see comments under the heading "Power to dismiss claims and record consent reports" at p 261).

18. Applications No 115 (Waramungu/Wakaya) No 120 (Wakaya/Alyawarre No 2) and No 130 (Waramungu/Wakaya) all relate to claims to large areas of land east of Tennant Creek. The Central Land Council (which has made the applications on behalf of the various applicant groups) has indicated that no research has been carried out in relation to any of these areas. In two cases (applications No 115 and No 130) the applications are repeat claims. Application No 120 relates to land which was excised from the claim area in application No 42 (Wakaya/Alyawarre) prior to the commencement of the inquiry in that matter. At an informal meeting with CLC and government representatives held at Alice Springs on 2 October 1998 the CLC indicated that it would like to enter into discussion with the relevant Territory authorities with a view to arrangements being made (apparently short of obtaining Aboriginal title) for the protection of the land. On the basis of this information it is reasonable to assume that some accommodation can be reached without the need for an inquiry and report under the Land Rights Act.

19. Application No146 (Alcoota) is a claim to the Alcoota pastoral lease (PL 1032) which is held by Alcoota Aboriginal Corporation. The claimed land is said to be alienated Crown land in which all estates and interests not held by the Crown are held by, or on behalf of, Aboriginals. In these circumstances, the Commissioner is prohibited (by s 50 (2C) of the Land Rights Act) from performing, or continuing to perform, a function under s 50(1)(a) in relation to the application unless the Aboriginals who hold the estate or interest have, or the body which holds the same on their behalf has, consented in writing to the making of the application. Justice Gray has commenced an inquiry into the claim but a question has arisen as to whether valid consent had been given. Justice Gray referred a series of questions of law to the Federal Court for determination pursuant to s 54D(1). In the result, the determination of the

Federal Court did not resolve the matter in dispute. In the meantime, a further application (application No 157) in respect of the same land has been made by a second group of claimants being those who alleged that valid consent was not given to application No 146. In addition, proceedings have been commenced in the Supreme Court of the Northern Territory in an attempt to resolve the dispute. Application No 222 (Alcoota (Supplementary)), which was made by the CLC on 4 June 1997, claims the same land and is apparently an attempt to establish a "repeat claim" in the eventuality that application No 146 is not successful. If the proceedings in the Supreme Court resolve the issue in dispute it is likely either that Justice Gray will continue to hear and report on application No 146 or that application No 157 will be proceeded with. In the absence of a negotiated settlement it is unlikely that the matter will be resolved in the near future.

20. It is not the role of the Commissioner to comment upon or express an opinion concerning policy considerations that may influence any decisions that are made as a result of the recommendations of the Reeves report, and nothing in this report should be construed as the expression of any such opinion. The information which this report discusses and to some extent analyses does however enable an assessment to be made as to the effect the implementation of the recommendations referred to in paragraph 8 would have on the land claim process.

21. If the Land Rights Act is amended to exclude from the definition of "Crown land" land which is vested in the Conservation Land Corporation and the Northern Territory Land Corporation, the Act would merely reflect the view of the High Court of Australia in *The Queen v Kearney; ex parte Japanangka* (1984) 158 CLR 395 which remained unchallenged for 13 years until the eve of the sunset clause taking effect. The land councils representing the claimant groups in each of the applications in which I have recently made preliminary determinations concerning the status of land vested in the land corporations concede that as Commissioner I am bound by the decision of th High Court in *Japanangka*. They seek however, to raise issues as to the validity of the vesting of the relevant land which were not raised in *Japanangka*. A specific

legislative amendment as contemplated in the Reeves report would not overrule the established legal principle but may affect alternative arguments based upon native title and the construction of the Northern Territory (Self Government) Act 1978 (Cth) and some Territory statutes.

22. A number of reports of Aboriginal Land Commissioners have recognised that the bed and banks of rivers may be the subject of an application under s 50(1)(a) and there have been cases where recommendations have been made for the granting of Aboriginal title to same. For the most part such recommendations have been made in cases where the river in question is entirely within other land (usually a pastoral lease) which is also recommended for grant. I am not aware of any case in which a recommendation has been made to grant title to the bed and banks of a river which is otherwise unconnected with land under claim. Nor am I aware of a recommendation having been made to grant title to the bed and banks of a river which forms the boundary between claimed land and land not available for claim but there may have been such a case.

