

ABORIGINAL LAND RIGHTS (NORTHERN TERRITORY) ACT 1976

BARROW CREEK (KAYTETYE) LAND CLAIM

(Application No 16.1)

REPORT AND RECOMMENDATIONS OF

THE ABORIGINAL LAND COMMISSIONER

JUSTICE H.W. OLNEY

Office of the Aboriginal Land Commissioner 9-11 Cavenagh Street DARWIN NT 0801

DECEMBER 1999

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JUSTICE H.W OLNEY

INTRODUCTION

1 This report is made to the Minister for Aboriginal and Torres Strait Islander

Affairs and the Administrator of the Northern Territory pursuant to the provisions of s 50(1)(a)(ii) of the *Aboriginal Land Rights (Northern Territory) Act 1976* (the *Land Rights Act*).

The report relates to the Barrow Creek (Kaytetye) traditional land claim (the application) which is identified as Claim No. 161 in the records maintained in the Office of the Aboriginal Land Commissioner in Darwin. It contains my findings concerning traditional Aboriginal ownership of the claimed land and my recommendations to the Minister for the granting of the claimed land in accordance with ss 11 and 12 of the *Land Rights Act*.

2. The *Land Rights Act* is "(a)n Act providing for the granting of Traditional Aboriginal Land in the Northern Territory for the benefit of Aboriginals, and for other purposes". It provides a mechanism whereby title to Crown land in the Northern Territory can, in appropriate circumstances, be granted for the benefit of Aboriginals entitled by Aboriginal tradition to the use or occupation of such land. Central to the scheme of the Act are two related statutory concepts namely, "traditional land claim" and "traditional Aboriginal owners". Section 3(1) defines these terms as follows:

"traditional land claim", in relation to land, means a claim by or on behalf of the traditional Aboriginal owners of the land arising out of their traditional ownership;

"traditional Aboriginal owners", in relation to land, 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;

3. There are a number of steps involved in the statutory process leading to the granting of title to land. First, application must be made to the Aboriginal Land Commissioner (the Commissioner) by or on behalf of Aboriginals claiming to have a traditional land claim to an area of land in the Northern Territory being either unalienated Crown land or alienated Crown land in which all estates and interests not held by the Crown are held by, or on behalf of, Aboriginals (s 50(1)(a)); second, the Commissioner must ascertain whether those or any other Aboriginals, are the traditional Aboriginal owners of the land (s 50(1)(a)(i)); third, the Commissioner's findings must be reported to the Minister and to the Administrator and, where the Commissioner finds there are Aboriginals who are the traditional Aboriginal owners of the land, the Commissioner is required to make recommendations to the Minister for the granting of the land or any part thereof in accordance with ss 11 and 12 (s 50(1)(a)(ii)); fourth, if the Minister is satisfied that an area of land that the Commissioner has recommended be granted should be so granted, the Minister must establish a Land Trust to hold the land and recommend to the Governor-General that a grant of an estate in fee simple be made to the Land Trust (s 11(1)); finally, the Governor-General upon receipt of such a recommendation, may execute a deed of grant of an estate in the land in accordance with the Minister's recommendation (s 12(1)).

THE APPLICATION

4. The application was made to the Commissioner on 20 December 1996. It was made by the Central Land Council (CLC) on behalf of 6 Aboriginals claiming to have a traditional land claim to an area of land said to be unalienated Crown land. The Aboriginals named in the application as the traditional Aboriginal owners are Cliffie Jabiard, Patsy Jabiard, Michael Jabiard, Tommy Jangala and Patsy Jangala.

5. The land to which the application relates (the claimed land) is described in the application as

An area of unalienated Crown land in the Northern Territory of Australia situated within Neutral Junction Pastoral Lease known as Barrow Creek Telegraph Station Reserve as shown coloured green on the attached plan.

Attached to the application there is a copy of a small scale map of the general area in which the claimed land is situated. On the map a rectangular area is coloured green. This area encompasses the place named Barrow Creek and for the most part is surrounded by the pastoral holding named Neutral Junction. The scale of the map is too small to identify with any precision the extra area claimed. Not all of the land within the coloured rectangle is unalienated Crown land. The North South Stock Route abuts both the northern and western boundaries of, but does not pass through, the claimed land. The Stuart Highway passes through the claimed land.

THE INQUIRY

6. Notice of my intention to commence an inquiry in relation to the application was advertised in the *Northern Territory News*, the *Tennant & District Times*, the *Centralian Advocate* and the *Katherine Times* during the second week of March 1999. A similar advertisement was also placed in the *Land Rights News*. In addition, copies of the notice were forwarded by post to the proprietor of the Barrow Creek Hotel (whose land although not the subject of the application is surrounded by the claimed land), the Manager of Neutral Junction Station (whose pastoral lease adjoins the claimed land on all sides) and the President of the Barrow Creek Turf Club Inc.

In response to an invitation contained in the notice a number of parties gave notice of their interest in the claim and of their intention to be heard.

Responses were received from:

The Attorney-General of the Northern Territory (the Attorney General);
The Conservation Land Corporation;
Normandy Pastoral Pty Ltd;
Mr Les Pilton;
The Barrow Creek Turf Club Inc;
The proprietors of Neutral Junction Station.

7. The Attorney-General did not specify any particular aspect of the claim on which the Northern Territory wished to be heard. It was unnecessary to do so. The Territory has an obvious interest in Crown land within its jurisdiction and in accordance with long established practice actively participates in all inquiries under the *Land Rights Act*.

8. The Conservation Land Corporation advised that it challenged the Commissioner's jurisdiction to hear the claim insofar as it extends to land held by the Corporation on the basis any such land is neither unalienated Crown land nor land in which all estates and interests not held by the Crown are held by or on behalf of Aboriginals.

In addition the Conservation Land Corporation gave notice of its intention to raise the issue of the detriment it may suffer in the event of the claim being acceded to in whole or in part.

9. Normandy Pastoral Pty Ltd wrote to the Executive Officer of the Office of the Aboriginal Land Commissioner by letter dated 29 March 1999 advising that its interest in the claim arose by reason of a sublease it held from the proprietors of the Neutral Junction pastoral lease. The land covered by the sublease is clearly not part of the claimed land and in the event, Normandy Pastoral Pty Ltd took no active part in the inquiry.

10. Mr Les Pilton wrote at some length to the Executive Officer by letter dated 26 March 1999. The thrust of his letter is to the effect that he considers that as the proprietor of the Barrow Creek Hotel he would be adversely affected if title to the whole of the claimed land were granted to the applicants. His main areas of concern relate to the need to use, or have access to, parts of the claimed land for the purposes of rubbish disposal and water supply as well as the capacity to use the Barrow Creek airstrip, part of which is on the claimed land.

Although Mr Pilton did not take any part in the inquiry his concerns are addressed later in my comments dealing with detriment issues.

11. The Barrow Creek Turf Club Incorporated gave notice of its interest in the claim by letter dated 29 March 1999 in which it points out that in October 1960 Northern Territory Portion 557 (which is encompassed within the outer boundaries of the claimed land) was reserved pursuant to s 103 of the *Crown Lands Ordinance 1931-1959*, for "the purposes of a racecourse and the recreation and amusement of the public". The reserve was designated as Reserve No 1058. It is said that the reserve has been the focal point for local people to use for community events such as social functions, children's and adult's sporting events, gymkhanas, camp-drafts, race meetings and fund raising events for charities. Over the years the Turf Club has improved the buildings and other fixtures on the reserve and is of the view that it ought to be retained as public land for the use of the general public.

Mrs Carolyn Klein, who I understand to be the President of the Barrow Creek Turf Club (and who is also a co-owner of the Neutral Junction pastoral lease) attended at the hearing of evidence at Barrow Creek and was accorded the opportunity to take part in the inquiry but did not seek to question any of the witnesses nor did the Turf Club seek to make any submissions in relation to matters which were dealt with at a subsequent hearing in Alice Springs.

The Turf Club's letter of 29 March 1999 was clearly written on the premise (albeit unstated) that Reserve No 1058 is part of the claimed land. This is an issue to which reference is made later in this report.

12. By letter dated 28 March 1999 Mr Walter Klein, one of the joint proprietors of the Neutral Junction pastoral lease, pointed out that the claimed land is surrounded on all sides by Neutral Junction. He also expressed the view that the North South Stock Route, which passes through Neutral Junction, also passes through the claimed land. This latter view appears to be incorrect as all available records suggest that the stock route ceases where it adjoins the boundary of the claimed land.

A number of specific matters raised in relation to the continued access by Neutral Junction to the claimed land will be addressed later in my comments dealing with detriment issues.

Each of the four joint proprietors of the Neutral Junction pastoral lease namely Mr & Mrs A.J. Mengel and Mr & Mrs W. Klein attended for either the whole or part of the hearing of evidence at Barrow Creek and were accorded the opportunity to take part in the inquiry but did not seek to do so. Nor did they attend at the subsequent hearing in Alice Springs.

13. The inquiry commenced at the Barrow Creek Racecourse on 20 April 1999. It continued on 21 April 1999 following which it was adjourned to recommence in Alice Springs on 19 May 1999. The hearing of evidence concluded in Alice Springs on 20 May 1999. The claimants, the Attorney General and the Conservation Land Corporation subsequently made extensive written submissions.

Throughout the inquiry the claimants and the Attorney-General were represented by counsel. The Conservation Land Corporation was represented by counsel at the hearing in Alice Springs on 19 May 1999.

Particulars of the representation of the parties, the witnesses called to give evidence and the exhibits tendered in the course of the inquiry are set out in Appendix 1. Although not formally tendered as evidence the several notices of intention to be heard referred to above and the written submissions of the parties have been marked as exhibits and are identified as such in Appendix 1.

THE CLAIMED LAND

14. Section 50(1)(a) refers to an application being made to an *area of land*. It is obvious that the area claimed must be identified with a degree of precision. The Commissioner must be able to determine whether the application relates to land which is available to be claimed, that is, unalienated Crown land or alienated Crown land in which all estates and interests not held by the Crown are held by or on behalf of Aboriginals. Further, any recommendation made to the Minister for the granting of claimed land or part of it must be sufficiently precise to enable the Minister to accurately identify the area recommended for grant. There is also another factor to consider. Since 5

June 1997 when s 50(2A) (the sunset clause) became effective the

Commissioner has been unable to perform any function under s 50(1)(a) in respect of an application made after that date and this means that the Commissioner is no longer able to inquire into and make findings and recommendations in relation to any area of land which may be added to the original claim by way of amendment, as was the case prior to 5 June 1997. Clearly, the amendment of a claim to include additional land not previously claimed would amount to a fresh application insofar as it relates to the additional area. In the past there would have been little or no difficulty occasioned by a minor addition to the area claimed but that is no longer the case.

15. The claimed land is identified in the application as "an area of unalienated Crown land ... known as the Barrow Creek Telegraph Station Reserve" and by reference to a coloured area on a plan attached to the application. In neither case is it possible to say with any certainty precisely what area of land is claimed. Reference has already been made to the inadequacy of the plan attached to the application, and as it happens there is no longer, nor was there at the date of the application, an area known as the Barrow Creek Telegraph Station Reserve. Furthermore, the area which was formerly the Barrow Creek Telegraph Station Reserve was larger than the coloured area on the plan attached to the application by a factor of five. In order to determine exactly what land is claimed it will be necessary to delve into the history of the land in the immediate vicinity of the former Barrow Creek Telegraph Station and to examine other associated traditional land claims and correspondence relating thereto. For this purpose the information shown in the maps in the Schedule to this report will be of assistance. Map 1 shows the boundaries of three areas which have been proclaimed as reserves. First, there was Barrow's Creek Telegraph Station Reserve proclaimed in 1888; then in 1918 a further area was added to the existing reserve. These reserves were revoked in 1954 and in 1986 part of the original area was reserved for commonage purposes. This area, known as Reserve No 1795 is shown in more detail in Map 2.

16. On 29 March 1888, when the Northern Territory was still part of the Province of South Australia, an area of land which encompassed the claimed land was

reserved pursuant to the *Northern Territory Crown Lands Consolidation Act* 1882 (SA) for the use and purposes of the Overland Telegraph Department. The area reserved was described as -

Barrow's Creek Telegraph Station Reserve - Commencing at a point two and a half miles true north of Barrow's Creek Telegraph Station; then true east for two and a half miles; thence south at right angles for five miles; thence west at right angles for five miles; thence north at right angles for five miles; and thence east at right angles for two and a half miles to the point of commencement.

It may readily be concluded from this description that at the time that the reserve was created there was already a telegraph station known as Barrow's Creek Telegraph Station at the centre point of what became a reserve 5 miles square (i.e. 25 square miles).

17. In 1918 (after the Northern Territory had been surrendered to the Commonwealth) the area of the reserve was expanded by the addition of a further 95 square miles. The proclamation by which this extension was effected, which was published on 14 March 1918, refers to the added area as "an addition to the existing Telegraph Reserve at Barrow Creek (proclaimed 29th March 1888)" The added area is described in the Gazette as:

Commencing at a point 7 1/2 miles true north of Barrow Creek Telegraph Station; thence true east for 452 miles; thence true south for 10 miles; thence true west to meet the south-eastern corner of the existing Barrow Creek Telegraph Reserve; thence north, west and south along the eastern, northern and western boundaries of that reserve to its south-west corner; thence true west for 5 miles, true north for 10 miles; thence true east for 7 1/2 miles, to the point of commencement, and containing 95 square miles or thereabouts.

18. On 17 August 1933 a declaration was published pursuant to s 113 of the *Crown Lands Ordinance* 1931 declaring various routes described in the declaration to be routes for the passage of travelling stock. Each such route was declared to be one mile wide. Relevantly for present purposes, the declaration describes a route headed "No 6 Bore (on Newcastle Waters - Queensland Border Stock Route) to South Australian Border" which ran from "Taylor Well generally in a south-western direction for about 142 miles via Barrow Creek, Stirling Station, Merino Well, Tea-Tree Well to Prowse's

Gap". It is unclear from this description whether the stock route passed through the reserve at Barrow Creek. Information received from the Northern Territory Department of Lands, Planning and Environment indicates that the Public Plan 1930 interpreted the stock route as passing through the original and extended reserve but the current Public Plan interprets the route as stopping at one side of what is now the commonage reserve and recommencing on the other side. Although the effect of the declaration of the stock route insofar as it relates to the reserve remains untested, the parties to the present application have not disputed the interpretation as adopted in the current Public Plan.

