CONSULTANT'S REPORT
ON

WATER RESOURCES AND
THE NOTION OF DETRIMENT

UNDER SECTION 50 OF THE
COMMONWEALTH ABORIGINAL LAND RIGHTS
(NORTHERN TERRITORY) ACT 1976

by
Sandford D. Clark
Harrison Moore Professor of Law
University of Melbourne

June 1983

Report No.: 65/83D
WATER RESOURCES AND THE NOTION OF DETRIEMENT UNDER SECTION 50 OF THE
COMMONWEALTH ABORIGINAL LAND RIGHTS (NORTHERN TERRITORY) ACT 1976

To assess the detriment that might result to persons or communities, including Aboriginal groups, if a land claim were granted which affected or included water resources, it is important to have regard to certain common-law principles concerning water; the legislative and administrative structure which superseded them in Australia; and the practical consequences which granting a land claim can have on that structure.

1. THE COMMON LAW RIPARIAN DOCTRINE

1.1 At common law, the water running in a watercourse is incapable of ownership, either by an individual or by the Crown. At most, beyond the reach of the tidal influence, one can enjoy only a limited right to use water. That right inheres only in those who own land in lateral or vertical contact with the flow of the stream and is, indeed, a natural incident of the ownership of riparian land. As such, the right can only be invoked in relation to riparian land and water cannot, pursuant to the right, be used other than on the riparian tenement in which the right inheres.

1.2 Where a river flows across the land of one proprietor, he, too, is limited in his right to use the water, except in the rare case where a river rises, runs its course and discharges to the sea, all on the land of one proprietor. Where the river is the boundary between tenements, the common law presumes that the proprietor of adjoining land respectively owns the bed and bank ad medium filius squae.

1.3 The actual right of use is severely limited, being restricted to the "ordinary" domestic use of the landowner of the riparian tenement, his family and servants and stock housed on the riparian
tenement. Other extractive, "extraordinary" uses, such as irrigation, may be tolerated, but only if no sensible diminution to the quantity or quality of the remaining water is thereby caused. Very few productive uses of water will not have a sensible effect on the quantity or quality of remaining water. Irrigation of adjoining land will generally result in a sensible quantitative loss, through seepage and evaporation, as well as a qualitative loss through saline drainage. Industrial uses, even for closed-system cooling, have a sensible impact on the temperature of the receiving waters and hence on their quality.

1.4 The right to enjoin such "extraordinary", even if productive, uses of water, inheres in every downstream riparian proprietor and he may exercise that right, whether or not he has actually suffered injury as a result of the upstream use. This is because continued extraordinary use might ripen into prescriptive title if it remains uninterrupted. The downstream riparian may thus assert his right at any time, whether or not he has suffered special damage.

2. PRACTICAL EFFECT OF THE RIPARIAN DOCTRINE

2.1 The common law, when left to its own devices, had the following consequences which are perceived as undesirable in arid and semi-arid lands.

2.1.1 No public rights of navigation exist in rivers above the reach of the tide.

2.1.2 Any right to use water for irrigation or industrial purposes can be enjoined at any time by any downstream riparian proprietor. The consequential uncertainty discourages investment in productive, but "extraordinary", uses.

2.1.3 The riparian proprietor may only use water on the riparian tenement and not on more remote lands.
2.1.4 The owners of more remote lands have no access to the river, nor do they have the right to abstract water for productive purposes on their land.

2.1.5 The assertion, maintenance and protection of one's riparian right could only be achieved through the courts, which was lengthy, costly and unnecessarily disruptive of social relationships between landowners.

2.2 The riparian doctrine also interacted with rules of trespass and land tenure in a way which discouraged either co-operative or governmental initiatives in investigating and planning for more widespread distribution of water resources in an arid country. Thus, without consent, access could not be obtained to rivers for hydrographic purposes and structures in rivers, or works to protect their banks from erosion, or to store waters, could not be undertaken without the consent of the affected landowners; or, after the passage of compulsory acquisition legislation, without paying compensation for the interest acquired.

3. **JUDICIAL RESPONSES TO THE RIPARIAN DOCTRINE**

3.1 The doctrine was not well received outside its fertile country of origin. In the eastern United States, Chancellor Kent sought to temper its severity by allowing such uses as might be "reasonable" and limiting the right of the downstream proprietor to enjoin upstream uses to those uses which were "unreasonable". Although toyed with by the United Kingdom courts in *Embury v. Owen* (1851) 6 Ex. 353; 155 E.R. 579, this approach was rejected.

3.2 In the western United States, the gold-rush and the failure of the U.S. Federal Government to pass legislation for the newly-acquired territory of California, led to the development of a doctrine of prior appropriation, suitable for mining communities, which allocated water according to the temporal priority of its appropriation. This doctrine allowed water to be appropriated by
persons who were not landowners; permitted its use on any land for any beneficial purpose whatsoever; and allowed a claim to be defeated, only by those prior in time. Its major deficiency, however, was that litigation joining all other riparian owners was necessary to assert a new right, or to obtain a declaration of one’s particular status in relation to potential rival claimants. Thus, Elwood Mead, the first Chairman of the Victorian State Rivers and Water Supply Commission, reported enquiring of a Californian in 1901 how he secured his right to irrigation water. The answer:-

"first I got a court decree and then I shipped in two men from Arizona who were handy with a gun".

(United States Department of Agriculture, Office of Experiment Stations, Report of Irrigation Investigations in California, Bulletin 100, page 55.)

3.3 In Australia, fidelity to common-law principle was more highly prized and the riparian doctrine, despite its manifest inadequacies in the Australian setting, was applied in all its rigour. Thus, as late as 1964, it was possible for Negus J., in the Supreme Court of Western Australia, to hold:-

"that the use of water of a stream for irrigation is use for an extraordinary purpose in Bridgetown just as it is in England, and I further hold that if irrigation takes place at a time when it must inevitably cause, and does in fact cause, a sensible diminution in the quantity of water reaching a lower riparian owner, it results in an infringement of that owner’s right”.

(Williams v. Cahill and Willmot, unrep., 2 Judgments of the Supreme Court (W.A.) 1118, 1126-27.)
4. ALFRED DEAKIN'S ROYAL COMMISSION ON WATER SUPPLY 1885

4.1 Deakin undertook an exhaustive world-wide study of water management as part of a Victorian Royal Commission in the 1880s. His recommendations were framed in the light of the inadequacies of the common-law riparian doctrine which had already been experienced in Australia. Equally, however, he was influenced by the doctrines which had developed in the west of the United States and what he saw as the most unfortunate aspects of the prior appropriation doctrine. In particular, he seems to have been disturbed by the possibility, even under that doctrine, that one group of owners could dominate sources of supply to the detriment of the wider public; that this posed unreasonable and unnecessary additional costs on the possibility of more equitable and productive distribution of water in the wider public interest; and that the need to establish a right by litigation was wasteful of time, costly, uncertain and socially undesirable.