23. The question of the availability for claim of the intertidal zone and the adjacent sea and seabed involves complex questions of law which have been touched upon in the Federal Court native title decision in *Yarmirr v Northern Territory* (1998) 156 ALR 370, which is at present under appeal. As yet there has been no authoritative determination as to whether those areas are "land in the Northern Territory" within the definition of "Crown land" in the Land Rights Act. These questions will be the subject of debate in the preliminary hearing presently scheduled for 7 December 1998. It is worth observing in this context that when Aboriginal title has been granted to land adjacent to the sea, the title extends to the low watermark whereas other grants of land normally extend only to the high watermark.

24. Excluding the applications that would be affected by the implementation of the recommendations of the Reeves report, the volume of work remaining to complete the land claim process under the Land Rights Act is not great. There are a number of applications relating to small areas of land which would

probably not justify the heavy expense of mounting a full inquiry but which may reasonably be expected to be capable of resolution by agreement. Whether or not those applications which will require an inquiry and report are capable of finalisation within the two to three year period recommended by the Reeves report depends to a large extent upon the capacity of the land councils, and in particular the Northern Land Council, to carry out the necessary research and preparatory work, and that capacity would seem to be governed by the financial and human resources available for the purpose. Recent experience (referred to in paragraph 27 of the 1998 Annual Report) suggests that the availability of adequate financial resources is essential to enable claims to be presented for hearing. Having regard to my own experience when I held the office of Commissioner from 1988 to 1991, I am confident that if the recommendations of the Reeves report are implemented, it would be possible to conclude the land claim process within the recommended period provided the land councils are able to proceed expeditiously with the preparation and presentation of the remaining claims.

SCHEDULE 1

Applications which involve claims to the bed and banks of rivers (BB), the intertidal zone (ITZ), the sea and seabed (SB) and land vested in the Conservation Land Corporation (CLC) or the Northern Territory Land Corporation (NTLC) but do not include other land

Application No	Name of Claim	
68	Lower Daly	BB
70	Lower Roper River	BB
141	Western Roper River (Bed and Banks)	BB
162	Wildman River	CLC
164	Roper Valley Area	BB
167	Gregory National Park/Victoria River	BB CLC NTLC
168	Scott Creek Region	CLC
169	Litchfield Region	CLC
170	Mount Bundey Region	CLC
172	Daly River Region	BB CLC NTLC
173	Larrimah Area	NTLC
174	Gregory National Park II	CLC
175	Billengarrah	NTLC
177	Fish River Region	NTLC
178	Wearyan River Beds and Banks	BB
182	Ban Ban Springs Area	CLC NTLC
183	Douglas/Daly River Region	CLC NTLC
184	The McArthur River Region	BB NTLC ITZ SB
185	The Manangoora Region	ITZ SR
186	The Seven Emu Region	BB ITZ SB
187	The Wollogorang Area II	ITZ SB
188	Legune Area	BB CLC NTLC ITZ SB
189	Fitzmaurice River Region	BB NTLC SB
190	Peron Islands Area	ITZ SB
191	Beagle Gulf Area	ITZ SB
192	Woolner/Mary River Region	BB CLC NTLC ITZ
193	Cobourg Peninsula Region	SB
194	Maningrida Area	SB
195	Milingimbi Area	SB
196	Galiwinku/Wessel Islands Region	SB
197	The Gove/Groote Region	SB
198	The Maria Island Region	BB NTLC ITZ SB
199	The Lorella Region	BB ITZ SB
200	Watarrka	CLC
201	Ewaninga	CLC
202	Corroboree Rock	CLC
203	Devil's Marbles	CLC
204	N'dhala Gorge	CLC
205	Western Macdonnell	CLC
206	NT Portion 3910 (Limestone Bore)	NTLC
208	Finke Gorge	CLC
209	Dulcie Range	CLC
210	Mount Sanford	CLC NTLC
211	Davenport Range	CLC
212	Emily & Jessie Gaps	CLC
213	Ruby Gorge	CLC
214	Acacia Peuce	CLC
215	Chambers Pillar	CLC
216	Rainbow Valley	CLC
217	Trephina	CLC