19. By separate proclamations published on 13 May 1954 both the 1888 reservation (again described as Barrow's Creek Telegraph Station Reserve) and the 1918 extension were revoked. In each case the detailed description of the land is identical to the description in the original proclamation.

20. In the period from 1931 to 1958 an area of 4 acres (1.61 hectares) which fell entirely within the original (1888) reserve and which since 1954 has been identified as Northern Territory Portion 449 was the subject of a series of miscellaneous leases granted pursuant to successive Crown Lands Ordinances, and in 1958 became the subject of Special Purposes Lease 22 granted pursuant to the *Special Purposes Leases Ordinance 1953-1956* for a term of 99 years for "business (Wayside Inn) purposes". SPI, 22 remained current until freehold title was granted on 6 September 1984. NT Portion 449 is presently owned by Leslie John Pilton and Beverley Mavis Pilton and is the site of the Barrow Creek Hotel. No claim is made to it in this application.

21. On 20 October 1960 part of the original (1888) reserve comprising an area of 104 acres 10 perches (otherwise 42.13 hectares) being NT Portion 557, was reserved "for the purposes of a racecourse and the recreation and amusement of the public to be known as Reserve No 1058". NT Portion 557 has since remained subject to this reservation.

22. In 1962 an area of 5 $\frac{1}{2}$ perches (148 square metres) to the west of the Stuart Highway close to the Barrow Creek Telegraph Station was surveyed and

designated as Northern Territory Portion 708. Although the area involved is very small it has had a somewhat complex history. By proclamation published 29 March 1962 it was reserved "for the purpose of the Postmaster General's Department to be known as Reserve No 1082". The reserve was revoked on 15 May 1981. On 2 September 1981 the Northern Territory granted the Commonwealth of Australia an estate in fee simple in the land, and on 18 August 1987 Australian Telecommunications Commission became the registered proprietor. Subsequently, on 12 April 1990, title to the land was transferred to Thangkenharenye Aboriginal Corporation.

23. On 10 February 1955 an area of 13 acres 1 rood in the immediate vicinity of the Barrow Creek Telegraph Station known as Northern Territory Portion 452 was reserved for the purposes of the Postmaster-General's Department and was later designated as Reserve No 969. The reservation was still in effect on 1 July 1978 when the land vested in the Northern Territory pursuant to s 69(2) of the *Northern Territory (Self Government) Act* 1978. However, it was acquired by the Commonwealth pursuant to s 70(2) of the *Self Government Act* on 30 November 1978. The acquisition was stated to be for the public purpose of "Telecommunications". By operation of s 70(4) of the *Self Government Act* upon the publication of the notice of acquisition in the Commonwealth of Australia Gazette (which occurred on 5 January 1979) NT Portion 452 vested in the Commonwealth "freed and discharged from any restriction, dedication or reservation made by or under any enactment A certificate of title under the *Real Property Act (NT)* for an estate in fee simple was issued to the Commonwealth on 24 February 1983, and was transferred into the name of Australian Telecommunications Commission on 31 October 1986. NT Portion 452 was subdivided in 1989, becoming Northern Territory Portions 3603 and 3604. Part of the former NT Portion 452 became a public road. NT Portion 3603 was transferred to the Conservation Land Corporation on 6 April 1990 and on 30 November 1993 the Administrator of the Northern Territory declared the area to be a reserve pursuant to s 12(1) of the *Territory Parks and Wildlife, Conservation Act*. On 1 February 1990 NT Portion 3604 was transferred to Thangkenharenye Aboriginal Corporation.

24. In December 1986, by proclamation pursuant to s 103(1)(c) of the *Crown Lands Act (NT)*, an area identified as Reserve No 1795 was reserved for the purposes of commonage. The precise description of Reserve No 1795 is:

ALL THAT parcel of land situated at Burrow Creek (sic) in the Northern Territory of Australia containing an area of 1246 hectares more or less and bounded by lines described as follows: Commencing at the easternmost corner of Northern Territory Portion 557 thence by lines bearing 180 degrees 3437.64 metres; 270 degrees 3598.29 metres; 360 degrees 3599.32 metres; 90 degrees 2966.22 metres; 90 degrees 1 minute 632.77 metres; 180 degrees 161.26 metres to the point of commencement but excluding therefrom Northern Territory Portions 449, 452, 557 and 708.

Subsequently, the land the subject of Reserve No 1795 has been designated as Northern Territory Portion 4339.

25. The outer boundaries of Reserve No 1795 substantially form a square. Although the northern boundary is not quite a straight line and there is a slight variation in the lengths of each side, for practical purposes the area can be treated as a square, the sides of which are approximately 3599 metres (2.224 miles) long and enclosing a total area (before taking account of the four excluded NT Portions) of 1295 hectares (or 5 square miles).

26. The application asserts that the claimed land is "known as the Barrow Creek Telegraph Station Reserve". Although there is no direct evidence as to the use of that term in relation to Reserve No 1795, it is reasonable to infer that the area surrounding the former telegraph station could be roughly described in that way, but to do so lacks the degree of precision necessary to identify a specific area of land. In other circumstances it might be possible to seek clarification from the plan submitted as part of the application but for the reasons already mentioned no assistance can be gained from that source. It is necessary therefore to look beyond the application itself in order to ascertain the intention of the claimants, or at least of the CLC at the time the claim was made. To do this it is necessary first to consider the history of this and related claims in the area.

27. On 4 June 1984 the CLC on behalf of Aboriginals claiming to have a traditional land claim to unalienated Crown land made an application to the

Aboriginal Land Commissioner pursuant to s 50(1)(a) of the *Land Rights Act* in respect of -

an area of unalienated Crown land in the Northern Territory of Australia situated within Neutral Junction Pastoral Station and within Singleton Pastoral Station containing an area of 195 square kilometres more or less being that part of the North South Stock Route and associated Stock Reserves as shown hatched on the attached map.

A small scale map showing portion of the North South Stock Route running through the Singleton and Neutral Junction pastoral leases was annexed to the application. The map shows two small squares, through which the stock route appears to pass. Each square is identified as a "stock reserve" and each is bounded on all sides by the Neutral Junction pastoral lease. Part of the stock route and the two squares are hatched. The most southerly of the two squares has the name Barrow Creek printed beside it and four Northern Territory Portions namely NT Portions 449, 452, 557 and 708 are shown as being within the outer boundaries of this area.

It is common ground that the northern square is sometimes known as Taylor Well Stock Reserve and the southern square is the area around the former Barrow Creek Telegraph Station.

The application is entitled "North South Stock Route Land Claim (Wauchope Bore South)" and is Claim No 86 in the records in the Office of the Aboriginal Land Commissioner.

28. Claim No 86 was amended on 20 December 1986 when the description of the land claimed was amended to

an area of unalienated Crown land in the Northern Territory of Australia situated within Singleton Pastoral Station being those parts of the North South Stock Route as shown orange on the attached map.

The area coloured orange on the map attached to the amended application is in two parts, each being part of the North South Stock Route and being in each case adjacent on their longer boundaries to the Singleton pastoral lease. The two areas claimed are separated by Northern Territory Portion 3804 which is shown as being held by the Iliyarne Aboriginal Land Trust. No part of the land claimed in Claim No 86 as amended is within the Neutral Junction

pastoral lease nor is any part of it common to the claimed land in Claim No 161.

Following the amendment, Claim No 86 has no longer related to either of the squares referred to above as "stock reserves".

29. The present application was submitted to the Commissioner at the same time as the amendment to Claim No 86 and an amended application in Claim No 85 which had previously included part of the North South Stock Route also within the bounds of Neutral Junction but to the south of Barrow Creek. The new application and the two amended applications were forwarded under cover of a letter from the CLC dated 16 December 1996 **the full text** of which is set out below.

Aboriginal Land Commissioner
GPO Box 2289
Darwin NT 8001
Attention: Bob Bird

Dear Sir

RE: NORTH SOUTH STOCK ROUTE CLAIM (No's 85 & 86) -
NEUTRAL JUNCTION

In accordance with an arrangement with the lessees of Neutral Junction Pastoral Lease the CLC, on behalf of the claimants, hereby withdraws that part of the North South Stock Route Claim which falls within the bounds of Neutral Junction Station so far as it relates to the Stock Route and Taylor Well Stock Reserve.

The CLC on behalf of the claimants, wishes to preserve however that part of the claim over the Barrow Creek Telegraph Station Reserve also known as Reserve No 1795 Barrow Creek Commonage.

Withdrawal of the Stock Route and Stock Reserve claim through Neutral Junction necessitates amendment to both Claims No's 85 and 86. We request an amendment to the description of the land claimed in Claim No 85 (as amended by our letter of the 13 June 1991) so as to exclude that portion of the North South Stock Route falling within the bounds of Neutral Junction. I have attached a further amended claim.

In respect to Claim No 86 we hereby withdraw the claim to that part of the claim which relates to the North South Stock Route within the bounds of Neutral Junction Station together with the claim to the area

known as Taylor Well Stock Reserve. This will leave three separate pieces of land left under claim - the Barrow Creek Telegraph Station Reserve and that portion of the North South Stock Route within the bounds of Singleton Station (Note: The 'Singleton' portion of the stock route is now divided by the Iliyarne Aboriginal Land Trust. The land held by the Trust is part of Schedule 1 of the *Land Rights Act*).

We request the remaining three areas of land constituting Claim No 86 as amended be divided into two claims, whereby Claim No 86 now becomes the claim to the two portions of Stock Route contained within the boundaries of Singleton Station and the claim to the Barrow Creek Telegraph Station Reserve becomes a distinct claim. I have enclosed two other amended claims incorporating the requested amendments and changes.

Yours faithfully,

D.H. AVERY
MANAGER LEGAL SERVICES

30. In their written submission on title in this inquiry, a document prepared in advance of the hearing and dated 19 March 1999, (exhibit CLC 1), the claimants assert (in paragraph 4):

The land the subject of Claim No 161 (the "land claimed") is described in the application as an area of unalienated Crown Land in the Northern Territory of Australia known as the Barrow Creek Telegraph Station Reserve as shown coloured green on plan attached to (and forming part of) the application. The land claimed corresponds to the land comprised in the Northern Territory Portion 4339 (covering an area of 12 square kilometres and 46 hectares) and Northern Territory Portion 557 (covering an area of 42 hectares and 1300 square metres).

In subsequent paragraphs the submission asserts that NT Portions 3603, 3604 and 708 form part of the land claimed. Such assertions are inconsistent with paragraph 4 which refers only to NT Portions 4339 and 557. NT Portion 4339 is the description given to Reserve No 1795. It does not and never has included the land comprising NT Portions 3603, 3604 and 708. Indeed, the proclamation establishing Reserve No 1795 expressly excludes the land comprising those portions as well as NT Portions 557 (the racecourse) and 449 (the hotel freehold).

31. The land originally claimed in Claim No 86 was described as containing "an area of 195 square kilometres more or less being part of the North South Stock Route and associated Stock Reserves". The map attached to the application depicts a length of stock route and two small square areas each of which is identified as "stock reserve". The two areas are obviously those known as Taylors Well (being the more northerly of the two) and Barrow Creek although neither has ever been a stock reserve. The map attached to the application in Claim No 86 (which was lodged on 4 June 1984) is quite obviously an exact copy of a plan which appeared in the schedule to a Bill introduced into the Northern Territory Parliament on 7 June 1984. The Bill was for an Act "to vest in the Northern Territory Development Land Corporation an estate in fee simple in certain land, and for related purposes". The proposed Act was to be known as the *Northern Territory Development Land Corporation (Vesting of Land) Act 1984* but was not proceeded with. Relevantly, the proposal was to vest in the Corporation an estate in fee simple in land described in the schedule to the Bill. Part C of the schedule is headed "Stock Routes etc" and contains the following description:

All that parcel of land in the Northern Territory of Australia containing an area of 195 square kilometres more or less being that part of the North South Stock Route and associated Stock Reserves as shown hatched hereon but excluding therefrom Northern Territory Portions 452, 449, 557, 708, 1757, 1806, that part of Northern Territory Portion 874 which is within the North South Stock Route, the Stuart Highway to a width of 100 metres and all public roads.

There follows a map which is clearly the source from which the map used in the application in Claim No 86 was derived.

32. It may be of importance to say something of the legal context in which the Northern Territory Development Land Corporation (Vesting of Land) Bill was introduced.

On 23 March 1984 the High Court of Australia handed down its decision in *The Queen v Kearney, ex parte Japanangka* 158 CLR 395. That decision established two principles that are important in this claim. First, it was held that once a claim under the *Land Rights Act* has been made to unalienated Crown land, it is not possible to defeat the claim by simply alienating the land.

The status of the land at the time of the application was held to be what determined its availability to be claimed.

The second matter decided by the Court had to do with the status of land held by the Conservation Land Corporation. The Court held that land which had been leased by the Crown to the Conservation Land Corporation prior to it being made the subject of a traditional land claim was for the purposes of the *Land Rights Act*, to be treated as alienated Crown land. The reason for this is that the Conservation Land Corporation is not the Crown or an emanation of the Crown and thus the estate or interest of the Corporation in the land is not held by the Crown. Such land is alienated Crown land. As the Act under which the Northern Territory Development Land Corporation was established is in all relevant respects the same as that by which the Conservation Land Corporation was created, the Court's decision can be applied equally to cases in which there has been an alienation to the Northern Territory Development Land Corporation.

Had the Bill become law before the application in Claim No 86 was made the land would not have been unalienated Crown land and thus not available for claim. As it happened the claim was lodged first and by virtue of the High Court's ruling, any subsequent alienation of the claimed land would not have been effective to prevent the claim proceeding. And this no doubt explains why the Bill was not proceeded with.

33. The land description in Claim No 86 does not expressly exclude NT Portions 449, 452, 557, 708 and the other portions referred to in the Bill but it does refer to an area of 195 square kilometres more or less shown hatched on the attached map, which map is identical to the corresponding map in the Bill. Understandably, s 2 of the Bill expressly excluded alienated land from the operation of the proposed legislation. NT Portion 449 was, in 1984 alienated land, and accordingly was not included in either the land described in the Bill or in Claim No 86. Because of the small scale of the map used in Claim No 86, it is not possible to say one way or another whether NT Portions 449, 452, 557 and 708 are hatched but it is beyond question that they were not intended

to be included in the land to be vested pursuant to the proposed Act and given the substantial adoption in claim No 86 of the verbal description (including the area specifically mentioned in the Bill), and the complete adoption of the map, used in the Bill, the inference is open that the intention of Claim No 86 was to claim the identical land which the Bill sought to alienate in favour of the Northern Territory Development Land Corporation.