4.2 The key recommendations of his 1885 Report were:

"(1) It is essential that the State should exercise the supreme control of ownership over all rivers, lakes, streams, and sources of water supply, except springs rising upon private lands.

(2) That it should dispose of the water to those desiring to irrigate, on such terms and conditions and to such an extent as may be determined by professional or qualified officers of its own, its object being to encourage the greatest possible utilisation of the water on the largest possible area...

(4) The State should appoint local water-masters to supervise the distribution of water, settle disputes, and exercise such jurisdiction under the central office as shall guarantee the preservation of water-courses and other sources of supply."
(5) Power should be given to holders of water-rights to obtain easements over private lands on payment of compensation and proof that the route asked for by them has been selected for sufficient reasons...

(7) In California it is also held that, to prevent all irrigation from necessarily falling into the hands of capitalists, or any scheme for the general benefit from being negatived by one or two refractory land-owners, there should be a means of organising irrigation areas and creating corporations for them, who should be capable, at the bidding of a majority of those interested, of doing all things necessary to the construction of works and distribution of water, by means of funds borrowed upon the common security. Here, again, the State officers would be employed in protecting the public interest and testing the plans of projectors".

These became the guiding recommendations for legislation which was rapidly adopted throughout mainland Australia, whereby the nation opted for public control of all river waters, with the State acting as the grantor of all private rights to use water and not merely as the registrar and arbiter of private claims between individuals. Furthermore, the realities of financing extensive conservation and irrigation projects meant that the State inevitably also became the entrepreneur of most water conservation and distribution systems.

4.4 The cornerstone was the assertion of a State interest in water. Deakin had recommended that the Crown own such waters, but Dr. Quick, of Quick and Garran fame, put paid to the original attempt to do this in the 1886 Irrigation Bill:—

"Such miserable and contemptible literary productions would disgrace a shire council of Timbuctoo".

(Victoria, Parliamentary Debates, Legislative Assembly, 13 July 1886, 679.)
In the end, the formula adopted was to vest in the Crown the right to the use, flow and to the control of river waters. This is the formula generally applied throughout Australia. Only the Northern Territory still vests the property in such waters in the Crown (Control of Waters Act, s. 3). In so doing, it follows provisions of the South Australian Control of Waters Act 1919, which were repealed in 1976.

5. ABOLITION OF COMPETING PRIVATE RIGHTS

5.1 The mere vesting of certain supervening rights in the Crown was insufficient to abolish the incidents of riparian title (Thorpes Ltd. v. Grant Pastoral Co. Pty. Ltd. (1954) 92 C.L.R. 317, 331); nor did it give sufficient interest to allow the State to build structures in, or adjacent to, rivers or to obtain access to them; or to create public rights of navigation beyond the reach of the tide. Neither did it allow the integrated, conjunctive use of land and water, which came to be more widely perceived as essential to the maintenance of both resources, as the effect of scouring, sapping, cultivation and grazing of banks and the erection of structures in flood-plains, came to be better understood.

5.2 It was, perhaps, fortuitous that understanding of the intimate relationship between water and at least its immediately surrounding land, had evolved by the time widespread alienation of Crown lands occurred; and men of vision already contemplated the need for co-operative community and even State works, to enable the clearing, development and grading of vast areas of irrigable lands, well away from riparian tenements, which would be served by major State diversion weirs or dams and by large public main canal systems.

5.3 The ability to do this depended, not just upon the vesting of title in the Crown and the State assuming its role as grantor of water resources, but upon two other particular practices:
5.3.1 The reservation of the bed and banks of certain rivers to the Crown;

5.3.2 The complementary reservation of strips of frontage land on each bank of the river.

Thus, Colonel Light's instructions for surveying the River Murray in South Australia included the requirement that a riverine frontage, as well as bed and banks, be reserved. At some time between 1863 and 1868, an informal practice was introduced into the Lands Department in Victoria whereby both the bed and banks of rivers and a strip of frontage land on either side was reserved. Orders-in-Council of 10 March 1873 and 23 March 1881 had the cumulative effect of applying this practice to all major rivers.

5.4 It is against this background that the rather limited provisions of s. 5 of the Victorian Water Act (Control of Waters Act (N.T.), s. 4), which vests the bed and banks of only border streams between allotments in the Crown, must be understood. The purpose of this particular provision was to catch only those streams which had not previously been reserved by the wholesale reservations made pursuant to the Lands Acts. The Victorian provision was maladroitly borrowed by other jurisdictions, including the Northern Territory, which had not taken quite the same preliminary step of reserving the bed and banks and strips of riparian frontage perpetually from alienation for public purposes.

5.5 Nevertheless, where pre-existing reservations of riparian frontages had not been made, this could subsequently be achieved by other means. Thus, at the time when Crown leases were renewed, or transferred into perpetual leases, or freehold title granted, it was possible to impose the requisite reservations. Alternatively, where it was thought necessary, powers of compulsory acquisition could be used for the purpose. Jurisdictions differed in the extent to which they deployed all of these powers, but each of them is critically important to the total system of water management.
5.6 The final stone in the delicate structure erected to facilitate irrigation development, river management and the co-ordinated use of land and water, was the abolition of the riparian proprietor's ability to make a barren assertion of legal right and to enjoin any upstream interference with the quantity or quality of water, whether or not he suffered detriment thereby. That equitable right lay because the riparian right was an incident, ex jure naturae, of ownership of riparian land and any interference with it could, by prescription, derogate from the downstream riparian's title, even if no present damage were suffered by him. With the same admirable finesse and keen appreciation of common-law principle that marks most of the basic legislative structure for water management, the legislative solution to the problem was to deny the upstream proprietor the possibility of prescriptive acquisition of a right to divert or impound water (Control of Waters Act (N.T.), s. 8.). Immediately that was done, the possibility of derogating from the downstream proprietor's title was removed and there were thus no grounds for granting equitable relief, unless actual damage was suffered. The possibility of a barren assertion of right, in the absence of damage, was removed - at least in relation to upstream diversions. But - and here again, possibly foresight, not oversight was responsible - the right of the riparian to enjoin upstream pollution in the absence of special damage was retained and has been reinforced by provisions such as the New South Wales Clean Waters Act, 1970, s. 5.

6. EFFECT OF THE AUSTRALIAN SYSTEM OF ADMINISTRATIVE RIGHTS TO WATER

6.1 The notion of administrative rights to water accurately encapsulates the unique element of the general Australian legislative response to devising an apposite system of water management which, although it offered the optimum possibilities of extensive but balanced use of water in the world's most arid, habitable continent (only Antarctica is drier) was nevertheless carefully attuned to the common-law heritage which applied. It is
a system which is often applauded and emulated in other countries for the following key reasons.

