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Kenbi Land Claim: 25 years on

by David Parsons

The Kenbi Land Claim is a claim made by the Northern Land Council on behalf of the traditional owners to the lands and islands in the area of the Cox Peninsula, which is the western arm of Darwin Harbour. The land under claim encompasses the traditional lands of the Larrakia people.

The Kenbi Land Claim is about to enter its twentieth year, although if one takes into account the Larrakia submissions to the Aboriginal Land Rights Commission made in 1973, the Larrakia have been at it for nearly 25 years. This is well before the *Aboriginal Land Rights (NT) Act 1976* (Cth) (pursuant to which the Kenbi claim is brought) came into force, on Australia Day 1977.

Each of the Aboriginal Land Commissioners appointed to hear claims lodged by the Central and Northern Land Councils on behalf of Aboriginal claimants in the Northern Territory (Justices Ward, Tsoohey, Sir William Kearney, Maurice, Olney and Gray) has heard aspects of the claim. However, it was not until November 1989 that Olney J heard evidence from the claimants, the first Commissioner to do so. His Honour noted at the time

'With all the preliminary manoeuvring out of the way, the claimants were ultimately able to present their case, but by then the ravages of time had severely depleted their numbers'.

The 'preliminary manoeuvring' referred to by His Honour is described in the chronology set out below, and occupied the years 1978 to 1989 inclusive.

In due course His Honour found there were no tradi-

tional Aboriginal owners of the claimed land within the meaning of that term as defined in the *Aboriginal Land Rights (NT) Act 1976* (Cth). That decision was overturned by the Full Court of the Federal Court in 1992, and it fell for the matter to be listed for a further hearing before the new Land Commissioner Justice Gray.

On 3 July 1995 Gray J convened a hearing in relation to the future conduct of the Kenbi Land Claim. By the time the claimants gave evidence during 1996-97, the small group of Larrakia claimants—the Danggalaba—on whose behalf the original claim was lodged in 1978, had been replaced by four separately represented claimant groups—the Danggalaba, the Larrakia language group as a whole, a second Larrakia subgroup and the Wagaitj. The anthropological experts are to be cross examined in July 1998. The 'detriment' evidence is to be led by the Northern Territory Government and the other 'Objectors' to the claim during September 1998. A program for the completion of final written submissions of all parties involved and replies occupies up to 19 April 1999. Final oral submissions are fixed to occur in June 1999. The report will then follow.

All things being equal the claimants will then know how much, if any, of their traditional lands are to be restored to them. It is of course not inconceivable that whatever decision Gray J makes will *itself* run the gamut of the legal appellate chain, and thus the result may not be known until well into the next century.

The reasons for this delay are apparent from the fol-

chronology

1942: in written submissions to the government Aborigines attempt to stop authorities from using one of their islands, Duwun (Quail Island) as a bombing range.

1971: Aborigines begin lobbying politicians in Canberra and Darwin in an attempt to protect sites in the area of Darwin. They also seek to be granted some tenure over the places where they live.

25 April 1971: Blackburn J hands down his judgment in *Milirrpum v Nabalco Pty Ltd & The Commonwealth* ((1971) 17 FLR 141) (the Gove Land Rights Case). This case upholds the principle of *terra nullius*, and provides impetus to subsequent Federal Governments to develop land rights legislation for the NT.

8 February 1973: newly elected Federal ALP Government commissions Mr Justice Woodward to inquire into and report on how to recognise Aboriginal land rights in the NT. The Aboriginal Land Rights Commission publishes its first report in 1973 and final report in 1974.

2 July 1974: Prime Minister Gough Whitlam announces the Federal Government accepts in principle the recommendations made in the second Aboriginal Land Rights Commission report, and has authorised drafting of appropriate legislation. That legislation was eventually passed as the *Aboriginal Land Rights (NT) Act 1976* (Cth).

April 1975: Mr Justice Ward of the NT Supreme Court appointed Interim Land Commissioner.

17 December 1975: a meeting at Belyuen (then Delissaville) on the Cox Peninsula agrees that a claim be lodged with Ward J.

23 September 1976: first formal Larrakia land rights claim lodged with the Interim Land Commissioner for the Cox Peninsula and nearby islands.

26 January 1977: *Aboriginal Land Rights (NT) Act 1976* (Cth) commences. Toohey J appointed Land Commissioner.

29 June 1978: further claim for the Dum-in-Mirrie island lodged with Land Commissioner.

22 December 1978: the Administrator of the NT makes regulations under the *Town Planning Act* (NT), which were notified in the Gazette of 29 December 1978. By these regulations the NT Government declares Cox Peninsula a portion of the town of Darwin (the expansion of the town from 142.4 km² to 4,350 km² makes it about 3 times the size of Greater London). The

townships of Katherine, Tennant Creek and Alice Springs are similarly expanded. Section 3 of the *Aboriginal Land Rights (NT) Act* excludes 'land within a town' from claims under the Act.