This inference is supported by the subsequent dealings in relation to NT Portions 3603 and 708. Reference is made to the claimants' anthropologist's report (exhibit CLC 2) in which the author (at p 22) under the heading "Thangkenhareng Aboriginal Corporation" states:

In the early 1980s, representatives from a number of Kaytetye families, assisted by Central Land Council staff, began moves to form a local association to obtain and develop land around Barrow Creek. In July 1986, the Thangkenhareng Aboriginal Corporation was incorporated. That same year, negotiations were entered into with Telecom (now Telstra) regarding people gaining access to those portions of the Telegraph Station lands which that organisation had 'inherited' from the Postmaster General. In October 1986:

Agreement was reached in principle with the Commonwealth Minister for Communications to transfer title to 5.3 hectares of Telecom land at the old Barrow Creek Telegraph Station reserve to the Kaytetye people to set up a store, resource centre and museum (Central Land Council 1994:61).

In the event, Telecom's attempts to complete the transfer were frustrated by the Northern Territory Government (Central Land Council 1994:71). It was two years before the Chairman of Telecom was in a position to hand over a letter of 'permissive occupancy' for part (roughly 4.4 hectares) of the land that was the subject of the 1986 agreement. And it was an additional two years before title to this area was finally transferred to the Thangkenhareng Aboriginal Corporation. At the same time, .85 of a hectare of land the land on which the old Telegraph Station is situated, was handed over to the Conservation Commission of the Northern Territory (now the Parks and Wildlife Commission of the Northern Territory).

It is simply not credible that at the time the dealings referred to in this extract took place, the CLC regarded the land which was subsequently transferred to Thangkenhareng Aboriginal Corporation as being the subject of the traditional land claim. Further, assuming it to be correct that the Northern Territory Government attempted to frustrate the transfer of the land (as

suggested in the CLC document quoted from) one can only pose the question as to why the existence of the land claim was not raised as a bar to the transaction.

All of the evidence points to the conclusion that Claim No 86 did not include a claim to NT Portions 452 and 708.

34. The present application is expressed to relate to unalienated Crown land. The term "Crown land" is defined in s 3(1) of the *Land Rights Act* to mean

land in the Northern Territory that has not been alienated from the Crown by a grant of an estate in fee simple in the land, or land which has been so alienated but has been resumed by, or has reverted to or been acquired by, the Crown

As at the date when the present application was made (20 December 1996) each of NT Portions 708, 3606 and 3604 had been alienated by the grant of an estate in fee simple. Those areas had ceased to be Crown land and were not available to be claimed.

However, as the claim was said to include also land which is currently registered in the name of the Thangkenharengge Aboriginal Corporation, the written consent of the Corporation to the making of the application in respect of NT Portions 708 and 3604 was tendered in evidence. Such consent is necessary in the case of a claim to alienated Crown land in which all interests not held by the Crown are held by or on behalf of Aboriginals (*Land Rights Act*, s 50(2Q). In the circumstances consent was unnecessary.

35. The use of the description "Barrow Creek Telegraph Station Reserve" in the present application is both confusing and unfortunate. The Telegraph Station Reserve had been revoked more than 40 years earlier, and in any event when it had existed, it extended to an area far in excess of that intended to be the subject of the claim. Indeed, given the precise definition of the claimants' intention as expressed in the CK's letter which accompanied the application namely:

to preserve that part of the claim over the Barrow Creek Telegraph Station Reserve also known as Reserve No 1795 Barrow Creek Commonage",

the words used in the application are as unhelpful as the plan attached to the application. I prefer to rely upon the express words *of* the claimants' legal adviser at the time the application was made as indicative of the real intention of the application. In my opinion the present application relates to, and was intended to relate to, the land which is described as Reserve No 1795. For reasons already stated the application does not include NT Portions 449, 3603, 3604, 557 and 708 all of which are excluded from Reserve No 1795.

Although NT Portion 557 would appear to remain as unalienated Crown land and could be the subject *of* a traditional land claim, by virtue *of* s 50(2A) of the *Land Rights Act* (the sunset clause) the Commissioner would have no capacity to perform any function in relation to a claim to that area even *if* the application were amended to include it within the area *of* land claimed. As no application has been made to effect any such amendment it is not necessary to pursue the matter in further detail.

36. This is not a case in which there is some ambiguity between the written description *of* the land and the boundaries marked on a map. The claimants rely upon the decision *of* the Federal Court in *Attorney-General (NT) v Maurice and Others* 73 ALR 362, in which there was a dispute as to the extent *of* the land claimed in a traditional land claim. In their final submissions the claimants quote part, but not the whole, *of* the headnote to the report. The full text is as follows:

Held: (i) The interpretation *of* the application and the identification *of* the land which is claimed should be approached bearing in mind that this is not a case *of* interpretation *of* a precise legal instrument such as a will, Crown grant or conveyance, that such applications usually relate to large areas *of* land whose area is difficult to define with any degree of real precision and that the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) requires a liberal or broad construction to give effect to the beneficial purpose it is intended to serve.

(5) Conflicts between the metes and bounds description in the application and the map attached to it were not to be resolved by recourse to principles *of* interpretation such as the *contra proferentem* rule or the principle *of falsa demonstratio non nocet cum de corpore constat*. The map was a clearer and more reliable exposition *of* the application.

(iii) Per Sheppard J: The question is one *of* the claimant's intention which is to be gathered from a consideration of the application read as a whole.

The situation in this matter is clearly distinguishable from the circumstances in *Attorney-General (NT) v Maurice*. Here, neither the written description nor the map is precise as to the area of land claimed. From the total context, including both the earlier claim and the CLUs letter of 16 December 1996, I have no hesitation in concluding that the claimants' intention was to claim Reserve No 1795.

37. My conclusion is that the present application relates to the area of land known as Reserve No 1795 (NT Portion 4339) which I find to be unalienated Crown land. The area claimed is therefore available to be the subject of an application under s 50(1)(a) of the *Land Rights Act*.

THE CLAIM DOCUMENTS

38. In accordance with the Aboriginal Land Commissioner's standard practice directions the CLC provided, in advance of the hearing, a number of documents which set out the basis of the traditional land claim. They include:

- i) Anthropologists' report. This document was prepared by the claimants' anthropologist Dr Lee Sackett. It is commonly referred to as the claim book.
- ii) Genealogy of the claimant group. The genealogy outlines and traces connections between the claimants.
- iii) Site map. This map indicates the location of significant sites on and near the claim area and identifies the Dreamings with which each site is associated.
- iv) Site register. The register complements the information on the site map by providing in relation to each site, its European name (if any), its location, a brief description of its physical features and details of the significance of the site to the claimants.
- v) Claimant profiles. Thirty-two claimants are named in this document but one has died since the claim was prepared. The document also identifies each claimant according to his or her gender, place and date of birth, place of residence and the basis of the claimant's claim to be a traditional Aboriginal owner.

Each of these documents was tendered by counsel for the claimants and accepted as an exhibit in the inquiry.

39. At the conclusion of the hearing of the evidence of the Aboriginal witnesses at Barrow Creek on 21 April 1999, counsel for the Attorney-General requested that Dr Sackett provide a supplementary anthropological report dealing specifically with three aspects of the evidence about which the Attorney General's anthropological consultant Professor Basil Sansom had some concern. The issues raised by the Attorney-General were dealt with in a supplementary report subsequently prepared by Dr Sackett and which was tendered, without objection, as an exhibit in the inquiry.

40. To a large extent the information contained in the claim documents was supported by evidence given by members of the claimant group and other knowledgeable Aboriginal people from the same general area. The claim book contains much additional information relating to the recent history of the area and of the social organisation of the Kaytetye people generally and the claimants in particular. Dr Sackett was available to be questioned by the representatives of the Attorney-General but was not called upon for this purpose. In these circumstances I can with confidence accept the claim book as reliable evidence of the matters discussed in it. A similar observation can be made in relation to the other claim documents.

THE BARROW CREEK AREA

41. The claimants and their neighbours call the claim area and its surrounds Thangkenhareng country. The claimants call themselves, and are known to their neighbours, as Thangkenhareng people. They are part of the wider Kaytetye language and cultural or 'tribal' grouping and their country lies within Kaytetye territory.

Numerous researchers have reported and commented on people living in and around the claim area and have plotted the area on 'Tribal Maps'. Whilst not all of the research and mapping is entirely consistent there seems to be a general consensus amongst the researchers that the claim area lies within Kaytetye country. Further, the claimants say they are Kaytetye and are

recognised as such and this has been the case at Barrow Creek since the early days of settlement.

42. In Chapter 2 of the claim book Dr Sackett provides a brief history of the Barrow Creek area which he describes as "a number of snapshots of events in that history". In a footnote Dr Sackett explains that the chapter is based on a draft prepared by Grace Koch which in turn was founded on the history she wrote for her book *Kaytetye Country* which itself was built on work done by Petronella Wafer (Vaarzon-Morel) for *A Claim to Areas of Traditional Land by the Keytej, Warlpiri and Warlmanpa*. As no issue has been raised as to the accuracy of the history the whole chapter is set out in Appendix 2 to this report. The references at the conclusion of Appendix 2 have been extracted from the References Cited at the end of the claim book.

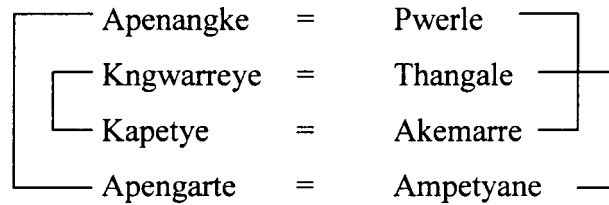
SOCIAL ORGANISATION AND LAND TENURE

43. In the claim book Dr Sackett observes (at p 23) that "there is no perfect congruence between Kaytetye land holding groups and Kaytetye language affiliations" and further that "not only is there no neat, one to one, relationship between land holding groups and linguistic affiliations, land holding groups are not associated with clearly defined parcels of land". He concludes that "land tenure on and around the claim area is best understood in terms of local descent groups and their associations with, and rights and responsibilities in relation to, Dreamings and sites on the land".

44. The claimants in common with other Kaytetye people, employ a subsection system which (according to one observer) "makes it possible to project ego centrically defined kinship relationships on a generalised socio-centric grid that locates them in terms of the overall structure", or as Dr Sackett helpfully says (at p 23) "the system provides a quick means of grouping different types of kin and identifying their general relationships to one another". The subsection system is by now a well known feature of the social organisation of many Aboriginal groups, particularly those whose countries are in the same general region as that of the Kaytetye. The system has been described in detail in other reports of Aboriginal Land Commissioners. In the

present case although nothing turns upon the detail of the system as practiced by the claimant group it will be useful to summarise the system which is described in more detail in the claim book.

45. The Kaytetye subsection system is best described by the following diagram and explanatory note:



Note: Equal signs link the subsections between which marriages ideally occur (eg Apenangke and Pwerle, Kngwarreye and Thangale, etc). Father-child links are marked by the vertical lines (e.g. Apenangke and Apengarte, Pwerle and Akemarre, etc).

This set of terms is matched with and to a set of what might be regarded as diminutives: diminutives in the sense that they point not to smallness but to familiarity. And whereas males and females are not distinguished between at the subsection level gender differences are indicated with the diminutives.

SUBSECTION	MALE DIMINUTIVE	FEMALE DIMINUTIVE
Apenangke	Tyaname	Ngamane
Kngwarreye	Tywekertaye	Ngapete
Kapetye	Tyapalye	Ngalyerre
Apengarte	Tyapeyarte	Ngampeyarte
Pwerle	Tywerlame	Ngamperle
Thangale	Tyangkale	Ngangkale
Akemarre	Tyakarre	Watyale
Ampetyane	Tyamperlke	Ampetyakwerte

These terms can and do 'stick', so that it regularly happens that adults and older people refer to themselves, and are referred to by others, with or through them. At the same time, there is alternation in usage between Kaytetye subsections terms and their diminutives. A person will, for example, be regarded as Watyale by some and as Akemarre by others, depending the level of familiarity.

46. The claimants are advanced as a single land owning local descent group the members of which trace their ultimate ancestry to the Beings who originally fashioned the landscape. Descent is traced in two ways, namely, through father and father's father and through mother and mother's father (and his fathers before him). Although the claimants can and do trace descent from other ancestors, e.g. through father's mother and mother's mother, it is descent through father and father's father and mother and mother's father that results in recruitment to the local group responsible for sites on the land.

47. Children of males of the patriline are currently referred to as either *apmereke artweye* ('country owners') or *kerte*; whilst children of females of the patriline are called *kwertengerle*. (In the claim book Dr Sackett consistently refers to "the country owners" as *apmereke-artweye/kerte* whereas in the evidence the term *kerte* alone was used - a practice I have adopted in this report). These terms can also apply to people who have become incorporated into the land holding group by the mechanism of adoption rather than by genealogical descent. In this context adoption involves the adoptees coming to share the spiritual and ritual rights and responsibilities of the group into which they are adopted; they are regarded as full members of the descent group and share a common spiritual responsibility for the group's country, its Dreamings and its Dreaming sites.

It is not uncommon for senior people who are not directly descended through the patriline to be regarded as *kwertengerle*. Generally this occurs in respect of members of neighbouring local descent groups who have a history of connection through marriage or of shared historical experiences and ongoing participation in regional ceremonies. Such people are however not regarded as having primary spiritual responsibilities for, and affiliations with, places in the claim area and are not included in the local descent group of claimants in relation to the claim area.

The land under claim and the claimant local descent group are associated with the Apenangke and Apengarte subsections and this is because significant Dreaming ancestors were associated with those subsections. The *kerte* are of

the Apengangke and Apengarte patricouple whereas the *kwertengerle* are of the subsections of the children of female *kerte* (Akemarre and Thangale).

48. The claimants regard their country (or *apmerele*) as comprising collections or clusters of named sites and the land surrounding those sites. The sites are believed to have been created by founding or ancestral or Dreaming Beings and to be imbued with the powerful spiritual essence of those ancestors. Often, the names of sites are associated with the creative era and creative events or in some cases, with countries, e.g., the claimants' country is called Thangkenharenye after a local ancestral rockshelter and rockhole. Some Dreaming Beings are believed to have stayed within relatively limited, localised areas whereas others are said to have moved great distances across many countries. The Dreaming Beings left tracks - usually manifested by lines of sites - as they moved about and although in cases where a Dreaming Being has crossed more than one country the different local descent groups are usually regarded as joint owners of the track, each such group generally has primary spiritual responsibility only in respect of the section of the track that runs across its own country.