6.1.1 The system does not allow for the domination of sources of supply by one privileged group of landowners, i.e. those who own lands adjacent to the supply.

6.1.2 The system potentially allows for water to be used for any beneficial purpose, whether adjacent to, or away from, the stream.

6.1.3 Rights to water are granted by, and held from, the State. This system has several practical beneficial effects.

(a) The costs of litigation necessary elsewhere to establish a right to water are avoided.

(b) The social disharmony which necessarily arises where resources are judicially apportioned between rival claimants by an adversarial process is avoided.

(c) The uncertainty which a system of judicial allocation of resources involves is also avoided, with consequent beneficial effects on the willingness of investors to make commitments.

(d) A system of relatively short-term interests in water avoids the additional costs of having to resume private proprietary interests in water where wider community or public interests supervene.

(e) It is possible to make a disposition of the resource which is adjudged to be in the best interests of all citizens by persons elected by those citizens.
6.1.4 The concomitant reservation of bed and banks and riparian frontages had additional but complementary beneficial effects.

(a) It allowed ready and unquestioned access by officials wishing to carry out stream gauging activities, hydrological investigations or other surveys.

(b) It permitted the execution of river management and bank protection works, without having to engage in processes of land acquisition.

(c) The erection of footings for bridges, wharves and causeways, or other in-stream structures such as weirs and locks, was possible without the need to acquire private lands.

(d) Effective management of part of the floodway - if not the whole of the floodplain - and the control of deforestation, cultivation and soil erosion was possible on frontage lands adjacent to rivers.

(e) Public access along rivers and river banks for recreational and navigational purposes could be protected and regulated.

(f) The excavation of gravel and other substances from river beds and adjacent frontage lands could be carefully controlled.

(g) There was no need to seek voluntary or compulsory acquisition of the lands reserved.

The beneficial effects set out in paragraph 6.1.3(a) to (c) were also achieved in relation to the bed and banks and to riparian frontage lands.
7. CONSTITUTIONAL RECOGNITION OF RIGHTS OF THE STATES AND CITIZENS

7.1 Any interference or perturbation introduced into the system of legislative control and administrative apportionment of water and associated land resources can be seen as a violation of principles as fundamental to the system of Australian resource allocation as is the Torrens system. The role of the State as both grantor and entrepreneur of water resources is deeply entrenched in Australian economic history. Thus, original opposition to the early plans of Samuel McCaughey to develop irrigation in southern New South Wales was based on the grounds that to make water available to a private developer would foreclose the possibility of future uses which might be of wider benefit to other sectors of the community. Again, it was Alfred Deakin, by means of the Victorian Waterworks Encouragement Act 1880, who lured the Chaffey brothers to Mildura and paved the way for the first intensive irrigation community by making available Crown grants of irrigable land and purported grants of water rights attached thereto.

7.2 The interests, not merely of a privileged group of riparian proprietors, in the use and management of water resources, but of all residents within a State and, indeed, of the State itself, are actually conceded and acknowledged by a little-explored provision of the Commonwealth Constitution.

"S. 100. The Commonwealth shall not, by any law or regulation of trade or commerce, abridge the right of a State or of the residents therein to the reasonable use of the waters of rivers for conservation or irrigation".

Some of the background to this provision and its political relationship with s. 98, concerning Commonwealth power over navigation and State railways, are set out in (1971) 8 Melbourne University Law Review 11.
7.3 For present purposes, however, the significant feature is that the section purports to recognize two rights which must be taken to have pre-existed the Constitution. In so far as they are not rights which would be cognizable at common law, they must be rights which had emerged from the legislative steps which, by 1901, had become general within Australia, of neutralising the riparian doctrine and conferring supervening rights on the State over water, bed and banks and riparian frontages. The rights identified by s. 100 are twofold:

7.3.1 The right of a State to a reasonable use of river water for conservation or irrigation;

7.3.2 The right of all residents of a State to the reasonable use of river water for the same purposes.

7.4 Because the clause was drafted in the context of the debate between railways and navigation and, ironically, because it was assumed that the Commonwealth would take an active role in managing the River Murray through the trade and commerce power, the latter on Commonwealth legislative power is primarily placed upon the trade and commerce power. But the underlying rights which the section acknowledges are clearly vested in the States and in citizens of States and not in the Commonwealth.

7.5 In so far as the Constitution bears witness to substantive rights, as distinct from nominating heads of legislative power, the State's right, and each individual resident's right, to the reasonable use of river water for irrigation and conservation are clearly acknowledged and s. 100 effectively denies any intention that such rights should be conveyed to the Commonwealth or abolished by virtue of federation.

7.6 The express fetter placed on Commonwealth laws with respect to trade and commerce in relation to these rights should not be interpreted according to the lights of the maxim expressio unius
est exclusio alterius. Instead, in exercising any of its constitutional powers, the Commonwealth should have regard to such rights as are expressly acknowledged by the Constitution to exist in the States or the residents therein at federation.

7.7 Nor should the substantive rights of the States and its residents be read too narrowly. Although rights to a reasonable use of river waters for irrigation and conservation will sufficiently embrace most practical examples of potential detriment which might be caused by a grant of Aboriginal lands, it must be pointed out that the possibility of the use of water for hydro-electric purposes could not have been considered and rejected by the framers of the Constitution. La Nauze has speculated that the reason why the power over postal, telegraphic and telephonic services was expanded to include "other like services" in s. 51(v) of the Constitution was purely because a public lecture by one of Marconi's disciples happened to have been given at Melbourne University on the evening before the amendment was moved during the Melbourne session; but the widespread use of electricity, or the possibility of harnessing water for its generation, was not contemplated by the founding fathers. Accordingly, to pursue the analogy with s. 51(v), on the principle espoused in Brisban's Case (1935) 54 C.L.R. 262, the rights confirmed as belonging to the States and to each resident thereof should, at this distance, be read as embracing a reasonable use of water for the purposes of hydro-electric generation.

7.8 Furthermore, no narrow interpretation of s. 100, which confined it to the States or the residents of States, as distinct from a Territory or the residents of a Territory, appears tenable. The right pre-existed federation and must thus have inhered in residents of the Northern Territory under pre-existing colonial law, before the Territory was declared. General policy arguments, as well as principles concerning the equality of subjects within a federal system and the potential practical difficulties in administering the numerous rivers which the Northern Territory shares with Western Australia and Queensland, support this view.
8. CONCLUSION

8.1 The uniquely Australian system of administrative rights to water was developed for the better protection and equitable distribution of the resource, in the interests of the whole community, prior to federation. It entailed the vesting in the Crown of each colony:

8.1.1 the right to the use, flow and control of certain waters;

8.1.2 the bed and banks of most rivers;

8.1.3 riparian frontage reserves adjacent to the banks of such rivers.

