

Terms of Reference

Review of Detriment - Aboriginal land claims recommended for grant but not yet finalised

Background

Section 50(1) of the *Aboriginal Land Rights (Northern Territory) Act 1976* (Land Rights Act) sets out the functions of the Aboriginal Land Commissioner to inquire into and report his or her findings of traditional Aboriginal ownership in relation to land claim applications, and where required, make recommendations to the Minister for the grant of land. Under s 50(3)(b) of the Land Rights Act, the Commissioner is also required to comment on the detriment to persons or communities including other Aboriginal groups that might result if the claim was acceded to in whole or part.

Section 11 provides for the Commonwealth Minister to proceed with the recommendation of the Aboriginal Land Commissioner (Commissioner) for the grant of land, where he or she is satisfied that the land should be granted. Although not specified in the Land Rights Act, it is accepted that “the Minister is bound to have regard to detriment in exercising his powers under s.11(1)”¹. In practice, the Minister is most likely to exercise his or her powers under s 11 upon agreement between parties to settle detriment matters.

There are 16 longstanding land claims recommended for grant but not yet finalised, and not currently subject to settlement negotiations, dating from 1981 to 2004. Ordinarily the Commissioner would not have a function to perform in respect of claims already recommended for grant. On 6 July 2017 the Minister requested the advice of the Commissioner under s 50(1)(d) of the Land Rights Act in relation to the status of detriment issues associated with these claims. While all 16 land claims are the subject of this review, it is appropriate to focus in some detail on the group of 12 claims that relate only to land which comprises the beds and banks of rivers and/or the intertidal zone (ITZ)². Beds and banks and ITZ claims constitute the majority of longstanding claims recommended for grant but not yet finalised, and present particular issues in relation to addressing matters of detriment.

A range of political, legal and procedural factors are likely to have contributed to the delayed resolution of detriment issues associated with the above land claims and therefore warrant consideration in this review. Notably, the 2008 Blue Mud Bay (BMB) decision by the High Court has impacted on the consideration of detriment in relation to beds and banks and ITZ claims not yet finalised. Detriment identified in past land claim reports largely reflected the widely held understanding prior to the BMB decision, that members of the public could enter (but not ‘drop anchor’ on) Aboriginal land in the ITZ without authorisation pursuant to sections 70 and 73 of the Land Rights Act. As a result of the BMB decision, entry to Aboriginal land in the ITZ, whether or not covered from time to time by tidal waters, is subject to such authorisation and administered by land councils under a permit systems established under the Aboriginal Land Act (NT).

¹ *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24 Brennan J at [22].

² As defined under section 67A(14) of the *Aboriginal Land Rights (Northern Territory) Act 1976*

Settlement negotiations between parties, and the Minister's decision to proceed with recommendations to grant Aboriginal land will be substantially assisted by this detriment review, including an update of detriment identified in land claim reports in light of the BMB decision.

Terms of reference

- Commence an independent review into the status of detriment issues relating to the following Aboriginal land claims³ that have been reported on and recommended for grant by the Aboriginal Land Commissioner, but not yet finalised under the *Aboriginal Land Rights (Northern Territory) Act 1976*:
 - Finnis River Land Claim No. 39 (Report No. 9)
 - Mataranka Area Land Claim No. 69 (Report No. 29)
 - Lower Daly Land Claim No. 68 (Report No. 67)
 - Lower Roper River Land Claim No. 70 (Report No. 65)
 - Maria Island and Limmen Bight River LC 71 (Report No. 61)
 - Maria Island Region Land Claim No. 198 (Report Nos. 61 and 63)
 - McArthur River Region Land Claim No. 184 (Report No. 62)
 - Manangoora Region Land Claim No. 185 (Report Nos. 62 and 66)
 - Lorella Region LC 199 (Report No. 63)
 - Garrwa (Wearyan & Robinsons River Beds and Banks) Land Claim No. 178 (Report No. 64)
 - Seven Emu Region Land Claim No. 186 (Report No. 66)
 - Wologorang Area II Land Claim No. 187 (Report No. 66)
 - Western Roper River (Beds and banks) Land Claim No. 141 (Report No. 68)
 - Roper Valley Area Land Claim No. 164 (Report No. 68)
 - Mataranka Area (NT Portion 916) Land Claim No. 129 (Report No. 68)
 - Eley Region Land Claim No. 245 (Report No. 68)

- Establish direct communication with the following key stakeholders for the purpose of inviting them to participate in the review:
 - Northern Land Council

 - Northern Territory Government (in particular the Solicitor for the Northern Territory, the Department of Infrastructure, Planning and Logistics, and the Department of the Chief Minister)

 - Commonwealth Government (in particular, the Department of Indigenous Affairs)

 - NT Seafood Council, Amateur Fisherman's Association NT, NT Cattleman's Association and other interests as appropriate

³ Two land claims in this category are excluded from the review due to the current progress of settlement negotiations: Implementation of agreed settlement outcomes relating to Kenbi (Cox Peninsula) Land Claim No. 37 (Report No.59) is currently underway, including a partial grant of land to the Kenbi Land Trust in June 2016; a report on the Frances Well Land Claim No. 64 (Report No. 73) was delivered to the Minister in June 2016 and detriment matters are currently the subject of negotiation between relevant parties.

- Review relevant land claim reports and related documents held by the Office of the Aboriginal Land Commissioner and the Indigenous Affairs Group, Department of the Prime Minister and Cabinet
- Ascertain the views of stakeholders and seek relevant information relating to detriment issues associated with the land claims
- Identify, review and where appropriate make recommendations with respect to relevant land claims in relation to:
 - Areas of progress and causes of delay to addressing/settling detriment matters to date;
 - Current opportunities and challenges to addressing / settling detriment matters;
 - New or updated detriment issues arising since the publication of land claim reports;
 - Such other matters as may be pertinent to the review.
- No later than 6 July 2018, provide to the Minister for Indigenous Affairs the Hon Nigel Scullion MP a written report and recommendations

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- Record the terms of reference for the review and processes by which stakeholders were engaged in the review.
- Identify the key sectoral stakeholders with an interest in identification and resolution of detriment associated with relevant land claims.
- List the groups, individuals and representative organisations consulted during the review, and the nature of their interest in the identification and resolution of detriment associated with relevant land claims.
- Summarise the views and actions of key stakeholders with regard to progress and delays to settling detriment matters to date, and challenges and opportunities to progress settlement by June 2019.
- Comment on the impact of the High Court’s 2008 Blue Mud Bay decision on the settlement of detriment in relation to relevant beds and banks and ITZ land claims, and where appropriate identify any new detriment arising as a result of the decision. Identify updated detriment issues relating to other claims as appropriate.
- In response to the review findings, and by reference to the Minister’s powers under s 11 of the Land Rights Act, make recommendations to expedite the resolution of land claims recommended for grant but not yet finalised addressing, among other things, procedural matters and stakeholder actions to settle detriment matters.
- Attach and index any written submissions received in respect of the review.