49. As owners of a country members of the local descent groups have an obligation to perform ceremonies associated with the country's sites and Dreamings. This requires the participation of both *kerte* and *kwertengerle*. The *kwertengerle* stage-manage the ceremonies and paint the ancestral designs whilst the *kerte* wear the designs and perform. Both *kerte* and *kwertengerle* are required to be present when a sacred site is visited or when there is any discussion with outsiders about country and its ceremonies. Furthermore, both groups have a general responsibility to "look after" country in a spiritual sense which they fulfil by keeping themselves aware of any activities taking place on the land and taking appropriate steps to prevent or remedy any damage that may be contemplated or done to it.

Senior members of the local descent group have the responsibility to transmit both important spiritual knowledge concerning the country and also more mundane information about it to younger members of the group.

50. The claimants possess, and exercise, a traditional right to forage on and around the claim area. There is evidence that members of the claimant group both hunt (e.g. kangaroos and perentie) and gather *yelka* (or bush onion) on their country as do Aboriginal people from neighbouring areas and the affines of members of the land holding group. Similarly, members of the claimant group travel widely and hunt and forage on other countries particularly those of close kinspeople. It is clear that the land holding group is not congruent with the land using group. However, the entitlement to forage as of right on the claim area and the right to control others' access to the resources of the land, remains with the people having primary spiritual responsibility for the land and the sites on it.

SACRED SITES AND DREAMINGS

51. The site map and the site register identify and describe 14 sites either on or in close proximity to the claim area. Each is associated with one or other of four

Dreamings associated with the area.

The four Dreamings are known as -

- Altyerre Kwerreympe (Women Dreaming)
- Altyerre Arelpe (Moon Dreaming)
- Altyerre Warlekerlange (Fire Dreaming)
- Altyerre Alatyeye (Yam Dreaming)

The sites associated with the Dreamings are

- Altyerre Kwerreympe
 - Tyempelkere (site 1.1)
 - Kwerreympe (site 1.2)
 - Amernenge (site 1.3)
 - Intewerrtne (site 1.4)
 - Erreyakwerre [A] (site 1.5)
 - Erreyakwerre [B] (site 1.6)
 - Ilantye (site 1.7)
 - Thangkenharengge [A] (site 1.8)
 - Thangkenharengge [B] (site 1.9)
 - Tyelkenheterre (site 1. 10)
 - Altyerrke-Marletherre (site 1. 11)

Altyerre Arelpe:

Arelparenge (site 2. 1)

Altyerre Warlekerlange:

Alpentyelye (site 3. 1)

Altyerre Alatyeye:

Altyerrke (site 4. 1)

52. During the hearing evidence was taken at a number of sites when claimants and other witnesses were able to recount the stories associated with the site and explain the spiritual significance of it.

Tyempelkere (site 1.1), Amemenge (site 1.3), Erreyakwerre [A] (site 1.5), Erreyakwerre [B] (site 1.6) and Arelparenge (site 2.1) were visited on 20 April 1999 and Kwerreympe (site 1.2), Thangkenhareng [A] (site 1.8), Thangkenhareng [B] (site 1.9), Altyerrke-Marletherre (site 1.11) and Alpentyelye (site 3. 1) were visited on 21 April 1999.

All but two of the Kwerreympe sites were visited in the company of mixed groups of men and women (and children) Women did not visit Thankenhareng rock shelter (site 1.8) and the evidence there was given in the presence of males only. At the request of the claimants I directed that the transcript be transcribed by a male and that access to it be restricted to males. The claimant women gave evidence in the absence of men (other than myself and the transcript recordist) at Kwerreympe (site 1.2) but this was not because the evidence was gender specific, rather an aspect of it was of such a nature that the witnesses would have been embarrassed to speak about it publicly. The stories associated with each of the Dreamings are summarised below.

53. Altyerre Kwerreympe:

The Kwerreympe were a large number of women; two (Apengarte) sisters awoke from their pre-Altyerre slumber but were unable to speak, they had no language. They urinated and created Tyempelkere spring (site 1.1). Their urine also caused *erreyakwerre* (also known as *yelka*) or 'bush onions' (*Cyperus bulbosus*) to sprout. These bush onions taught the two sisters to speak Kaytetye. They also transformed into more Kwerreympe. The two sisters joined with the other Kwerreympe in interacting with other groups of

Kwerreympe who visited or moved through their country. They also joined with them in moving about the countryside around Tyempelkere, gathering and eating *erreyakwerre*. They would go to a particular spot to shed the tubers of their husks which are now represented by a rugged looking sandstone hill (site 1.4). The two (Apengarte) sisters became pregnant, and each had a son. They did not want the other Kwerreympe to know about their (Thangale) boys, so they hid them at Thangkenhareng rockshelter (site 1.8) high in the hills east of Tyempelkere. In time the boys, who were also Zebra Finches (*Poephila guttata*), grew into young men, and wished to seek sexual partners. Their mothers (who along with the other Kwerreympe also at times were Zebra Finches) stopped them from doing so. With this, the boys flew west to be initiated into manhood in Warlpiri country. As they travelled they forgot Kaytetye. They learned Warlpiri and never returned to their birthplace. The two sisters watched, and wailed, as their sons flew away. They still are standing there (site 1. 11) in the form of two trees.

54. Altyerre Arelpe:

Arelpe (Moon Man) came into the area from the north, from Warumungu country. Among other things, he was pursuing sexual encounters. Near the claim area he decorated himself so the Kwerreympe women would fall in love with him even though he was an old man. However, he decided against trying to seduce any of the Kwerreympe, beautiful as many of them appeared to him, because they were his "aunties". Indeed, rather than seeking to have sex with them, he by "Law" had to completely avoid them. He moved through Arelpareng Atwatye (to the immediate south-southwest of site 2.1), and continued on in a southerly direction, off into Anmatyerre country.

55. Altyerre Warlekerlange:

The Fire Dreaming is spoken of as Warlekerlange from the Warlpiri word 'Warlukurlangu' meaning belonging to fire. It came from its home to the west of the claim area in the form of smoke and is sometimes conceptualised as a grey bird. After visiting relatives it returned home.

56. Altyerre Alatyeye:

In the Dreaming, Alatyeye or Yam (*Vigna lanceolata*) came to the claim area from Unamarre on the other side of the Harts Range. It came because it had seen a flower the same colour as itself, which it thought was the same type as itself. In the event, it discovered when it got close that the flower it had seen was not that of another yam, but that of a bush onion. Alatyeye turned and returned home.

THE LOCAL DESCENT GROUP

57. As previously noted, the members of the claimant group call themselves, and are called by their neighbours, Thangkenhareng (the suffix *areng* meaning 'belonging to' or 'usually found at') which is the same name as their country. They regard themselves, and are considered by others, to be members of an extended family related to one another by virtue of their descent from two now deceased Apengarte brothers, Tropery and Chippy. These men were either the *arrende* (father's father) or *tateye* (mother's father) of the men and women who currently constitute the senior generation of the claimant group.

58. Tropery Apengarte had six children namely Wida Apenangke, Eileen Apenangke, Johnny Brown Apenangke, Clarrie Apenangke, Ruby Willis Apenangke and Ivy Apenangke all of whom are now deceased. Wida Apenangke is survived by seven children who are recognised as *kwertengerle*. Their names are Alec Ross Akemarre, Judy Heywood Akemarre, May Heywood Akemarre, Allan Heywood Akemarre, Eliza Heywood Akemarre, Jane Heywood Akemarre and Clarrie Heywood Akemarre.

Johnny Brown Apenangke is survived by one son (Cliffy Brown Tyapeyarte) and one daughter (Patsy Brown Ngampeyarte). Cliffy and Patsy are recognised as *kerte* as are Cliffy's children Kym Brown Apenangke and Stella Brown Apenangke. Stella's daughter Miriam and Patsy's five children Heidi Brown Ngangkale, Patrick Brown Tyangkale, Agnes Brown Ngangkale,

Elaine Brown Ngangkale and Maureen Brown Ngangkale are recognised as *kwertengerle*.

Clarrie Apenangke is survived by three sons, Michael Tyapeyarte, Robert Tyapeyarte and Lawrence Tyapeyarte. Each is regarded as *kerte* as are Michael's sons (Nathan Price Apenangke and Fabian Price Apenangke) and Robert's son (Marcus Apenangke).

Ivy Apenangke is survived by four sons and three daughters namely Kwementyaye (Peter) Young Tyakarre, Kenny Gorey Tyakarre, Gladys Price Watyale, Beryl Gorey Watyale, Eileen Gorey Akemarre, Mark Gorey Tyakarre and Clarence Gorey Tyakarre, all of whom are *kwertengerle*.

Eileen Apenangke and Ruby Apenangke have no surviving descendants.

59. Chippy Apengarte had two daughters, Stumpy Apenangke and Mampi Apenangke. His only surviving descendant is Mampi's daughter Nancy Peterson Akemarre who is a *kwertengerle*.

60. There are numerous historical and other records referring to the presence of Tropery and Chippy Apengarte and their descendants and affines in and around the Barrow Creek area. The relevant source documents are identified at pp 35-36 of the claim book.

Tropery is recalled for his involvement in the construction of the Barrow Creek Hotel and for his work in the vegetable gardens. Indeed, it is suggested that the name Tropery comes from strawberry. Tropery was also considered as one of the major ritual leaders in relation to those ceremonies which belonged to Barrow Creek. He was active in passing on his knowledge to younger Kaytetye men.

There is ample evidence that Tropery and Chippy and their descendants and affines have maintained a strong and ongoing presence in and around the claim area. As early as 1938 Patrol Officer Strehlow noted seeing a man named Tjipi (Chippy) and his wife Topsy Ampetyane, and Tropery's daughters Ruby and Ivy Apenangke at Taylor Crossing a short distance north

of Barrow Creek. Other reports, made in 1947, 1950, 1953 and 1958 by various patrol officers record members of the descent group as living and in some cases working at Singleton and Stirling Stations (both adjacent to Neutral Junction), at the Telegraph Station and at Neutral Junction. In 1950 Cliffy Brown Tyapeyarte and his sister Patsy Brown Ngampeyarte (then only children) were living at a camp at Barrow Creek "a couple of hundred yards south of the hotel". Their father, Johnny Brown Apenangke was employed as a linesman at the Telegraph Station. Both Cliffy and Patsy continue to live at Barrow Creek.

61. Many of the claimant group continue to live either on or near the claimed land and at Aboriginal communities established on other parts of their traditional country. More detailed reference will be made concerning this aspect of the evidence in the comments made later in relation to the number of people likely to be advantaged by a grant of the land. It is however sufficient for present purposes to observe that the group as a whole has strong local connections with the claimed land both in terms of spiritual attachment and physical presence. It is appropriate therefore to regard the group of claimants who are described in the preceding paragraphs as either *kerte* or *kwertengerle* as a local descent group.

TRADITIONAL ABORIGINAL OWNERSHIP

62. A local descent group of Aboriginals will be regarded as the traditional Aboriginal owners of land for the purposes of the *Land Rights Act* if members of the group have common spiritual affiliations to a site on the land which place the group under a primary spiritual responsibility for that site and for the land and if the members of the group are entitled by Aboriginal tradition to forage as of right over the land (*Land Rights Act* s 3(1)).

In determining the nature of the spiritual affiliations and responsibilities of the group and its members, and their right to forage, it is desirable to have regard to what the people themselves say about these matters. The following paragraphs contain a summary of the evidence of some of the major witnesses.

63. The first issue to resolve is to establish whose land, in the traditional Aboriginal sense, the claim area is.

On the morning of 21 April 1999 evidence was taken at Altyerrke-Marletherre (site 1. 11) which is on elevated ground in the centre of the claim area. Kwementyaye (Peter) Young, whose father's country was Arrente to the north said that his father's country did not include the claim area, rather it is his mother's country. His mother was Tropery's deceased daughter Ivy.

Michael Price (who is not a claimant) said that his country is Alukwere some 40 kilometres distant to the south-east. He said that the right people for the claim area are the "Thangkenhareng mob" and identified Kym, Cliffy, Michael, Robert, Lawrence, Patsy and Stella as some of that group.

Tommy Walkabout (who is not a claimant) said that his country is Akalparre immediately to the west adjoining Thangkenhareng and he too identified Kym, Cliffy, Patsy, Michael, Robert and Stella as being the right people for the claim area.

David Ampetayne, the father of a number of the claimants by his marriage to Patsy Brown, said his country is to the south of the claim area and that the claim area belonged to Patsy, Cliffy, Kym, Robert and Lawrence. He identified his and Patsy's children as "real *kwertengerle* for this country". On an earlier occasion Tommy Thomson (who is not a claimant but is regarded as having the status of *kwertengerle*) had said that his country (Etwerrpe) was to the east of the claim area and that the claim area was not his country.

On the basis of the evidence of knowledgeable people from adjoining countries it is clear that no claim is made to the claim area by the traditional owners of those adjoining countries and that in the region the claimant group, the senior members of which have been identified by the witnesses, are regarded as the right people for the claimed land.

64. The assertions made by Dr Sackett in the claim book (at p 25) to the effect that membership of the local descent group may be traced either through one's father and father's father or through one's mother and mother's father is supported by the evidence of the witnesses and has not been challenged. Indeed, several witnesses with close social and residential connections with the claimant group but who did not fit within the principle of descent described, notably Tommy Thomson, Michael Price, Tommy Walkabout, David Ampetyane and Vincent Janima made no claim to recognition as traditional owners of the claimed land.

65. The common spiritual affiliations of members of the claimant group to sites on the claim area are also demonstrated by the evidence.

At the sites visited during the hearing witnesses told the stories associated with those sites. Without exception the stories described either the process of creation of the site or the use made of it by mythical Beings associated with the Dreamings described. Although not all of the claimants gave evidence, the presence during the taking of evidence of many members of the claimant group demonstrated their obvious concurrence with what the various witnesses said. The affiliation of the members of the claimant group to sites on the land are clearly spiritual in nature and although some claimants have a special interest in particular sites, all members of the group share in common the spiritual connection with those sites.