8.2 Where, for one reason or another, the vesting of the matters included in paragraphs 8.1.2 and 8.1.3 had not been done initially, reservations were generally made when Crown leases were renewed or converted to other forms of tenure, or Crown Lands Acts provided for their acquisition, consensually or compulsorily.

8.3 Where private lands were required to form new dam storages or protected catchments for water conservation, or where such land was required for major public distribution works, such as main irrigation canals, State laws provided for the acquisition of such lands, either consensually or compulsorily.

8.4 Each of the above legislative arrangements asserted a commonly perceived right of each State and of each resident therein to a reasonable use of river water for the purposes of conservation and irrigation. Those pre-existing rights received constitutional recognition in s. 100 of the Constitution and apply equally to residents of the Northern Territory as they do to residents of other States.

8.5 Any decision by a body duly constituted under Commonwealth legislation which had the effect of interfering with, or altering,
diminishing or rendering less certain, or conditional, or readily exercisable, any of the powers mentioned in paragraph 6 above would constitute a detriment:—

8.5.1 in the case of intra-territorial rivers, to all residents of the Territory;

8.5.2 in the case of shared rivers, to all residents of the Territory and to the rights of other States or the residents therein.

8.6 In particular, the following results of a decision would result in a detriment to other communities.

8.6.1 Restrictions on the right of navigation in either tidal or non-tidal waters.

8.6.2 Restrictions on the present ability of persons to obtain access to surface waters and to use them for domestic, stock, irrigation or other purposes.

8.6.3 Restrictions on the ability of the Government to obtain access to, and to use water for wider community purposes.

8.6.4 Restrictions on the ability of Government to maintain sole control over the bed and banks of rivers and to regulate, prohibit, remove or execute works in the bed or on the banks of rivers. This would include snagging, river improvement and bank protection works, or dams, weirs, pumping stations, wharves, bridges or other obstructions to the flow, or the removal of gravel, etc. from the river bed.

8.6.5 Restrictions on the ability of Government and its contractors to have free and unfettered access to the bed and banks for the purposes mentioned above.
8.6.6 Restrictions on the ability of Government to regulate, prohibit, remove or execute works on frontage reserves. This would include powers over the abutments and footings of structures mentioned in 8.6.4, but it would also include powers over other structures such as levee banks or buildings which would have an effect on the normal course of flood-flows adjacent to the banks. Such a power is necessary to control soil erosion and to prevent scouring of the bed and banks, with consequential local and downstream effects. It is also necessary for there to be administrative powers of positive action and intervention in relation to such lands, in order to put down obstructions or to remedy deficiencies which presently exist in structures.

8.6.7 Restrictions on the ability of the Crown, where it does not already have sufficient interests in the bed and banks, or in adjacent frontage lands, to acquire such interests at minimum social and economic cost, for example:-

(a) by inhibiting the power of the Crown to change the conditions of pastoral leases upon their renewal, so as to reserve such lands - a step which entails no financial costs;

(b) by inhibiting the Crown's power to reserve Crown lands from exclusive occupancy;

(c) by inhibiting the Crown's power compulsorily to acquire a sufficient interest to support the free exercise of its powers by means of compulsory acquisition with an independent assessment of consequential loss;

(d) by subjecting the acquisition of such interests to uncertainty or delay, through the need to negotiate a
solution, or to the possible additional costs of litigation to maintain an interest once acquired;

(e) by removing a mechanism to impose a fair and equitable solution, taking into consideration both public and private interests, in the event that the owner or occupier refuses to treat with the Crown;

(f) by subjecting the Crown to the possibility of demands for unreasonable compensation for the acquisition of an interest, without providing a mechanism to arbitrate a just and reasonable compensation for that interest.

8.6.8 Restrictions on the ability of the Crown to acquire adequate interests in lands more remote from the river bank for occupation by storage dams and irrigation canals, etc., at minimum social and economic cost. Such restrictions can occur in the same way as set out in paragraph 8.6.7. Although previous Commissioners have had difficulties in grappling with the uncertainty associated with future predictions of need for storages when there is no patent, immediate need (e.g. Daly River Land Claim, paragraphs 322, 329-334) the concept of opportunity foregone is well-known to economists, is quantifiable and is, in their analysis, a cost or detriment which must be considered in any analysis. In so far as the loss of this future opportunity amounts to a restriction of rights acknowledged in the Constitution of citizens to a reasonable use of river waters for irrigation and conservation, it must be carefully addressed.

9. GROUNDWATER RESOURCES

9.1 The preceding discussion has primarily addressed problems of river waters, rather than groundwater. The riparian doctrine did not apply to percolating groundwater, although it is applicable to
known and defined subterranean rivers, which fortunately occur rather more often in the law reports than in nature. Nevertheless, a comparable philosophy of denying the possibility of private domination of sources of supply and of ensuring the equitable distribution of existing resources has been followed since New South Wales, alarmed by the proliferation of bores and the consequential loss of head in the Great Artesian Basin, first legislated to control bores in the Artesian Wells Act 1897.

9.2 At common law, the overlying landowner did not own water percolating through his land (Ballard v. Tomlinson (1885) 29 Ch. D. 115) but early English authority conceded to the overlying owner the right to use it for whatsoever purpose he wished. That principle was carried to its logical conclusion in Mayor of Bradford v. Pickles [1895] A.C. 587 where Pickles, in an attempt to have his land acquired by the town, dug a bore for the express purpose of intercepting the town's water supply and with no intention of putting the water to productive use. It was held that his absolute right could not be qualified by reference to his motive. The absolute right of the overlying landowner did not, however, extend to pollutive acts, which would give rise to an action.

9.3 In Australia, there has been both judicial and legislative responses to the common law. In Barnett v. Kidman (1962) 108 C.L.R. 12, Windeyer J. and Dixon C.J., at p. 47, were of the opinion that prevalent criteria of "reasonableness" would now intervene to limit the rule in Bradford v. Pickles; and there is now widespread legislation:

9.3.1 to require those drilling bores to be appropriately qualified, in order to safeguard the resource;

9.3.2 to require bores to be constructed, altered or required in accordance with criteria often set out in a construction permit;
9.3.3 to require licences to extract water which limit the amount
of water to be drawn and the purposes for which it may be
used;

9.3.4 to prohibit or to control the discharge of waste materials
into bores;

9.3.5 to allow directions to be given, concerning the repair or
maintenance of bores and to intervene to undertake
necessary works at the cost of the occupier;

9.3.6 to allow directions to be given restricting the licensed
use of groundwater where circumstances so require.

