however with a difficult decision concerning the extent to which evidence is adduced. This dilemma was referred to by the Tribunal in its decision dated 2 September 1999 concerning the application by the native title party for a global confidentiality order. At page 6 the Tribunal summarised the submission of the native title party in the following way:

> It was said that the future act determination inquiry was a discrete exercise which should be quarantined from any trial in the Federal Court of the application for the determination of native title. Proceedings relating to the claim, including mediation by the Tribunal and trial in the Federal Court, will probably involve both the other parties appearing in this inquiry and will certainly involve the Government party. Should the current inquiry not be quarantined a serious prejudice would be caused to the native title party in subsequent proceedings as a fair trial would be prejudiced. Further research by the native title parties may mean that something is said at the claim trial which differs from what is said in this inquiry.

At page 9 the Tribunal, in rejecting the application for global confidentiality, referred to the absence of evidence 'supporting the possibility of harm or prejudice except for a general assertion that it could occur' and referred to an earlier finding[4] that 'tactical considerations are not generally valid reasons for ordering a private hearing'. Native title parties accordingly face a real choice regarding the extent to which evidence is put forward in an arbitral proceeding. The evidence if adduced will ordinarily stand on the public record and may be referred to in later proceedings. The evidence put forward may however impact in a substantial way on the prospects of success of the future act application or on the question of conditions if a determination is made that the act may be done.

(c) Notwithstanding exhaustive attempts to reach agreement prior to the commencement of arbitration, the reality of an impending arbitral decision no doubt contributed to agreement being reached. This further illustrates the proposition that in some respects native title proceedings are little different to more mainstream litigation.

(d) The site visit to the power station and adjacent mine was of considerable assistance in understanding the location and size of the land subject of the proposed act and the dimensions of the portions of land subject of claim. This is not to underestimate the significance of providing the Tribunal with detailed documentation and opening statements. It merely reinforces the importance of site visits in both the hearing of native title claims and the arbitration of future act proceedings.

[4] *Western Australia/Strickland (Maduwongga)*, NNTT, WF 97/4, Hon CJ Sumner, 20 February 1998.

The settlement of the *Upper Daly (Repeat) land claim* (no. 128)

by Karen Bowley, Law Officer, and Hugh Bland, Research Officer, Anthropology, both of Northern Territory Attorney-General's Department

Introduction

Following the 1983 hearing of Wagiman, Wardaman and Nangiomeri traditional evidence in the Upper Daly land claim, Justice Kearney as the Aboriginal Land Commissioner declined to recommend a grant in respect of a number of areas because he considered that the claimants had not demonstrated the requisite attachment to the land.[1] In 1990 the Wagiman (Wagaman) people lodged the Upper Daly (repeat) land claim (the 'repeat claim') over the areas which Justice Kearney had excluded from the earlier grant. The grounds for re-hearing the claim were based on legal argument and new traditional evidence.

During the interval between the hearings the NT Government and the Northern Land Council (representing the Wagiman claimants) both commissioned reports in relation to the areas excluded from the Upper Daly grant. As a result of these further studies it became apparent that there were areas of mutually exclusive interest which might favour a settlement of the claim. A short and intense period of negotiation resulted in an agreement which was concluded just prior to the commencement of the inquiry.

It is the intention of this article to indicate the process and the content of this agreement. Although each claim lodged under either the Aboriginal Land Rights (NT) Act 1976 (ALRA) or the Amended Native Title Act (NTA) will be unique, there may be elements of the settlement which will be of interest to other claimants or government parties.

[1] Having regard to subsequent decisions of the Federal Court in *Northern Land Council v Aboriginal Land Commissioner* (1992) 34 FCR 485 and *Jungarrayi v Olney* (1992) 34 FCR 496, the claimants contend that Kearney J erred in that he took into account his assessment of the strength of traditional attachment of the claimants in determining whether there were any traditional Aboriginal owners of the repeat claim areas.