66. The social organisation of the various Aboriginal groups and communities in the Northern Territory is not uniform. In reports made by Aboriginal Land Commissioners since the introduction of the *Land Rights Act* findings as to the extent and nature of the spiritual responsibilities have not always been consistent. In some cases where claimant groups have had a social organisation similar to that of the present claimants findings have been made that it is only the direct patrilineal descendants of an apical ancestor (the *kerte*) who have a primary spiritual responsibility for sites and the land whereas in others, those who claim through their mother and mother's father (the *kwertengerle*) have been included as traditional owners. Each claim must be resolved on the evidence put forward and in this case the evidence of the

claimants supports the model advanced in the claim book which includes both *kerte* and *kwertengerle*.

67. There are three main responsibilities associated with traditional ownership. First, there is the responsibility to learn the stories and spiritual associations relating to the sites and the land and to teach others, particularly the young people, about the stories and their rights and obligations in relation to the sites and the land. Second, there is the obligation of the group as a whole, but in particular of the senior members of the group, to protect the sites and the land against actual or threatened interference. Third, there is the responsibility to visit sites to ensure that their integrity has not been compromised. Such visitation is frequently associated with camping or hunting in the area proximate to a site.

The evidence supports the conclusion that members of the claimant group, including both *kerte* and *kwertengerle*, accept these responsibilities as part of their spiritual connection with the sites and the land of the claim area. Witnesses spoke of their concern when a site was damaged by the realignment of the Stuart Highway, of the need to consult with "the family" when a site was damaged or threatened, of the right to camp and hunt on the land and of the passing on of information from one generation to the next.

Some of the cross-examination of counsel for the Attorney-General seemed to be directed towards establishing that different levels of responsibility existed between the *kerte* and the *kwertengerle* but the evidence does not lead to that conclusion. Rather, it consistently demonstrated that the rights and obligations of all members of the group, whether *kerte* or *kwertengerle*, were the same. They have the same rights to live and hunt on the land and to otherwise exploit its resources and similarly they have the same obligations to protect the sites and land and to pass on knowledge relating to them.

The obligations associated with the status of *kerte* and *kwertengerle* within the claimant local descent group are properly to be regarded as a primary spiritual responsibility. The responsibility is primary because it is derived directly by descent and not from some secondary source; it is spiritual because it relates

to the preservation of ancient beliefs having their origin in the era commonly called the Dreamtime; and it is inextricably linked with the existence and protection of sites and of the land itself.

68. Reference is made above (at paragraph 50) to the claimed right of the claimant group to forage on the claim area. This right has not been put in issue and is amply demonstrated both by the claims made in evidence and by the actual practices of the claimants.

69. The conclusions which are expressed in the foregoing paragraphs justify a finding that the members of the claimant group who are advanced as *kerte* and *kwertengerle* are a local descent group of Aboriginals who have common spiritual affiliations to sites on the claimed land which place the group under a primary spiritual responsibility for those sites and the land and are entitled by Aboriginal tradition to forage as of right over the land.

The claimant group thus meets all of the criteria of the definition of "traditional Aboriginal owners" in the *Land Rights Act*.

The names of the *kerte* and *kwertengerle* who have been shown to be traditional Aboriginal owners of the claimed land are set out in Appendix 3 to this report.

STRENGTH OF TRADITIONAL ATTACHMENT

70. Section 50(3) of the *Land Rights Act* requires that in making a report in connection with a traditional land claim the Commissioner shall have regard to the strength or otherwise of the traditional attachment by the claimants to the land claimed.

It has been held by the Full Court of the Federal Court of Australia that the strength or otherwise of traditional attachment of the claimants to the claimed land is not a matter which is to be taken into account in relation to a finding as to whether there are any traditional Aboriginal owners of the land but rather is a matter to which regard may be had in formulating any recommendation the Commissioner may make to the Minister in his report. (*NX v Aboriginal Land Commissioner* 34 FCR 485; *Jungarrayi v Olney* 34 FCR 496)

It will be noted however that it is the strength of the traditional attachment of the claimants and not that of other Aboriginals to which regard must be had.

An important indication of the strength of traditional attachment to land is the fact of residence on or in close proximity to the land in question. This is not to say that absence from the land is indicative of the absence of a strong traditional attachment but rather in a case where there is evidence of long and continuous residence on or near a person's traditional country it may readily be inferred that the person's attachment to the land is strong.

Such is the case in this claim.

Of the 31 claimants found to be traditional Aboriginal owners the vast majority are shown in the claimant profiles to be presently resident either at Barrow Creek or at Aboriginal communities or on pastoral stations on Kaytetye country in close proximity to Barrow Creek. Cluffy Brown Tyapeyarte and his sister Patsy Brown Ngampeyarte have spent their whole lives at Barrow Creek whilst other claimants have expressed the intention of returning there in the event that as a result of this claim, title to the land is obtained.

71. Although there is little evidence of the claimant group being involved in traditional ceremonial activity specifically related to the claim area, there is no doubt that the preservation and handing on of knowledge concerning the sites and Dreamings in the area is indicative of the continuing traditional attachment of the claimants to the land.

One claimant, Alec Ross Akemarre, was unable to attend the hearing due to the then recent passing of his father, but a written statement of his evidence was subsequently tendered (exhibit CLC 17). Alec has not lived at Barrow Creek since he was about three years of age when he was removed by "the Welfare" first to the Bungalow at Alice Springs, then to Croker Island, then (following the bombing of Darwin during World War II) to Pine Creek and ultimately to Otford near Sydney. After the war he was sent back to Croker Island where he remained until he was 18. It was not until the early 1970s, after a colourful career as a street sweeper, grave digger, pearler, drover and

ultimately a professional boxer that he returned on a visit to Barrow Creek and learned for the first time about his birthplace and his family. He has subsequently learned much of the traditional knowledge associated with Thangkenhareng country around Barrow Creek from members of his close family. His statement concludes:

If we got our land back it would be easier to sit down and talk about that country. There's where I come from, Barrow Creek. I would move back home.

72. Closely related to the obligation imposed on the Commissioner by s 50(3) to have regard to the strength or otherwise of the traditional attachment of the claimants to the claimed land are the two principles set out in s 50(4) to which the Commissioner is required to have regard, namely that:

- (a) Aboriginals who by choice are living at a place on the traditional country of the tribe or linguistic group to which they belong but do not have a right or entitlement to live at that place ought, where practicable, to be able to acquire secure occupancy of that place;
- (b) Aboriginals who are not living at a place on the traditional country of the tribe or linguistic group to which they belong but desire to live at such a place ought, where practicable, to be able to acquire secure occupancy of such a place.

Each of these principles is highly relevant in the present case. Those claimants who presently reside at Barrow Creek have no right or entitlement to live on the land; they are merely squatters, albeit long term squatters. It is entirely appropriate that their continued presence on the land be regularised. Similarly, there are some who do not at present live at Barrow Creek but who would do so if secure tenure could be obtained.

RECOMMENDATION

73. Having regard to

- a) my finding that the application extends only to the area of land known as Reserve No 1795 (Northern Territory Portion 4339);
- b) my finding that the Aboriginals named in Appendix 3 to this report are the traditional Aboriginal owners of the claimed land;

- c) the strength of the traditional attachment of the claimants to the claimed land; and
- d) the principles referred to in s 50(4) of the *Land Rights Act*;

I recommend to the Minister for Aboriginal and Torres Strait Islander Affairs that the area of Crown land in the Northern Territory being Reserve No 1795 (NT Portion 4339) be granted to a Land Trust for the benefit of Aboriginals entitled by Aboriginal tradition to the use or occupation of that area of land, whether or not the traditional entitlement is qualified as to place, time, circumstance, purpose or permission.

MATTERS FOR COMMENT

74. In making a report in connection with a traditional land claim the Commissioner is required by s 50(3) of the *Land Rights Act* to comment on each of the following matters:

- a) the number of Aboriginals with traditional attachments to the land claimed who would be advantaged, and the nature and extent of the advantage that would accrue to those Aboriginals, if the claim were acceded to either in whole or in part;
- b) the detriment to persons or communities including other Aboriginal groups that might result if the claim were acceded to either in whole or in part;
- c) the effect which acceding to the claim either in whole or in part would have on the existing or proposed patterns of land usage in the region; and
- d) where the claim relates to alienated Crown land - the cost of acquiring the interests of persons (other than the Crown) in the land concerned.

These matters are dealt with in the following paragraphs.

ADVANTAGE OF A GRANT

75. It is always difficult to make an accurate assessment of the number of Aboriginals who would be advantaged by a grant of land under the *Land Rights Act* but there are a number of factors which may assist in making a reliable estimate.

Clearly, there are those Aboriginals who presently reside on the claimed land which include both claimants and their extended families, not all of whom are Kaytetye people. Then there are those claimants and their close families who presently do not reside at Barrow Creek because of the unavailability of

housing, electricity and an adequate water supply, but who would prefer to live there if proper facilities were available. In addition, because of Barrow Creek's strategic position on the Stuart Highway adjacent to a significant tourist attraction (the Old Telegraph Station) it is highly likely that other Aboriginals, particularly those who are, or have close connections with members of the wider Kaytetye group would either reside at, or visit, any community that may subsequently be established on Aboriginal land at Barrow Creek.

The best available evidence, which is not in any way put forward as conclusive, suggests that there are about 230 Kaytetye living in the Thangkenhareng region. This includes residents at Elewarre (Stirling Station), Artarre (Neutral Junction Station), Ankwelyelengkwe just south of Barrow Creek) Amerre (about 30 km. north of Barrow Creek) and at Barrow Creek itself. In addition there are about 180 Kaytetye people living in other rural Aboriginal communities which are for the most part in the general region of Barrow Creek but not on traditional Kaytetye country, and there are about a further 74 who live in urban areas. In round figures there are about 480 Kaytetye who would derive some advantage from a grant of the land. In addition some family members who are not Kaytetye would be similarly advantaged.

76. It can reasonably be expected that the granting of secure title to land at Barrow Creek will lead to the development of a viable permanent Aboriginal settlement in the area and that it would be comprised mainly of Kaytetye people. The bringing together of such people is likely to provide an environment in which the Kaytetye language would be more generally used and thus reverse the current position in which Kaytetye is in danger of being lost. Further, the same factors are likely to lead to a renewal of Kaytetye cultural and ceremonial activity on Thangkenhareng country, something which has not been possible for many years due to the inability to accommodate and provide basic human services to enable a significant number of people to visit the area for any length of time.

77. There would also be some economic advantage to be derived from the establishment of a larger Aboriginal population at Barrow Creek. The Thangkenhareng Aboriginal Corporation, which has an established resource centre and store at Barrow Creek, is also involved in the administration of a CDEP program for Aboriginals in the local area. An increase in population would enable the CDEP program to be expanded thus providing additional income for people in the area.

DETRIMENT

78. The granting of Aboriginal title to the claimed land could give rise to some detriment to non-Aboriginal persons who currently make use of the land which presently is reserved for commonage purposes. Reference has been made earlier to correspondence received from Mr Les Pilton, the proprietor of the Barrow Creek Hotel and from the proprietors of Neutral Junction Station. Their concerns are dealt with in the following paragraphs.

79. The Barrow Creek Hotel is erected on an area of 1.61 hectares (NT Portion 449). Mr and Mrs Pilton hold the land in fee simple. Mr Pilton's letter raises three main issues, namely water supply, rubbish disposal and the airstrip. At present there is only one water bore serving the Barrow Creek Hotel and it is located on the commonage reserve. Mr Pilton suggests that three bores are needed. A grant of title to a Land Trust could jeopardise both the current and future water supply of the hotel. As the granting of Aboriginal title to the land would be likely to lead to an increase in the local population, the available water resources would be inadequate, thus compromising the viability not only of the Aboriginal community but also of the hotel and other public facilities. The point is well made and it is obvious that in the absence of a proper water supply it would not be possible to develop a permanent Aboriginal community on the land.

The area of land for which Mr Pilton holds title is inadequate for him to dispose of his rubbish within the bounds of his title, consequently it has been his practice to use part of the commonage land for this purpose. If Aboriginal title is granted to the commonage the continuation of this practice would be

dependent upon some accommodation being reached between the traditional owners and the hotel proprietor. During the hearing my attention was not drawn to this issue by the claimants and I am not aware of any suggestion that it is causing any concern to them. In the event that an Aboriginal community is established on the land there would be a need for the community to have a facility to dispose of rubbish and given the cordial relationship which appears to exist between the claimants and the publican it would seem likely that some mutually acceptable arrangement could be arrived at.

There is currently an airstrip in close proximity to Barrow Creek which is mainly on the Neutral Junction pastoral lease but in part occupies a portion of the commonage reserve. As with the question of rubbish disposal, all sections of the local community have a vested interest in maintaining the existing facility provided by the airstrip. Unless some arrangement is made to ensure the continuation of unrestricted public access to all parts of the airstrip (particularly that part of it which may be on Aboriginal land) the general community could suffer detriment. Having regard to the small area of the commonage affected by the airstrip and the interest that the local population has in having access to it there would not seem to be any real likelihood of any person suffering detriment in the event of the area in question becoming Aboriginal land.

80. The proprietors of Neutral Junction Station have expressed a number of concerns. First, they have raised the question of the North South Stock Route which it is suggested passes through the claimed land. As indicated earlier in this report that does not appear to be the case but if the commonage area becomes Aboriginal land the established practice of Neutral Junction to use the land for grazing and for gaining access to other parts of the leasehold which border the commonage would be subject to any agreement reached between the traditional owners and the station owners. Unless and until such an agreement is concluded, the proprietors of Neutral Junction Station would suffer detriment in the event that the land becomes Aboriginal land.

81. In view of my conclusion that the area of land claimed does not include either NT Portion 3603 (the Conservation Commission Land) or NT Portion 557 (the

racecourse reserve) neither the Conservation Land Corporation nor the Barrow Creek Turf Club Inc would suffer any detriment in the event that the claimed land becomes Aboriginal land.

It is however appropriate to refer briefly to the evidence adduced on behalf of the Conservation Land Corporation. Ms Kay Bailey, a Principal Planner with the NT Parks and Wildlife Commission gave evidence at Alice Springs on 20 May 1999. She also tendered a written statement which is exhibit NTG 4.

A Plan of Management for the Barrow Creek Historical Reserve was completed and became operational in May 1994.