9.4 In most States, the right to the use and control, and sometimes to
the flow, of groundwater is vested in the Crown. This step has
not been taken in the Northern Territory and any supervening Crown
interest in the resource must depend upon the regulatory powers
asserted by the Control of Waters Act, rather than a specific
vesting section. It seems that, unlike surface river waters,
 ss. 12(2) of the Aboriginal Land Rights Act does not require a deed
of grant of Aboriginal lands to contain a specific reservation of
groundwater as a mineral, precisely because there has been no prior
legislative assertion that “all interests” in groundwater vest in
the Crown. On the other hand, at common law, the grant of land to
a Land Trust would not make the Trust “owner” of underlying
percolating water, although title to, and occupation of,
surrounding and overlying land is sufficient to exclude other
potential users of that water.

9.5 The beneficial effects of the legislative system applied to
groundwater are precisely the same as those asserted in paragraphs
6.1.1 and 6.1.3 above. It should be noticed, however, that no
argument for public or private access to groundwater can rely on
any real or asserted rights recognised in s. 100 of the
Constitution, which applies simply to river waters.
9.6 The following results of a decision to vest lands in a Land Trust would accordingly cause detriment to individuals or communities.

9.6.1 Restrictions on the ability of Government to obtain access to, and to use groundwater for wider community purposes.

9.6.2 Restrictions on the ability of Government to carry out investigatory drilling in order to monitor the use of the resource, and to collect data to establish the safe yield for particular aquifers and thus maintain the resource.

9.6.3 Restrictions on the ability of Government to enter Aboriginal land in order to execute emergency work on bores to protect the resource, or to make good the failure of the occupiers of bores on Aboriginal lands to abide by directions or to repair and maintain bores, with the possibility of consequential damage to an aquifer or wastage of water, to the detriment of other users.

9.6.4 Restrictions on the ability of Government, if the need arises, to acquire or to set aside lands for the purpose of artificially re-charging aquifers, which may be necessary either:-

(a) to increase the safe yield of those aquifers;

(b) to use aquifers as underground natural storages for water;

(c) to transport water naturally from sources where water is available to places of need.

(These techniques are not widely used in Australia at present, partly because data on groundwater occurrence are imperfect and partly because the need has not yet arisen. Such techniques are, however, widely used in the United
22

States e.g. in the San Fernando Valley to the north of Los Angeles.)

9.6.5 Restrictions on the ability of Government to acquire interests in land, not merely for the purposes mentioned above, but for pipelines, etc., at minimum social and economic cost, in the same way as is envisaged in paragraphs 8.6.7 and 8.6.8.

9.6.6 Restrictions on the ability of persons whose lands do not overlap sources of requisite quantity or quality to prospect for waters on Crown lands and to obtain the necessary interests in those lands occupied by pumping stations and pipelines, at least cost and without attendant uncertainty.
10. STEPS TO REDUCE THE IMPACT OF DETRIMENT

10.1 Certain of these grounds of detriment have been addressed and acknowledged by Commissioners in previous Aboriginal claims. The particular reading given to s. 59 by the High Court, however, proscribes Commissioners from endeavouring to weigh potential detriment against the strength of a traditional claim in order to make a recommendation. In the Daly River land claim, Commissioner Toohey acknowledged that it was the Minister who must weigh his comments on detriment in reaching a decision (paragraph 386(30)); but that one appropriate solution might be for the Minister to defer a decision, pending successful negotiation of rights of access to the river (paragraph 386(43)).

10.2 In the interests of the preservation and optimum utilisation of the resource and in the interests of the asserted right of citizens to a reasonable use of river water for conservation and irrigation, some appropriate means must always be found of preventing the primary evil which the Australian system was designed to avoid: viz. the domination of a source by any particular group of landowners. This is precisely the problem which must be addressed in deciding whether to grant Aboriginal claims to land adjacent to rivers, or which may need to be made servant to the wider distribution of the resource.

10.3 The Water Division has attempted to address this objective in a Discussion Paper of 13 May 1981, prepared after the formal submission of the Northern Territory Government in the Jawoyn Land Claim. It has adjudged three possibilities as acceptable and three - including the two enshrined in the Government's submission - unacceptable. The distinction between the two groups appears to depend on the certainty with which each ensures the protection of the interests mentioned in paragraph 10.2.
The three acceptable options are said to be:

1. "Appropriate amendment to be made to the Aboriginal Land Rights Act to guarantee the sustainability of all Northern Territory environmental management legislation. Exclusion from the claim of those areas encompassing currently identified damsite development sites.

2. Appropriate amendment to be made to the Aboriginal Land Rights Act to allow the Northern Territory Government to acquire Aboriginal land for water resources development or management purposes for the benefit of the community at large.

3. Exclusion of the entire claim area by the Northern Territory Government".

The three unacceptable options are said to be:

1. "No exclusion or guaranteed provision for water resources management controls or activities.

2. Exclusion of currently identified possible dam development sites, with the Crown retaining ownership of bed and banks throughout, and access to currently identified monitoring stations (the situation envisaged in the existing submission).

3. As above, but with the exclusion of the catchment areas pertaining to the identified possible dam development sites (the situation allowed to fit the recommendations of the existing submission)".

In order to protect the interests mentioned in paragraph 10.2, however, it is important to note that it is not necessary that the Crown retain absolute title to the bed and banks, to frontage lands or to all potentially usable catchment areas or damsites. Accordingly, a decision to press for exclusion of such areas from a claim must be seen quite clearly as a political decision and not one which the necessity of the situation inevitably requires.
10.5 All that is required by the Crown, in relation to each type of
land, is an interest commensurate with the water and land resource
management needs set out in paragraph 6.1.6. Contrary to the
assertion on page 1 of the Discussion Paper of 11 May 1983,
previous claims seem to have established that the Control of Waters
Act continues to apply to Aboriginal lands and that the regulatory
or "passive" powers conferred by the Act continue undiminished. It
would thus be possible to require licences for structures within,
say, the bed and banks, or to prohibit or regulate the mode of
their construction. Presumably, it would also be possible to
revoke or suspend licences if their terms were not observed and
also to prosecute for failure to obtain or observe a licence.
There are the following areas of doubt and difficulty.

10.5.1 It is doubtful whether, in default of a proper direction,
or a licence issued under the Act, it would be possible for
an officer to enter Aboriginal land and to execute such
repairs or works as may have been directed, or to remove
structures or abate nuisances.

10.5.2 It seems unlikely that the Crown could, of its own
volition, enter Aboriginal riparian frontage lands or more
remote Aboriginal lands and erect structures or carry out
public works, without obtaining the consent of the land
Council and all traditional owners. No means exist to
break deadlocked negotiations on such an issue, once the
grant of land has been made.