Application No	Name of Claim	
218	Arltunga	CLC
223	Northern Territory Portions 3790 and 4075 (Alcoota Locality)	CLC NTLC
228	Barry Caves Roadhouse Site	NTLC
229	Northern Territory Portion 2341, Tennant Creek Area	NTLC
230	McLaren Creek Area	NTLC
231	Howard's Paddock	NTLC
232	Rocky Hill	NTLC
233	Kulgera Area	NTLC
235	Daly River Region II	BB CLC
236	Groote Island Region	SB
237	Finniss River Region	BB NTLC
238	Coomalie Shire/Deepwater Area	BB NTLC
239	Mataranka Region II	CLC NTLC
240	Katherine Region	BB NTLC
242	Fergusson River to Adelaide River Area	NTLC
243	Adelaide River to Darwin Area	NTLC
244	Katherine Region III	NTLC
246	Katherine Region II	NTLC
247	Larrimah to Mataranka Area	NTLC
248	Mataranka to the Fergusson River Area	NTLC

Number of applications involved: 70

SCHEDULE 2

Applications related to claims now the subject of an inquiry or report

Application No	Name of Claim	Related Matter
9	Vernon Islands (Larrakeyah)	Kenbi (Cox Peninsula)
41	Simpson Desert	Wangkangurru
127	Kenbi (Cox Peninsula-Section 12)	Kenbi (Cox Peninsula)
144	Central Simpson Desert (Repeat)	Wangkangurru
153	Port Patterson Islands	Kenbi (Cox Peninsula)
157	Alcoota	Alcoota (Appln 146)
219	Central Mount Wedge (Supplementary)	Central Mount Wedge
220	Wangkangurru (Supplementary)	Wangkangurru
221	Palm Valley (Supplementary)	Palm Valley
222	Alcoota (Supplementary)	Alcoota
224	Tempe Downs & Middleton Ponds (Supplementary)	Tempe Downs/Middleton Ponds
225	Loves Creek (Supplementary)	Loves Creek

Number of applications involved: 12

SCHEDULE 3

Applications about which there is doubt as to the status of the claimed area or in respect of which the Commissioner is not authorised to commence an inquiry or the Minister is not able to recommend a grant of title

Application No	Name of Claim	Status of Land
54	Beetaloo	No consent (s 50(2C)) (See para 13)
66	Mittiebah Reserve	Stock Reserve (s 50(2D))
73	Newcastle Waters	Claim withdrawn (see para 12)
122	Kakadu (Jim Jim) Area	Public Purpose (see para 12)
155	Wulna (NT portion 2001)	Public Purpose (see para 12
207	Tjula	Alienated land (PPL 1092)
227	Nurrku	Aboriginal freehold
241	Belyuen Area	Public Road (see para 12)

Number of claims involved: 8

SCHEDULE 4

Applications relating to claims which are said to have been settled or are the subject of settlement negotiations

Application No	Name of Claim	Status
74	Anthony Lagoon	Settlement in progress
76	Wickham River	Settlement in progress
111	Alligator Rivers Area III	Settlement under consideration
116	Frewena	Settled – land to be scheduled

Number of applications involved: 4

SCHEDULE 5

Other unresolved applications

Application No	Name of Claim
64	Frances Well
71	Maria Island and Limmen Bight River
93	Ngombur (Repeat)
106	Crown Hill (Repeat)
115	Waramungu/Wakaya
120	Wakaya/Alywarre No 2
125	Kybrook
128	Upper Daly (Repeat)
129	Mataranka Area (NT portion 916)
130	Wakaya/Alyawarre (Repeat)
151	Yirwalalay
159	Urapunga
161	Barrow Creek
165	Wollogorong Area
166	Brunette Downs Area
176	Part of Dry River & Stock Route
179	Kakadu Region
180	Myra Falls
226	Mbungara
245	Elsey Region
249	Avon Downs Region

Number of applications involved: 21

H.W. OLNEY
Aboriginal Land Commissioner.

21 October 1998.