The following extracts from Ms Bailey's statement provide an insight into the importance of the Telegraph Station and of the role of the Parks and Wildlife Commission in relation to its preservation and use:

The Barrow Creek Telegraph Station provides an opportunity for visitors to discover the historical significance of the Telegraph Station. This includes its impact on the local Aboriginal people as well as the wider story of the Overland Telegraph Line and its relevance in the history of European settlement of Northern Australia. The almost continual occupation of the Telegraph Station and modifications to its buildings over the years are of interest to visitors. Visitors currently have unrestricted access to the grounds of the Telegraph Station. Visitors can obtain access to the interior of the buildings by appointment with the publican of the Barrow Creek Hotel who holds the keys. Continued access by visitors to the historical reserve is essential to ensure that activities such as sightseeing, photography and cultural interpretation can continue. Unimpeded visitor access to the Telegraph Station is essential to ensure that visitors can appreciate the site's historical appeal. Access is presently from the Stuart Highway via a public sealed service road and should remain so. Signage interpreting the significance of the Telegraph Station and its telecommunications history has been installed on the site.

Should the Land Claim (to the extent that it covers the area) not be acceded to as regards NT Portion 3603, the Parks and Wildlife Commission envisages future management of the Historical Reserve to continue as outlined in the Plan of Management. It is proposed to produce further interpretation of the Reserve as a handout information sheet and hold "open days" at the Station on appropriate occasions. Opportunities will be investigated as they arise to provide for use of the Telegraph Station buildings. Management and maintenance by the

Barkly District rangers would continue, with the possibility of arrangements with the Thangkenhareng Aboriginal Corporation for particular tasks.

As set out above, the Parks and Wildlife Commission has demonstrated over several years that it is well qualified to manage conservation of the value of the Barrow Creek Telegraph Station whilst ensuring visitors are provided with information on its historical significance and allowing access to view the Station buildings. The key heritage values of the Telegraph Station must be maintained in the national interest by long term management in accordance with the Plan of Management. The Barrow Creek Telegraph Station is an important tourist attraction and an interpretative and educational element of the old Overland Telegraph Line.

82. No other Aboriginal group would suffer detriment if the claimed land becomes Aboriginal land.

EFFECT ON PATTERNS OF LAND USAGE

83. In the event of the claimed land becoming Aboriginal land it may be expected that there will be some, albeit slight, effect on existing patterns of land usage in the region.

First, a likely consequence of a grant of title to a Land Trust is that the claimant group will seek to develop a permanent residential area on the land. This could involve a significant increase in the Aboriginal population in the area with consequential increased demand for services such as housing, water supply and electricity.

Second, the land would cease to be a commonage reserve with the result that access to it for grazing and other pastoral purposes would be subject to the approval of the traditional Aboriginal owners. In his letter of 28 March 1999 (exhibit ALC 6) to which reference has previously been made, Mr W. Klein on behalf of the proprietors of Neutral Junction Station stated that the CLC had advised by letter that the claim will not have any impact on the Station's activities. It seems therefore that whilst the present cordial relationship between the claimants and Neutral Junction Station continues, it is unlikely

that a grant of title to the land would have any significant effect on the existing usage of the land by the station.

There is no reason to believe that the use of any other land in the region would be affected by a grant of title to the claimed land.

COST OF ACQUIRING OTHER INTERESTS

84. As the claim relates entirely to unalienated Crown land no question arises as to the acquisition of the interests of persons other than the Crown in the event that the land becomes Aboriginal land.

ROADS

85. The *Land Rights Act* does not specifically require the Commissioner to deal with the question of public roads within an area recommended for grant but as any deed of grant under s 12 of the *Land Rights Act* flowing from the recommendation made in this report must first identify any land on which there is a road over which the public has a right of way and second, must be expressed to exclude such land from the grant (s 12(3)) it is convenient to comment on such information as is available concerning roads in the area.

The proclamation creating Reserve No 1795 does not exclude roads from the area reserved, and accordingly as the recommendation in this report includes the whole of the reserve, it includes that part of the Stuart Highway which passes through the reserve and also any other public roads encompassed within its boundaries. To the extent that the Stuart Highway passed through the former NT Portion 452, it is not part of Reserve No 1795 and is not part of the claimed land.

STUART HIGHWAY

Approximately 4.3 km of the Stuart Highway passes through the claimed land. The existing road reserve is 40.23 metres wide where the highway passes through the former NT Portion 452, otherwise it is 100 metres wide.

The current policy of the NT Department of Transport and Works in relation to road reserves is explained in a document which forms part of the statement of Mr Lindsay Bryceson (exhibit NTG 2). The relevant parts of the document (paragraphs 14-17) state:

14. In late 1988, the Department adopted a 3 tier road reserve policy for rural roads to reflect the system of classification and the requirements of the Department in respect of each type of road. That policy on the width of road reserves is as follows:

Classification Road	Reserve Width
National Highway	200 metres
Rural Arterial Road	150 metres
Local	100 metres

The rationale for the road reserve policy has been explained in evidence in previous land claim hearings (and particularly in Warumungu Land Claim No 22 and Central Mount Wedge No 154). Briefly, the Department requires these minimum widths to allow for:

- (a) seal and shoulders (main carriageway and service roads where required);
- (b) road maintenance construction and future upgrades;
- (c) access roads for those purposes;
- (d) construction and maintenance of drains (table drains, offlet and diversion drains);
- (e) construction and maintenance of road infrastructure (e.g. signage, bollards etc);
- (f) construction and maintenance of rest areas and associated infrastructure (e.g. access roads, facilities such as shelters, tables, rubbish bins etc);
- (g) detours during maintenance and construction;
- (h) stockpiling of materials required for construction and maintenance (e.g. gravel, sealing aggregate, crusher fines);
- (i) buffers from adjoining improvements (e.g. fences, buildings);
- (j) services including telecommunications, gas, power and water);
- (k) minor road re-alignment (e.g. easing of curves).

15. The designated widths of road reserves are considered the minimum required to effectively manage the road network and to accommodate future needs. The former policy was to seek 100 metre road reserves for all roads irrespective of their classification. This proved inadequate in the case of National Highways and Rural Arterial Roads. Progressive development had occurred and road upgrading was necessary, particularly in the cases of the Stuart and Arnhem Highways, hence the adoption of the current policy.

16. The Department can only implement its policy when the opportunity arises, that is:

- (a) as part of land developments (e.g. subdivisions) adjoining the road (usually by way of surrender);
- (b) specific acquisition of land for road purposes under the *Lands Acquisition Act*;
- (c) by way of submission to the Aboriginal Land Commissioner in the course of inquiries under the *Aboriginal Land Rights (Northern Territory) Act*; and
- (d) upon conversion of pastoral leases to perpetual pastoral leases.

17. Whatever the means of implementation, it is necessary in all cases to make a reasonable assessment of current and future needs, particularly in the *Aboriginal Land Rights (Northern Territory) Act* context given the inability to acquire land if the surrounding land should become Aboriginal land.

The Attorney-General seeks a 200 metre road reserve in relation to Stuart Highway. The claimants oppose such a proposal on the grounds that it is based on a policy decision rather than a demonstrated need and would remove a substantial area of land from the grant. It is noted that where the highway passes through the adjoining Neutral Junction pastoral lease, a reserve of 100 metres is excluded from the leasehold. The claimants concede that they have an interest in the proper maintenance of the highway. Their main concern is for the protection of important sites within or adjacent to any proposed road reserve. The matter is one which is beyond the function of the Aboriginal Land Commissioner to resolve. It is noted however that in a supplementary statement made by Mr Bryceson on 19 May 1999 (exhibit NTG 3), whilst not resiling from the requirement for a 200 metre reserve for Stuart Highway, the Department is prepared to accommodate the concerns of the claimants to some extent. In paragraphs 5 -7 of the statement Mr Bryceson says:

5. The Department's approach to the 200 metre road reserve policy is flexible in the sense that the Department's approach is designed to cause minimum disruption or expense to adjoining land holders. For example, the Department is prepared to allow fences and other encroachments to remain at current offsets where such infrastructure does not interfere with maintenance and construction operations. In the normal course, the Department will only require fences and other improvements to be re-aligned when existing fences require replacement or renewal in any event (eg where fences reach the end of their economic life).

6. In accordance with that flexible approach, the Department would be prepared, in the circumstances, to accept a narrowing of the 200 metre wide road reserve in the vicinity of the site numbered 1. 1 in this

land claim to take account of the concerns of the claimants. As I understand it, site 1.1 is close to 100 metres from the centreline of Stuart Highway. The Department would be prepared to accept an "indentation" of say 20 metres inwards from the edge of the required road reserve, running for a length of say 50 metres along the required road reserve in the vicinity of site 1. 1.

7. A reduction in the required road reserve of this magnitude would not significantly impact upon the 200 metre wide road reserve policy, but any greater a reduction in the road reserve would do so.

ACCESS ROAD TO BARROW CREEK HOTEL AND OLD TELEGRAPH STATION

When NT Portion 452 was subdivided, provision was made for a road to give access from the Stuart Highway to both the Barrow Creek Hotel and to the Old Telegraph Station. At the time the application was made this area was part of NT Portion 452 and is not included in the area of land claimed.

NEUTRAL JUNCTION ACCESS ROAD

This road runs for 9.67 km from the Stuart Highway east to the Neutral Junction homestead and to the nearby Tarra Aboriginal Community. A reserve 100 metres wide is excluded from the Neutral Junction pastoral lease. A small portion of the road reserve, but not the road itself, lies within the claimed land, at the extreme north eastern corner of it.

BARROW CREEK AIRSTRIP

Although the airstrip is not a road, reference is made in the evidence of Mr Bryceson to his department's requirement for a 100 metre wide reserve as clearance space for safety purposes. A small part of the airstrip itself is within the claimed land, in the extreme south-western corner of it. The airstrip is classed as an emergency airstrip required for aero-medical evacuations by the Royal Flying Doctor Service. It is regularly maintained by the Northern Territory government at an average cost of approximately \$2,350 per annum.

SUMMARY OF FINDINGS AND RECOMMENDATIONS

86. The following is a summary of the findings and recommendations contained in this report

- (a) The land claimed in traditional land Claim No 86 does not include a claim to NT Portions 449 (the freehold of the Barrow Creek Hotel), 557 (the racecourse reserve), 708 and the former NT Portion 452.
- (b) Prior to the present traditional land claim application (Claim No 161) being lodged, the subdivided parts of NT Portion 452, namely NT Portions 3603 and 3604, as well as NT Portion 708, were alienated by the Crown by the grant in each case of an estate in fee simple. They are not part of the unalienated Crown land claimed in this application.
- (c) The land claimed in this application (Claim No 161) is the land described in the proclamation of Reserve No 1795 (NT Portion 4339) from which NT Portions 449, 452, 557 and 708 are expressly excluded.
- (d) The Aboriginals named in Appendix 3 to this report are the traditional Aboriginal owners of Reserve No 1795 (NT Portion 4339).
- (e) I recommend that Reserve No 1795 (NT Portion 4339) be granted to a Land Trust for the benefit of Aboriginals entitled by Aboriginal tradition to the use or occupation of that land whether or not the traditional entitlement is qualified as to place, time, circumstance, purpose or permission.
- (f) Stuart Highway, which is a road over which the public has a right of way, passes through the area recommended for grant and would have to be excluded from any grant made pursuant to the *Land Rights Act*.
- (g) The access road from Stuart Highway to the Barrow Creek Hotel and the Old Telegraph Station is not part of the claimed land.

SCHEDULE

Map 1 Boundaries of Reserves

Map 2 Northern Territory Portions within Reserve No 1795

APPENDIX 1

a) REPRESENTATION OF PARTIES

Mr D. Parsons (instructed by the Central Land Council) appeared for the claimants.

Mr S. Southwood and Ms S. Brownhill (instructed by the Solicitor for the Northern Territory) appeared for the Attorney-General for the Northern Territory.

Mr B. O'Loughlin (instructed by Messrs Cridlands) appeared for the Conservation Land Corporation.

b) WITNESSES

i) Claimants:

Beryl Gorey Watyale
Elaine Brown Ngangkale
Kwementyaye (Peter) Young Tyakarre
Kym Brown Apenangke
Lawrence Tyapeyarte
Michael Tyapeyarte
Patrick Brown Tyangkale
Patsy Brown Tyangkale
Stella Brown Apenangke

ii) Other Aboriginal Witnesses:

Carol Thomson
David Ampetyane
Michael Price
Tommy Thomson
Tommy Walkabout
Vincent Janima

iii) Other Witnesses:

Kay Bailey
Myfany Turpin

c) EXHIBITS

- CLC 1 Claimants' Submission on Title
- CLC 2 Anthropologist's Report (Dr Sackett)
- CLC 2.1 Supplementary Report (Dr Sackett)
- CLC 3 Claimant profiles
- CLC 4 Genealogies
- CLC 5 Site Map
- CLC 6 Site Register
- CLC 7 Photograph of Perentie
- CLC 8 Family Tree painting by Tommy Thomson
- CLC9 Population Statistics
- CLC 10 Exchange of correspondence between Prof. Sansom and Dr Sackett
- CLC 11 Agreement under Sec 102 (1)(g) of the Pastoral Land Act, dated 27 June 1995
- CLC 12 Letter from the Central Land Council to the Office of the Aboriginal Land Commissioner dated 16 December 1996
- CLC 13 Consent to application dated 14 May 1999
- CLC 14 Map showing current distribution of Central Australian languages
- CLC 15 Letter from CLC to Solicitor for the Northern Territory dated 17 May 1999
- CLC 16 Statement of Myfany Turpin
- CLC 17 Statement of Alec Ross
- CLC 18 Final submissions on behalf of claimants
- CLC 19 Claimants' submissions in reply
- NTG 1 Tenure History
- NTG 2 Statement of Lyndsay Bryceson dated 10 May 1999
- NTG 3 Supplementary statement of Lyndsay Bryceson dated 19 May 1999
- NTG 4 Statement of Kay Bailey
- NTG 5 Submissions on jurisdiction
- NTG 6 Final submissions on behalf of the NT

- CON 1 Memorandum of transfer of NT Portion 452
- CON 2 Outline of submissions of Conservation Land Corporation
- CON 3 Submissions on matters for comment on behalf of Conservation Land Corporation
- ALC 1 Notice of the Attorney-General of intention to be heard
- ALC 2 Notice of Conservation Land Corporation of intention to be heard
- ALC 3 Letter dated 29 March 1999 from Normandy Pastoral Pty Ltd
- ALC 4 Notice of intention to be heard and letter dated 26 March 1999 from Mr Les Pilton
- ALC 5 Letter dated 29 March 1999 from the Barrow Creek Turf Club Inc
- ALC 6 Letter dated 28 March 1999 from the proprietors of Neutral Junction Station

APPENDIX 2

[From Chapter 2 of Exhibit CLC 21

A Brief History of the Barrow Creek Area

The Kaytetye have maintained a presence at and around Barrow Creek throughout the course of recorded history. This chapter provides a number of snapshots of events in that history.