Complete excision

10.6 The first strategy which I understand is currently advocated to
overcome these difficulties is that of complete excision of land and
banks and possible dam sites (and, perhaps, frontage reserves).
As suggested in paragraphs 10.4 and 10.5, it is not imperative that
the Crown should have the free simple of such lands provided
interests sufficient to support its entry, occupation and use can
be retained or obtained. In view of this, to press for complete exclusion can be seen as unnecessarily provocative. If the strategy is unsuccessful - and there are sound reasons to believe that it may be - residual goodwill and hence the possibility of arranging mutually satisfactory terms of entry and occupation will be prejudiced, precisely because of the polarisation which would be caused by the Government's stand.

Transferring lands to Crown corporations

10.7 The second strategy which is being considered is that of transferring lands to quasi-public corporations, in the event that lands held by such bodies are held by the High Court not to be Crown lands within the meaning of the Land Rights Act. Apart from the unresolved question whether the creation of interests in Crown lands after a claim has been lodged would be held to be effective and the potential risk that the motive for such a transfer would be subject to scrutiny and adverse judicial comment, the strategy is again one which would inevitably create polarisation. In the event that the strategy is unsuccessful, the possibility of negotiating a mutually acceptable solution would again be prejudiced, as would the possibility of persuading the Commonwealth Government to introduce legislative amendments to accommodate the individual needs of proper water management.

Litigation to test Control of Waters Act

10.8 The third strategy which I understand is presently being considered is that of mounting an action which would test the degree to which powers conferred under the Control of Waters Act are applicable to lands already vested in a Land Trust. In particular, such a test would presumably seek to clarify the doubts mentioned in paragraphs 10.5.1 and 10.5.2. I have reservations about the wisdom of this course of action for reasons similar to those previously referred to. In the quite possible event that such a test is resolved adversely to the interests of the Government, any doubts will
thereby be foreclosed and any incentive for future negotiations on
the part of Land Councils or for amendments by the Commonwealth,
may disappear. While doubts persevere, a strong argument exists
for achieving a negotiated settlement of Commonwealth amendments.
Once doubts disappear, that incentive is lost and any bargains
contemplated by Land Councils would be from a position of unlimited
and unprecedented strength.

For the reasons set out above, I have serious reservations about
any of the strategies presently in contemplation and canvassed in
paragraphs 10.6 to 10.8.

Amendment to allow compulsory arbitration

10.9 Several other strategies exist and deserve serious consideration if
they have not already been contemplated. The first involves two
possible approaches to the Commonwealth Government for limited
amendments to the Land Rights Act. The Act presently contains
provision for the compulsory arbitration of disputes between the
Director of National Parks and a Land Council, where there is
conflict between an Aboriginal claim and lands reserved for
national parks (s. 128). In default of an agreement, the
Commonwealth Minister is entitled to grant the requisite lease on
behalf of a Land Council. Comparable powers to refer a dispute
between a proposed mining operator and a Land Council to compulsory
arbitration exist under sub-sections 45(1) and 46(1) and for the
Minister to grant the requisite interest on behalf of a Land
Council (sub-sections 45(1) and 46(3)).

10.10 On the basis of the arguments advanced in the earlier part of this
paper, it is suggested that the public interest in being able to
retain Government access to land and banks and to frontage lands and
to acquire sufficient interests in more remote lands for landform
or distribution works, is at least as great as in the establishment
and maintenance of national parks and, in the long-term, is
unquestionably greater than the ability of mining operators to
obtain access to Aboriginal lands for relatively short-term objectives.

10.11 Accordingly, if reason rather than antipathy were allowed to prevail, a reasonable case could be made for inserting comparable provisions where a dispute arises in the process of negotiating appropriate interests for water management purposes. If this argument were put to the Commonwealth, it would be preferable if the process of compulsory arbitration could be initiated, not merely by the Commonwealth Minister, but also by either a land Council or the Northern Territory Government. Furthermore, it would be desirable if the process provided for the acquisition of interests other than leases, some of which may not readily fall within existing common-law categories. Thus easements may be sufficient to support distribution works and a species of irrevocable licence might be sufficient to support rights of entry onto frontage lands. Rights to put down obstructions, or to sink investigation holes on land, however, possibly involve a licence coupled with a grant and may even go beyond usual common-law categories of proprietary interests.

10.12 Political exception might be taken to the fact that, under existing provisions, the decision to break an impasse and to grant the requisite interest is that of the Commonwealth Minister. Given the continued existence of the Commonwealth Act, however, it is highly unlikely that a satisfactory regime can be developed which avoids the need for Ministerial consent. Thus, even if the option of a negotiated commercial regime were adopted (see para. 10.20 below) it is highly likely that the total amount of compensation to be paid in respect of the interests acquired by the Crown in any one land claim area would exceed $50,000 and the arrangement would therefore require the consent of the Commonwealth Minister (subsections 27(1), (4)).

10.13 Exception might also be taken to the fact that compensation would doubtless be payable for interests re-acquired in this way. Part
of the answer to this point is that any other freeholder or Crown lessee who happens to occupy lands required for public purposes would be entitled to compensation and it is part of the unavoidable policy of the Act to put Aboriginal landowners in a comparable position in this respect. The positive proposition is that, if provisions for compulsory arbitration exist, only compensation adjudged to be reasonable by the arbitrator would be payable. Without such a provision, the possibility of exaggerated demands for compensation could not be avoided.

Amendments of s. 67 of Land Rights Act

10.14 The alternative possible approach for legislative amendment would be to request that s. 67 of the Aboriginal Land Rights Act be amended to allow a limited, if not plenary, use of the Northern Territory’s Lands Acquisition Act. Section 67 provides that “Aboriginal land shall not be resumed, compulsorily acquired or forfeited under any law of the Northern Territory”. It seems to have been assumed that this forecloses any operation of the Lands Acquisition Act. In balance, this is probably correct, although it should be noted that, whereas s. 67 speaks in terms of “land” being resumed, etc., many other sections in the Act speak of the acquisition of “estates and interests” in land (e.g. ss. 10, 11(1)(4), 11(1ABC)(4), 66(4)). The argument could thus be mounted that the purpose of s. 67 is to ensure that Territory laws should not be used to divest Aboriginals of their basic, underlying title to land, i.e. of the free simple estate, for this would be contrary to the basic policy of the Act. On the other hand, paragraph 24(1)(c) of the Act demonstrates that it is also the policy of the legislation to allow lesser estates to be created over Aboriginal lands and there is no policy reason why such lesser estates should not be acquired for public purposes. Despite the force of this argument, the generous view which the High Court has previously adopted of the purposes of the Act could lead them to conclude that all interests in Aboriginal lands must be created with the consent of the Land Council and all traditional owners, except for those
rare and specified cases where the Minister is given power to override their wishes.