20 March 1979: consolidated claim for entire area lodged by the Northern Land Council. The claim includes various islands and reefs to the west of the Cox Peninsula, Bynoe Harbour, Port Patterson, and the Cox Peninsula itself. This consolidated claim is what became known as the 'Kenbi Land Claim'. The original claimants, 7 named members of the Danggalaba clan, are replaced by 3 groups of Larrakia and Wagaitj people.

26 June 1979: Toohey J considers whether the Cox Peninsula is part of the (expanded) town of Darwin.

20 December 1979: Toohey J rules the Cox Peninsula is 'land within a town within the *Aboriginal Land Rights (NT) Act* and hence not unalienated Crown land within that Act'. The land is therefore not available to be claimed.

27 June 1980: Toohey J rules the remaining portions of the Kenbi claim area (Bare Sand, Duwun/Quail, Indian and Dum-in-Mirrie Islands) are available for claim.

11 September 1980: argument before the High Court regarding Toohey J's decision of 20 December 1979.

24 December 1981: High Court states that the Land Commissioner has the power to inquire into the reasons why the Administrator of the NT made the planning regulations gazetted on 29 December 1978, and to impute bad faith to this decision (*R v Toohey; Ex parte Northern Land Council* (1981) 151 CLR 170). Reverses decision of Toohey J of 20 December 1979, and orders writ of mandamus issue to Toohey J to proceed with hearing the Kenbi claim.

2 April 1982: Toohey J orders the NT government to prepare an affidavit of documents relating to making of the *Planning Act* (NT) (which had superseded the *Town Planning Act*), and permit the NLC to take copies of the documents. The NT government objects to discovery of a number of the documents on the basis they are legally professionally privileged.

1983: Sir William Kearney appointed Land Commissioner.

3 February 1984: Kearney J rules there is *prima facie* evidence the disputed documents came into being as part of a plan to defeat claims under the *Aboriginal Land Rights (NT) Act*, and are not legally professionally privileged. He directs the NT government produce the documents to the NLC. The NT government appeals ruling in the Full Federal Court.

14 September 1984: Full Federal Court rejects the NT government appeal (*R v Kearney; Ex parte Northern Land Council* (1984) 55 ALR 545). NT government appeals to the High Court.

25 September 1985: NT government appeal dismissed by the High Court (*Attorney-General (NT) v Kearney* (1985) 158 CLR 500). Held the case came within the rule denying privilege to communications made to further an illegal purpose. It then fell to the Land Commissioner to determine whether the regulations were a valid exercise of power under the *Town Planning Act*.

1986: Maurice J appointed Land Commissioner.

13 April 1987: upon application by the NT government, Full Court of Federal Court rules Maurice J unable to sit in the Kenbi Land Claim. This is because of negative comments he made about ministers of the NT government in another land claim. Kenbi claim cannot progress until appointment of another Land Commissioner.

25 May 1988: Olney J appointed Land Commissioner.

8 December 1988: Olney J publishes reasons concluding regulations did not represent a valid exercise of power by the Administrator of the NT under the *Town Planning Act*.

13 November 1989: land claim hearing commences at Belyuen on the Cox Peninsula. Evidence is heard over the next 3 weeks.

19 March 1990: Olney J raises idea of preparing interim report dealing only with whether there are any 'traditional owners' within the meaning of the *Aboriginal Land Rights (NT) Act* in the claim area. All parties agree, given the following factors: (1) out of original 7 claimants, 2 had died, 1 had had a stroke, and 2 others were very old and infirm; (2) changes to the way land claims are conducted that had arisen over the decade; (3) modification of the Wagaitj claim.

21 February 1991: Olney J finds there are no traditional owners within the meaning of the *Aboriginal Land Rights (NT) Act*. One person was said to have a 'spiritual affiliation' to one site within the meaning of the Act; however, one person cannot be a group, and land rights can only accrue to groups under the Act.

22 October 1991: Gray J appointed Land Commissioner.

27 February 1992: Full Federal Court overturns Olney J decision of 21 February 1991, and directs land claim be reheard (*Northern Land Council v Olney* (1992) 34 FCR 470, *Jungarrayi v Olney* (1992) 34 FCR 496).

October 1995: rehearing of Kenbi Land Claim begins before Gray J.

December 1996: native title claim lodged by members of the Larrakia for areas within the City of Darwin and surrounding areas of country. Notwithstanding Larrakia attempts to reassure the citizens of Darwin (see 'Larrakia native title: the long march' by C Carey and A Collinge, 1997 (4) 2 *Indigenous Law Bulletin* 22), the announcement engenders the usual amount of hysteria. It is no small irony that Shane Stone, the NT Chief Minister, is outraged and asks the Federal Government to ban native title claims in towns and cities.

14 June 1997: hearing by Gray J over the future conduct of the Kenbi Land Claim. Final oral submissions scheduled for June 1999.