Exploration and the Construction of the Overland Telegraph Line

John McDouall Stuart and party were the first non-Aborigines to enter Kaytetye country. Sponsored by the South Australian land speculators James Chambers and William Finke, they initially moved into the area in April 1860, looking for likely pastoral lands. Travelling northeasterly along the Hanson River, they noted "[n]ative tracks quite fresh in the scrub and plain"; they also "passed several old worleys" (Stuart 1865:164). They scaled Central Mount Stuart, and erected a flag pole. As Stuart wrote, they "then gave three hearty cheers for the flag, the emblem of civil and religious liberty, and may it be a sign to the natives that the dawn of liberty, civilisation, and Christianity is about to break upon them" (Stuart 1865:165-166). Something certainly was about the 'break upon' the indigenous peoples of the region.

From the Hanson and Central Mount Stuart, and following a foray to the west, Stuart and his party moved on to, and named, Stirling Creek. One of Stuart's men:

observed a little water in th[is] creek, where the natives had been digging. He also came upon two of them, and two little children. They did not observe him until he was within fifty yards, when they stood for a few minutes paralysed with astonishment; then, snatching up the children, ran off as quickly as their legs could carry them. They did not utter a sound, although he called to them (Stuart 1865:185-186).

Stuart and his party next struck a creek:

running between two low ranges towards the north-east. At seven miles changed ... course to north-east to camp in the creek, and endeavour to get water for the horses ... At five miles came upon a low range, but no creek; it must have gone further to the eastward (Stuart 1865:187-188).

It being dark, the exploration team simply "camped under the ranges" (Stuart 1865:188). While the exact spot of that camp of the night of 23 May is unknown, the "low ranges" are those rising in, and running northwest and southeast through, the middle of the claim area. Stuart was ill the next day, so it was not until 25 May that the group skirted to the west of the "low range", and moved on to, and named, the Crawford Range to the north.

A month and a half later, after reaching and being turned back at Attack Creek, north of Tennant Creek, Stuart and his men again entered Kaytetye country, and the vicinity of the claim area. Stuart reported that on 13 July they proceeded:

to the gum creek coming from the north side of Forster's range, where we found a little water, numerous fresh tracks of natives, and a great number of birds. I have

named this the 'Barrow Creek', after JH Barrow, Esq, [South Australian] MP (Stuart 1865:226).

As the day wore on, and the party passed (through and) out of the claim area, they encountered a "number of native tracks and encampments"; that night they could "hear the natives down the creek" (Stuart 1865:227).

Following Stuart's quick (re)traverse of the area the following year (1865:265-266), it was to be a decade before non-Aborigines returned to Kaytetye country. In 1871, John Ross and his survey party arrived, looking for the best corridor for the Overland Telegraph Line. They were succeeded later that same year by construction teams. These latter parties of men, animals and equipment worked and camped their way along the line, sinking wells, erecting poles, stringing wire and building the fort like telegraph stations. By 1872 the Barrow Creek Telegraph Station was up, and running.

Virtually over night, the Kaytetye were confronted with, among other things, a new human presence in their lives, new kinds of animals and a new world of technology. The Telegraph Station was manned by a permanent staff - men who regarded themselves in every way as superior to Aboriginal people and who jealously and zealously guarded all that they deemed to be theirs. There was a stable, with goats, cows, horses and camels, and a herd of approximately 100 sheep (Koch et al 1981: 12). And there was the telegraph line itself. A now deceased Kaytetye man used to tell the story of an old man who told him about first encountering the 'singing wires' of the telegraph line. The old man told of listening to the humming wires, and thinking that bees were alerting him to the honey, or 'sugarbag' inside the poles. But when he chopped down a pole, he found some iron instead. This, he averred, made for an exceptional tomahawk, however (Koch 1993:20-21).

The presence of a permanent settlement and large numbers of stock put heavy pressures on the local Kaytetye (cf Mulvaney 1989:110). The Telegraph Station officers were instructed to secure the good will of people by supplying rations to the old and infirm; they also provided younger people with rations in exchange for work. But the number of ration recipients was kept small. By 1890, only ten people were receiving support. In response, it seems Aborigines made do in other ways. The late Rattler Brown Akemarre told how Aborigines occasionally speared animals from the herds owned by the whites at Barrow Creek, and took the meat to their camps to cook and eat (Koch 1993:54-56).

In 1873, a decision was made, in part in response to the threats to property posed by Aborigines, to station a police officer at the Telegraph Station. On 14 February 1874, Mounted Constable Samuel Gason arrived at Barrow Creek as part of the Far North Division of the South Australian Police Force, and the Barrow Creek Police Station was officially opened. Gason was charged with teaching the Aborigines law and order. Minor infringements were to be dealt with locally, employing the lash and the lockup. With more serious matters, offenders were to be taken on foot and in chains to Alice Springs, where they would be forced to do hard labour (Koch 1993:54-56).

Although Gason was sent to Barrow Creek to arrest and punish Aboriginal thieves and vandals, his arrival was marked by something much more serious. A week after he reached Barrow Creek, the best known and possibly most tragic of events in the history of the region began.

The "Barrow Creek Massacre" and Reprisals

During the evening of 22 February 1874, a number of Aboriginal men descended from the hill behind the Barrow Creek Telegraph Station and fatally speared Station Master James Stapleton and Linesman John Franks. A third man, Assistant Master Ernest Flint, was injured. Commentators have offered a variety of reasons for the attack. Frank Gillen (1968:108) said it was "unprovoked" (see also Stapleton 1992:17). Mounted Constable William Willshire (1891:22) was of the view that the Aborigines were seeking "to possess themselves of all the treasures which the station contained". Peter Taylor (1980:167) holds it happened because the Station "had been built too close to an important waterhole." Harold Koch et al (1981:13) indicate it was the outcome of white staff refusing rations to the Kaytetye during a year of severe drought (see also Hartwig 1965:265-266). And Diane Bell (1983:63) suggests the Aborigines had realised the "whites were not transients: they took both land and women; they threatened the very fabric of Aboriginal life" (see also Strehlow 1971:590).

The Kaytetye themselves say the attackers were responding to the fact that the white men, deprived of the companionship of white women, sought the company of young Aboriginal women (see also Strehlow 1971:592-593). One Kaytetye man says the old people told him that the Telegraph Station crew enticed a young woman to do their laundry for them:

She worked until about dinnertime ... They fed her and she worked late ... And they took her inside and made her camp overnight with them ... And her promised husband said, 'Hey, that young girl, my father-in-law has given her to me. That's my promised wife! My father-in-law sent her to the whitefellas now. They might take her away from me!.. Those whitefellas are robbing us of our women. Ah, we'll have to fight with them now!' That's what happened. They fought them. They speared the whites who had rifles. They only had their spears, plus backup spears and boomerangs. Some of them didn't have a chance against the shells. Some of the old people got shot and some got away, and still they killed two men. That's what happened (Koch 1993:15-16)

A Kaytetye woman reports:

They (the whites) robbed them. Ah, they took their women as girlfriends ... They (Kaytetye people) brought up spears with their feet.

They came up from the hills, from the caves ... They brought up spears, dragging them with their feet. They killed only two men. Yeah, they speared the whitefellas. Two whitefellas died, and many Aborigines were shot with gunfire (Koch 1993:16-17).

The attack at Barrow Creek was closely followed by a skirmish between Aborigines and a group of teamsters on Taylor Creek, not far to the north. Hearing of the situation, the Colonial Chief Secretary announced the need to "to teach the blacks the consequences to themselves of such wanton and cruel acts of aggression" lest "worse disasters" occur (quoted in Hartwig 1965:268). This, in effect, condoned punitive expeditions against the Kaytetye. *The (Adelaide) Advertiser* of 26 February 1874 indicated:

We hope Trooper Gason is not hampered by too many instructions... Retribution, to be useful, must be sharp, swift, and severe.

According to Mervyn Hartwig (1965:27 1), "Gason was not hampered by instructions." The net result of this was that while some Aborigines died during the attack on the Telegraph Station, many more were killed in the aftermath of the event. Indeed, the reprisals continued for some months. Officially, no arrests were made, and 11 suspected members of the attacking party were killed. In actuality, whites rode down and killed every Aborigine they could find. And indications are that their actions resulted in the death of numerous, wholly innocent, men, women and children (see Spencer and Gillen 1912:319-321; Spencer 1928:401-403; Strehlow 1957:6; Hartwig 1965:264-278; Taylor 1980:167). That is, the real massacre took place in the wake of the Aboriginal attack on the Telegraph Station.

To this day, Kaytetye remember stories told to them by their parents and grandparents about this frightening time. And while the graves of the two Telegraph Station employees serve as historic reminders and a point of interest for tourists, there are no memorials to the many Aboriginal people who lost their lives in the killings of 1874.

Pastoral Activity

The first moves in the direction of pastoral activity in the claim area occurred in 1876, when the Barrow Creek Pastoral Company applied for a lease to 1620 square miles of the country surrounding Barrow Creek and Central Mount Stuart (Hartwig 1965:292a). In the event, the lease was never stocked and most of it was forfeited over the course of the next few years. Subsequent events were more long lasting, however. In 1888, Frank Scott took out a lease on Stirling Station, and George Hayes leased Neutral Junction Station (Hagen and Rowell 1978:15).

The commencement and development of pastoral enterprises in the Barrow Creek area meant that Kaytetye people soon had to compete with livestock for water. The situation became especially serious during the 1890s drought. Indeed, circumstances did not improve for several years; severe drought conditions occurred off and on into the first couple of decades of the Twentieth Century.

Spencer and Gillen (1912:322-323 and Spencer 1928:404-405) reported one type of response mounted by the Kaytetye. As they told it, the "head man of the rain totem", the man "responsible for the [Barrow Creek] water supply", had:

a year or two before our visit [in 1901], during a long drought ... told the natives that he did not intend to allow any more rain to fall until drought had killed off all the white men and their cattle, so that the blacks could have their country to themselves once more (Spencer and Gillen 1912:323 and Spencer 1928:405; see also Gillen 1968:128-129).

Another Kaytetye response involved preying directly on the cattle (cf Kimber 1991:10 16). Hartwig indicates:

As the grip of the drought tightened in 1893 the cattle were forced to go deep into the ranges for water, and the Kaititja ... set upon them, scattering them all over the countryside, perishing and killing over 300 in three weeks. When rain fell the situation eased a little, but by the beginning of 1894 it was worse than ever (Hartwig 1965:403).

But once again, attack was met by solid counter-attack. On the one hand, four Aboriginal trackers were stationed at Barrow Creek, to assist, as the Commissioner of Police put it, in protecting "the settlers from the outrages of the natives". (quoted in Hartwig 1965:424). Not surprisingly, the Barrow Creek Telegraph Station records show that in the 1890s several Aborigines were charged, convicted and punished for common assault and larceny of goods. On the other hand, through pressure from pastoralists, the police, the Pastoral Lands Commission and a Board of Inquiry, all of whom argued that providing Aborigines with food would bring about a decrease in the incidence of cattle killing, a ration depot was established at Barrow Creek (Hartwig 1965:44 1). At the same time, pastoralists and Telegraph Station staff began encouraging local Aborigines to take up stock work.

The "Coniston Massacre" and More Reprisals

The "Coniston Massacre" began with the death of a prospector named Fred Brooks, at what became known as Brooks Soak, quickly followed by an assault on Nugget Morton at Boomerang Bore on the Lander River.

Brooks was attacked ... on 7 August 1928. His throat was cut and his body bundled into a rabbit hole. On the 28th, two hundred kilometres away, Morton was attacked but his great strength enabled him to fight off his attackers, crawl to his revolver and shoot his way clear (Read and Read 1991:34)

According to Read and Read, the immediate cause of the twin attacks was conflict over women (see also Bell 1980:245). Both Brooks and Morton:

had taken Aboriginal women and not returned them to their husbands. The[y]... should ... supply food, tobacco and material goods to the husband and his relatives (Read and Read 1991:34).

The men had either ignored or failed to comprehend their obligations. Whatever the case, the acts of the Aborigines were answered by a swift and brutal rejoinder imparted by Mounted Constable William Murray and party.

Mounted Constable Murray was known for meting out harsh punishments to Aboriginal offenders. At the time of the Coniston incident he was in charge of the Barrow Creek police station. This position carried with it the title of Chief Protector of Aborigines. However, Murray was more active in protecting the "rights" of others. His entry in the Barrow Creek Police Station Journal of 4 December 1927, for example, reads:

MC [Mounted Constable] Murray and Tracker Dan per car to Stirling Station interviewed Mr Spencer. Thence to Merino Well cautioned natives camped there, and ordered thence to disperse to their respective localities, returned to Stirling. Thence by horse visited Aboriginal camp and dispersed the visiting inhabitants destroyed a number of dogs, and returned to Barrow Creek per car (quoted in Read and Read 1991:93).

Kaytetye people remember Murray as a "big and fearful man"; a man who carried "two guns, one on each side" (Koch 1993:72).

Murray's reputation no doubt was "enhanced" through his having led a number of post Coniston punitive expeditions from Barrow Creek. His reprisals seem to have caused real and widespread panic. Those who escaped being shot in large part did so by fleeing the

region. Some older Kaytetye remember both the killings and the subsequent separation from their countries (Koch 1993:66-7 1).

Reports vary as to how many Aborigines Murray and his men killed. In 1929, due to public outcry, Murray was brought to task over the vehemence of his vengeance. During the course of the proceedings, he admitted to killing 17 people; the inquiry found the number to be 3 1. It also determined that the shootings were justified. Little wonder many Kaytetye people, with ancestors of claimants (like Ivy Apenangke [see Genealogy]), were fearful of the police (see Koch 1993:80).

Buildings and Mining

In 1932, two developments occurred which radically changed the lives of the Kaytetye people of Barrow Creek. Each brought more non-Aborigines to the area and offered prospects of access to food and cash for Kaytetye people.

First, a store and hotel were built. Joe Kilgariff, who managed the construction of the pub, engaged a number of Kaytetye people as labourers. Some materials came from Limestone Bore, to the northeast of Barrow Creek. People carted the limestone, a ton at a time, in horse-drawn wagons to Barrow Creek. They then burned the lime in order to make a kind of cement. This was mixed with sand they extracted from Barrow (or Tyempelkere) Creek. The building stone was carried from the other side of the creek.