10.15 If the Land Acquisition Act cannot be presently deployed in this way, it would be possible to seek a qualified amendment to the Commonwealth Act which allowed the Territory law to have limited effect on Aboriginal lands. It is unlikely that the Commonwealth could be persuaded to grant the Land Acquisition Act plenary effect for it would go against the basic policy of the Land Rights Act, which is to recognize the underlying identity of tribal groups with their traditional lands and to ensure that their basic identity is retained, come what may. Further, in the Commonwealth's view, there are doubtless good reasons to suspect that plenary powers of acquisition would not always be exercised in a bona fide way. Whether that view is, or is not, justified may be a matter for political debate - but it is not ultimately in the best interests of the management of the resource, and hence of the community, that such an issue should become a sticking-point. The fact of the matter is that, in most circumstances, the public interest in water resource management would adequately be served if there were power to acquire interests less than a free simple, by way of lease, easement, licence coupled with a grant, or a right to exercise statutory powers. This latter interest may, or may not, accurately be categorised as an existing common-law or equitable interest in land, although all such interests may be adequately embraced by the description of a "right, power or privilege in, under, over, effecting or in connection with land" (c.f. Land Acquisition Act, s. 4).

10.16 Accordingly, a rational resolution of the existing impasse might be achieved by the following action.

10.16.1 Amendment of the Northern Territory Land Acquisition Act in a way which prevents the compulsory acquisition of plenary fee simple interests in Aboriginal lands.
10.16.2 Amendment of s. 13 and Part IV of the Act in a way which specifically provides for proper negotiation and consultation with traditional owners and Land Councils, in the manner envisaged by the Commonwealth Act, where a proposal is to be made in relation to Aboriginal lands.

10.16.3 Widening the scope of matters which the Tribunal is directed to consider under s. 10, to include matters of particular relevance and sensitivity in the case of Aboriginal lands.

10.16.4 Providing for the automatic termination of interests acquired over Aboriginal lands if they are not deployed for public purposes within a specified period.

10.16.5 Requiring that, where the Tribunal is to hear a proposal in relation to Aboriginal land, it is empowered to obtain and required to consider, alternative plans for achieving the proposed objective, whether or not these alternatives would involve the acquisition of Aboriginal lands.

10.16.6 Possibly amending s. 7 of the Act to include persons with appropriate qualifications for assessing matters relating to Aboriginal lands as members of the Tribunal and amending s. 19 to ensure that such a person is included on any Tribunal dealing with Aboriginal lands.

If undertakings were given to incorporate such amendments in the 
Land Acquisition Act, a strong case could be made to the 
Commonwealth to amend s. 4 of the Land Rights Act to allow the 
former Act to operate in the way envisaged.

10.17 Two other alternatives which would not require amendment of either Act, are also worthy of further investigation; but in both cases the goodwill of the Commonwealth Minister is necessary.

Accordingly, they depend on the ability of the Northern Territory
Government to convince the Minister that a resource management problem exists, which transcends temporary or even long-term political issues. If it is sought to pursue either of these alternatives, therefore, to follow the courses considered in paragraphs 10.6 to 10.8 in the meantime, would probably lessen chances of success. Both strategies build on the view of Commissioner Toohey, noted in paragraph 10.1 and the possibility that the Minister may either make a grant conditional upon a satisfactory agreement, or delay a grant until such agreement is reached.

Conditional or determinable grants

10.18 Although the reading given to s. 50 of the Land Rights Act in Re Toohey ex parte Meekong Station (1983) 57 A.L.J.R. 59 confirms the view that a Commissioner cannot qualify his recommendation by reference to the matters of detriment on which he comments, the Minister is accorded a wide discretion in deciding whether a grant should be made. As far as I have been able to determine - and here I must state that I have not had an opportunity to examine and consider all previous land claims - it has not been suggested that the Minister lacks the power to defer a grant, pending agreement. Nor, as far as I can tell, has the issue been canvassed whether the Minister has power to make a conditional grant.

10.19 This latter possibility arises by virtue of the wording of subsection 10(1) and paragraphs 11(1)(c), 11(1A)(c) and 11(1A)(f) of the Land Rights Act, which empower the Minister to "recommend to the Governor-General that a grant of an estate in fee simple" be made to a Land Trust. It must be noted that the words used are not a "fee simple absolute". Accordingly, on a literal construction of the provisions, the possibility of a conditional fee simple or a determinable fee simple is not ruled out in as many words. If the Act were held to contemplate the possibility of either a conditional or a determinable fee simple being granted, it would be possible to make the very continuance of the fee simple estate dependent upon-
10.19.1 either the arising of a specific need for the Crown to acquire a supervening interest in certain lands nominated in the grant; or

10.19.2 the continued adherence by the Land Trust and Aboriginal owners to the sort of voluntary regime suggested in paragraph 10.20.

It would, of course, be necessary for the conditional element of the grant to be carefully drafted in order to accommodate the differing interpretations accorded to determinable and conditional grants by the Courts and the different consequences in each case if the conditional element is held to be contrary to public policy.

Agreement by negotiation

10.20 A further possibility is to reach a communual regime by negotiation. This could be done by virtue of paragraph 27(1)(e) of the Land Rights Act after a grant has been made, although if compensation payable under a negotiated agreement exceeds $50,000, sub-section 27(3) requires the Commonwealth Minister's consent to such an agreement. Alternatively it would be possible to negotiate a proposed regime prior to a grant being made, in the manner envisaged by Commissioner Toohey in the Daly River Claim. Such a contractual regime could specifically confer on the Crown such powers of entry on lands as may be necessary for water management purposes, including a power to put down unauthorised structures and to execute repairs to structures in default of action by the occupier. It would also be necessary for the agreement to embrace lands subject to leasehold or other interests granted by the Land Trust. Further, the regime could confer power on the Crown to require present or future interests in land to be occupied by Crown structures or works, for the economic life of those structures or works. Where the possible storages, etc. are already identified, specific tracts of land could be nominated in the agreement. Where future possibilities are not ascertained, it
would be necessary for the agreement to provide for compulsory arbitration. It would also be necessary to include an appropriate technique for assessing and capitalising any amounts of compensation attributable to whatever degree of enforcement, entry or occupation as is not already permitted pursuant to the Control of Waters Act.

10.21 Two arguments have been immediately deployed against such a suggestion. The first is that it will be impossible to reach an agreement with both the relevant Land Council and traditional owners. The second is that a mere contractual regime is insufficient and the interests of the public cannot be adequately protected unless all land which may be potentially required is excised from the claim or is able to be compulsorily acquired.