Ivy Apenangke (see Genealogy), now deceased, and others in her family were some of the workers. She said:

I grew up at the pub at Barrow Creek. At the hotel ... My mother and my father, all my uncles - we all worked there. We made that building (Koch 1993: 77).

In fact, after helping to build the hotel, Ivy worked for the publican up until the late 1970s, washing and ironing clothes and polishing floors. Ivy's father, Tropery (see Genealogy), worked at the truck garden adjacent to the old dam, which was located to the west of the Telegraph Station, planting, weeding, watering and harvesting vegetables.

The second major development in the lives of the Kaytetye people of the Barrow Creek area in 1932 involved mining. The discovery of the Tennant Creek gold fields precipitated a rush that lasted until World War 11. At roughly the same time, wolfram mines were established near both Barrow Creek and Wauchope, with approximately 40 miners working the digs. In those days, mining was fairly labour-intensive, and many Aborigines were employed, operating windlasses and carting rock. Kaytetye people also fossicked for minerals, selling the proceeds to local whites. Some older people, for instance, remember filling coolamons with chunks of wolfram and receiving up to one pound a load (see Koch 1993:112-113).

The increase in the non-Aboriginal population in the area brought new problems, and exacerbated old ones. Meggitt indicates that:

Partly as a result of the mining developments and partly in response to changes in public opinion in other states, the Administration in 1933 introduced new legislation to redefine the status of Aborigines in the Territory. Employers were to pay natives a prescribed minimum wage and to feed and clothe their dependants ...

Police and medical officers, who were Protectors of Aborigines, could prosecute negligent or defaulting employers (Meggitt 1962:26).

In its operation, the legislation had woefully little impact on Kaytetye lives. They remained largely locked out of developments in the area, enjoying few benefits while coping with many adverse impacts. They stayed a people apart, serving as unskilled labourers on their own lands.

"Army Time"

During World War II, a series of staging bases was established along the north-south road between Alice Springs and Darwin. One of these was located at New Barrow, some 30 kilometres northeast of Barrow Creek. A number of Kaytetye people, claimants among them, were either born, or lived and worked, at this camp. Indeed, many have fond memories of this as a time when blacks and whites worked together. In 1943, they joined in realigning and sealing the Stuart Highway through the Barrow Creek district. They travelled together up and down the line, loading, transporting and unloading supplies. Kaytetye people also were employed in persuading Aboriginal people still living in the bush to come into the army camp, and in tracking down Army deserters. The naked bush people were given clothes and food at New Barrow. The deserters were another story. One tracker recalled:

I had to follow that useless thing [deserter] ... I had to follow him all through the mulga, through the desert, until I found him ... Well, he was really perishing, all the way ... We had to get him to come back again, and we had to tell him lies, all the way. He tried to hang back and he told me, "You're lying. There's no water here." I'd tell him, "Well it's getting close now," to keep him going like that ... We had to go toward the Home of Bullion [Mine]. I left him on the road ... while I went and got water... [W]e picked him up and took him to Barrow Creek (Koch 1993:121-122)

Assimilation

In the years following the War, the Kaytetye people, like Aboriginal people elsewhere around the country, fell subject to the policy and practice of assimilation. Importantly, they experienced moves to Christianise and 'settle' them on Aboriginal reserves. Missionaries had been visiting the Barrow Creek region off and on since the early 1920s. Lutheran pastors from Hermannsburg held occasional services beside the creek near Barrow, and on Neutral Junction Station. And following the 1932 "Coniston Massacre" a special inquiry into the conditions of the Aboriginal people of the district had proposed the establishment of a reserve of some 400 square miles in an area to the northeast of Barrow Creek.

However, it was in the mid 1950s that Warrabri (now Ali Curung/Alekareng/Alekaherenge) was established - "to accommodate [mainly] Warlpiri and Waramunga transferred from Phillip Creek Baptist Mission where the water supply proved inadequate" (Bell 1980:242; Bell 1988:346-348). The name of the new community was a composite of European origin, combining the "warra" of Warramunga (Warumungu) and "bri" of Walbri (Warlpiri), after the two groups then regarded as being the owners of the lands around the settlement. This construction of a name with Aboriginal "flavour" but no ethno- or tribal-specific meaning was supposed to engender and symbolise cultural unity (Bell 1983:72). In the event, the name merely exemplified the extent to which

Welfare Branch employees were removed from, and ignorant about, day-to-day Aboriginal reality. The Warrabri settlement lay on Kaytetye land - not that of the Warumungu or the Warlpiri. And the presumption of the government, in locating and naming the community as it did, then filling it with peoples from other areas, greatly affronted the Kaytetye traditional owners. Rather than being a place of cultural unity, Warrabri from the start was a place of disquiet and division.

Warrabri, in addition to being a place of cultural unity, also was to be where Aboriginal culture was abandoned in favour of non-Aboriginal culture. It was to be a place where a "backward" people would be "protected" from harmful aspects of non-Aboriginal society while being acclimatised to non-Aboriginal ways and values (Bell 1983:72). In short, it was to be a place of training. Like similar places, it fell far short of the mark in this regard. It certainly was an instrument for displacing many Aboriginal people from their traditional lands, though. So much so, people recall being rounded up and "trucked like cattle" from surrounding pastoral leases to live at Warrabri.

Given its mixed beginnings, and assimilationist regime, Warrabri was not a happy place. Indeed, as Diane Bell reports:

All the women I know at Warrabri who are over sixty can recount stories of the 1928 massacres; women over fifty tell of sexual abuse by a missionary at Phillip Creek ... while women over forty recall the forced removal of part-Aboriginal children from their families to institutions. Women in their thirties struggle to rear children in a community tormented by disease, alcoholism and poverty. Women in their twenties query the value of their Western education in view of chronic unemployment on settlements, while girls of twelve and thirteen become mothers, deserted wives and recipients of social security. Warrabri, women agree, is a sad, sick place (Bell 1983:42).

Land Rights

The Warrabri Aboriginal Reserve became Aboriginal Land at the commencement of the *Aboriginal Land Rights (Northern Territory) Act 1976* (under Schedule 1). Some Kaytetye had regained possession of some of their lands. Significantly, the name of Warrabri was dropped in favour of Ali Curung/Alekareng. This is the traditional name of the area; it is the name of a nearby soakage (Bell 1983:8).

A combined Alyawarra (Alyawarre) and Kaititja (Kaytetye) claim to some 1545 square kilometres of land to the east of Barrow Creek was lodged in 1977, and heard by the Aboriginal Land Commissioner in 1978 (see Hagen and Rowell 1978; Toohey 1979). The land was granted to the Alyawarra Aboriginal Land Trust in 1980. Another claim, to approximately 17014 square kilometres of land lying to the northwest of Barrow Creek, was lodged in the wake of the filing of the Alyawarra and Kaititj claim. This claim, known as the Kaytej (Kaytetye), Warlpiri and Warlmanpa Land Claim, was submitted in 1978, and heard in 1982 (see Koch et al 1981; Toohey 1982). The land was granted to the Karlantjipa South Aboriginal Land Trust in 1986. (The granting of this area was delayed owing to legal proceedings initiated by the Northern Territory Government). A number of Kaytetye people were also found to be traditional owners of lands claimed in the McLaren Creek Land Claim. This claim, over an area of about 3498 square kilometres of land to the north of Barrow Creek, was lodged in 1985, and heard in 1989 (see Keen et al 1988; Olney 1990). The land was granted to the Mungkarta Aboriginal Land Trust in 1992.

At the same time some Kaytetye were successfully claiming and winning blocks of unalienated Crown land, others were fighting to gain community living areas. In 1978, Tara, covering 661.8 hectares, was carved out of Neutral Junction Station; and in 1979, Wilora, covering 266.9 hectares, was excised from Stirling Station. More recently, Arnerre, covering 1225 hectares of land, has been established some 30 kilometres to the north of Barrow Creek; and Ankwelyelengkwe, covering 36.5 hectares of land, has been established some 18 kilometres south of Barrow Creek.

However, despite some successes, many Kaytetye, the claimants among them, do not have title to their traditional lands. Barrow Creek claimants either live on the lands of fellow Kaytetye, on those of neighbouring peoples, or squat on their country - in temporary camps on the claim area.

Thangkenhareng Aboriginal Corporation

In the early 1980s, representatives from a number of Kaytetye families, assisted by Central Land Council staff, began moves to form a local association to obtain and develop land around Barrow Creek. In July 1986, the Thangkenhareng Aboriginal Corporation was incorporated. That same year, negotiations were entered into with Telecom (now Telstra) regarding people gaining access to those portions of the Telegraph Station lands which that organisation had 'inherited' from the Postmaster General. In October 1986:

Agreement [wa]s reached in principle with the Commonwealth Minister for Communications to transfer title to 5.3 hectares of Telecom land at the old Barrow Creek Telegraph Station reserve to the Kaytetye people to set up a store, resource centre and museum (Central Land Council 1994: 61).

In the event, Telecom's attempts to complete the transfer were "frustrated by the Northern Territory Government" (Central Land Council 1994:71). It was two years before the Chairman of Telecom was in a position to hand over a letter of 'permissive occupancy' for part (roughly 4.4 hectares) of the land that was the subject of the 1986 agreement. And it was an additional two years before title to this area was finally transferred to the Thangkenhareng Aboriginal Corporation. At the same time, .85 of a hectare of land, the land on which the old Telegraph Station is situated, was handed over to the Conservation Commission of the Northern Territory (now the Parks and Wildlife Commission of the Northern Territory).

Since regaining title to their portion of the land, members of the Thangkenhareng Aboriginal Corporation have initiated the Thangkenhareng Resource Centre, which services communities and outstations in the Barrow Creek area, and the Jemelkere Community Store. The names "Thangkenhareng" and "Jemelkere" are significant. Thangkenhareng is the name of a sacred rockshelter and rockhole in the hills behind Barrow Creek township (see Sites 1.8 and 1.9). And Jemelkere refers to Tyempelkere, or Barrow Creek Spring, an important Dreaming and camping place lying across the highway from the shop (see Site 1. 1).

The Barrow Creek/Kaytetye Land Claim

In and through the Barrow Creek/Kaytetye Land Claim, traditional owners seek the return of the remaining claimable lands around Barrow Creek. They are keen to complete initiatives they began over a decade and a half ago.

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APPENDIX 3
LIST OF TRADITIONAL ABORIGINAL OWNERS
(IN ALPHABETICAL ORDER)

kerte

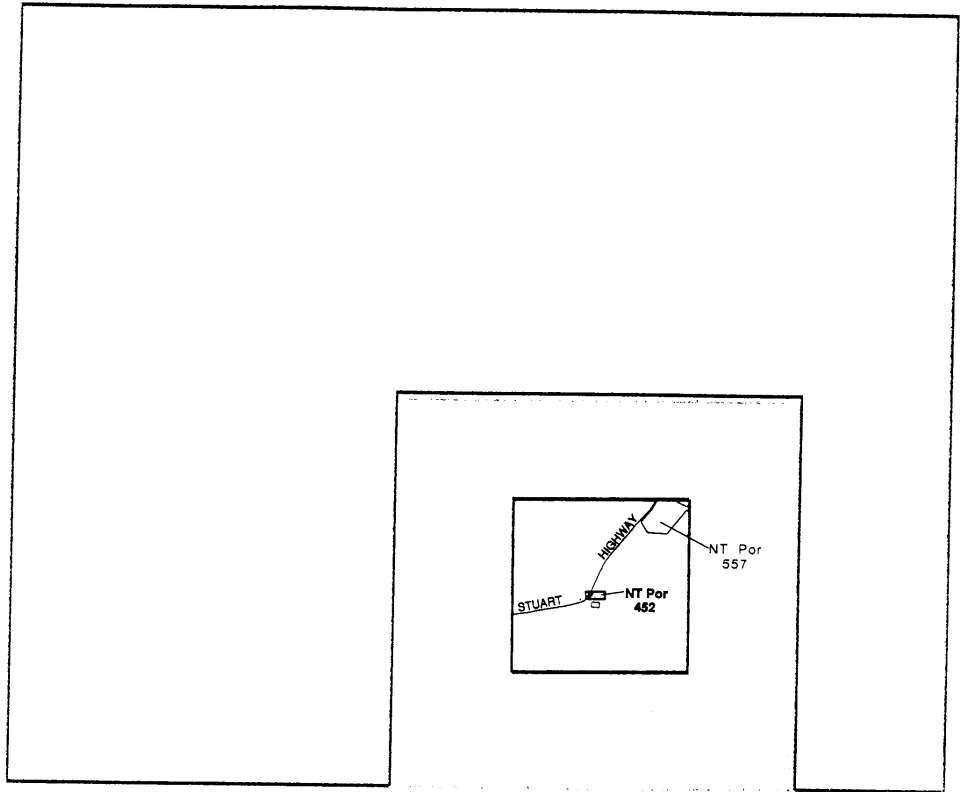
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 Fabian Price Apenangke
 Kym Brown Apenangke
 Lawrence Tyapeyarte
 Marcus Apenangke
 Michael Tyapeyarte
 Nathan Price Apenangke
 Patrick Brown Tyangkale
 Patsy Brown Ngampeyarte
 Robert Tyapeyarte
 Stella Brown Apenangke

kwertengerle

Agnes Brown Ngangkale
 Alec Ross Akemarre
 Allan Heywood Akemarre
 Beryl Gorey Watyale
 Clarence Gorey Tyakarre
 Clarrie Heywood Akemarre
 Eileen Gorey Watyale
 Elaine Brown Ngangkale
 Eliza Heywood Akemarre
 Gladys Price Watyale
 Heidi Brown Ngangkale
 Jane Heywood Akemarre
 Judy Heywood Akemarre
 Kenny Gorey Tyakarre
 Mark Gorey Tyakarre
 Maureen Brown Ngangkale
 May Heywood Akemarre
 Miriam Brown Akemarre
 Nancy Peterson Akemarre
 Peter Young Tyakarre

BARROW CREEK (KAYTETYE) LAND CLAIM

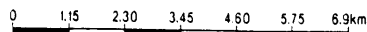
MAP 1 The outer Boundaries of the Reserves



LEGEND

- Boundary of the Commonage Reserve No. 1795
- Boundary of the Barrow Creek Telegraph Station Reserve
- Boundary of the Extension to Barrow Creek Telegraph Reserve
- Telegraph Station (former NTP 452)

Approx. Scale 1 : 115000



Date 8/12/99



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