10.22 In partial answer to the first argument, if the Minister delays the making of a grant until a mutually acceptable regime is reached, there is a powerful incentive for a Land Council to reach a reasonable agreement with the Government. Where a grant has already been made, the same incentive does not exist. But it seems unwise automatically to assume that it will be impossible to reach a reasonable agreement. In the Jawoyn Claim, I sensed that the fact that the bed and banks of rivers have not been claimed is widely interpreted in Government ranks as merely an admission that a claim over bed and banks is unlikely to succeed, because of obvious detriment. I do not share that view, either of motive or of the likely result. It bed and banks were included in the claim.

According to the information available to me, the failure to claim bed and banks should be interpreted as a genuine recognition on the part of the claimant there is a wider, supervening public interest in those ... If this hypothesis were true, the possibility of negotiating a satisfactory agreement in relation to other areas would be heightened. If such a possibility currently exists, it would seem ill-advised to prejudice it by pursuing the courses canvassed in paragraphs 10.6 to 10.8.
10.23 In the event that agreement cannot be reached over lands which have already been granted, there would obviously be a difficulty. This could only be resolved by the legislative amendments suggested in paragraph 10.11.

10.24 In answer to the argument that any such regime would be purely contractual and impossible to enforce effectively if either traditional owners or a Land Council changed their mind, it must be remembered that the whole purpose of the agreement would be to create limited interests in land in the Crown. Provided that sufficient attention were paid to questions of certainty in formulating the agreement and the identification of the precise interests and precise areas in relation to which the agreement would operate, the agreement would be specifically enforceable.

In the event that a Land Council or a traditional owner subsequently sought to deny the agreement and refused to create any legal interests required pursuant to it, the Crown would be able to rely on its existing equitable interests in land which would spring up upon execution of the agreement, pursuant to the doctrines in

Lysaght v. Edwards (1879) 2 Ch. B. 499 and Walsh v. Loundale (1882) 21 Ch. B. 9. The traditional reasons for not resting content with an equitable interest in land - i.e. possible defeasance at the hands of a bona fide purchaser for value without notice; non-justiciable in inferior courts; and the discretionary character of equitable remedies - do not seem to be significant in such a situation. Accordingly, the argument that a communal, contractual regime would ultimately be unenforceable is not compelling.

Water as a mineral

10.25 One final and particularly interesting strategy springs from s. 69 of the Northern Territory (Self-Government) Act 1978. That section defines "mineral" as "a naturally occurring substance or mixture of substances, whether in a solid, liquid or gaseous state". On its literal interpretation, this appears to include
water — although if reference were had to the common-law meaning of "mineral" in order to qualify the apparent plain meaning of the words, a different result would be reached.

10.26 Accordingly, by sub-section 69(4), all Commonwealth interests in water are vested in the Territory; a step which removes any ambiguities arising from conflicts between Commonwealth and Territory laws which might otherwise be argued in relation to the effect of s. 3 of the Control of Waters Act. Accordingly, water is unequivocally vested in the Territory.

10.27 Equally, sub-section 3(1) of the Land Rights Act specifically defines minerals to include water, thereby making it subject to the provisions of Part IV. This, in turn, prohibits the grant of any "lease or other interest in land...granted under a law of the Northern Territory relating to mining for minerals". Accordingly, wherever the Northern Territory purported to make a grant of rights to water in a way which also involved the creation of rights over Aboriginal lands, s. 60 would require the prior consent of both the Minister and the Land Council, or a proclamation by the Governor-General that the grant was necessary in the national interest.

10.28 But the provisions of Part IV of the Act apply only where the Territory, as owner of minerals (including water) seeks to create interests in land in others. The Crown itself, as owner of the minerals, has certain significant common-law rights to enter lands and to do all such things as are necessary for the working and extraction of minerals (Borys v. Canadian Pacific Railway [1957] A.C. 217; Rombootha v. Wilson (1860) 8 H.L.C. 548). These rights are retained, even when the overlying land has passed to other proprietors and include not only rights of ingress and egress, but also a right to occupy portion of those lands for mining purposes, which would include the right to erect structures and to dump tailings, etc.
10.28 By analogy, it can be argued that the Crown, as owner of the mineral, water, has the same common-law right to enter and occupy such Aboriginal lands as may be necessary for the purpose of working, winning and using water. Furthermore, provided this work is undertaken by the Crown itself and there is no attempt to grant that right to others, Part IV of the Land Rights Act would not apply and it would be unnecessary for the consent of the Commonwealth Minister or of a Land Council to be obtained.

10.30 This analysis would allow the present impasse in relation to the re-acquisition of Aboriginal lands for the purposes of storage and pipelines, to be overcome. The Northern Territory could, if it chose, create a Crown authority for the express purpose of using its common-law rights to work and win water belonging to it, but occurring on or in the lands of others which, in this case, would include Aboriginal lands.

10.31 The only way around this analysis would be to argue that the Crown holds minerals in other than a common-law capacity. To open that door would invite distinctions in the capacities in which the Crown holds property (e.g., the distinction between patrimonial and administrative property of the State at civil law). Once this is done, notions of the public trust, inalienability and imprescriptibility easily intrude and the inevitable conclusion would have to be that Crown lands are also held in different capacities. If so, the same arguments which would deny the Crown the ability to exercise its common-law rights over minerals would apply with equal force to deny that the Land Rights Act operates to make bed and banks of rivers and reserve riparian frontages subject to Aboriginal claims.

11. CAVEAT

11.1 The preceding document has been prepared for two quite separate purposes. Sections 1 to 9 have been prepared to support future arguments about detriment under s. 50 of the Land Rights Act. It
is possible that the Water Division may wish to reproduce those sections separately and to submit them as they stand in support of their evidence at future hearings before Commissioners, or to inform those responsible for formulating or presenting the Government's case.

11.2 Section 10 has rather a different purpose. It contains matters of political and legal import which may be of value to the Solicitor-General's officers, or to counsel instructed by the Government. It contains some comments upon strategies which were discussed as being under active consideration and outlines several other strategies which do not appear to have been actively pursued, or which, at least, were not canvassed with the Consultant.

11.3 Because part of the purpose of sections 1 to 9 is advocacy, it is necessary to confess that at least one of the arguments advanced would probably not ultimately be successful if it were tested in the High Court. This concerns the argument advanced in section 7 about s. 100 of the Constitution. There has been a marked reluctance in the High Court to analyse constitutional provisions in terms which confer or acknowledge private rights and some would argue that in areas such as s. 92, where some analysis has proceeded along such lines, there are indications that the present Court would back away from such an approach. Coupled with this is the active interpretation which has been traditionally given to the Commonwealth's power over Territories; an interpretation which the present Commonwealth Government would doubtless strongly support. Accordingly, if it came to a test in the High Court, I am doubtful whether the argument advanced on s. 100 would be successful. But as the argument involves propositions which are politically significant to the Northern Territory Government, it is worth using as a negotiating tool.