

THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

Jabiluka: The Undermining of Process

Inquiry into the Jabiluka Uranium Mine Project

Report of the Senate Environment, Communications, Information Technology
and the Arts References Committee

June 1999

© Commonwealth of Australia 1999

ISBN 0 642 71017 1

This document is produced from camera-ready copy prepared by the Senate Environment, Communications, Information Technology and the Arts References Committee Secretariat, and printed by the Senate Printing Unit, Parliament House, Canberra.

MEMBERSHIP OF THE COMMITTEE

Members:

Senator Lyn Allison (Chair)
Senator John Tierney (Deputy Chair)
Senator Mark Bishop
Senator the Hon Nick Bolkus
Senator Kate Lundy
Senator Marise Payne

Substitute Member:

Senator Trish Crossin was appointed substitute member for the Jabiluka Inquiry for Senator Mark Bishop

Participating Members:

Senator Eric Abetz
Senator Andrew Bartlett
Senator Ron Boswell
Senator Bob Brown
Senator the Hon David Brownhill
Senator George Campbell
Senator Kim Carr
Senator Mal Colston
Senator Helen Coonan
Senator Winston Crane
Senator Alan Eggleston
Senator the Hon John Faulkner
Senator Brian Harradine
Senator Meg Lees
Senator Dee Margetts
Senator Natasha Stott Despoja

Secretariat:

Mr Richard Selth, Secretary
Mr David Arnold, Principal Research Officer
Dr Anthony Burke, Senior Research Officer
Ms Stephanie Holden, Senior Research Officer
Mr Jason Vickery, Executive Assistant

The Senate
Parliament House
CANBERRA ACT 2600

Telephone: 02 6277 3526 Facsimile: 02 6277 5818
Email: erca.sen@aph.gov.au
Website: http://www.aph.gov.au/senate/committee/erca_ctte/index.htm

TERMS OF REFERENCE

On 27 April the Senate referred the following matters to the Committee for inquiry and report by 30 May 1999 (subsequently extended to 30 June 1999):

(a) the approvals process for the Jabiluka uranium mine project, including both the Ranger Mill and Jabiluka Mill options and the appropriateness of the process, including but not confined to the independence of the process, the level of assessment, the timing and content of decisions and the capacity of the assessments to deal with world heritage obligations and impacts;

(b) whether an inquiry under section 11 of the *Environment Protection (Impact of Proposals) Act 1974* is now warranted in relation to the project;

(c) whether Australia is appropriately fulfilling its international obligations in relation to the protection of the Kakadu National Park World Heritage Area in relation to the project;

(d) whether Australia is appropriately fulfilling its international and domestic obligations in relation to radiological protection in relation to the project; and

(e) the rights of Traditional Aboriginal Owners over the area and the extent, appropriateness and outcome of consultation with the Traditional Owners.

TABLE OF CONTENTS

<i>Membership of the Committee</i>	<i>iii</i>
<i>Terms of Reference</i>	<i>iv</i>
<i>Table of Contents</i>	<i>v</i>
<i>Acronyms</i>	<i>vii</i>
<i>Executive Summary</i>	<i>ix</i>
<i>Recommendations</i>	<i>xxi</i>
CHAPTER 1	1
INTRODUCTION	1
Reference to the Committee	1
Conduct of the Inquiry	1
Acknowledgments	1
CHAPTER 2	3
BACKGROUND	3
Introduction	3
Kakadu National Park	5
Kakadu and World Heritage	7
Aboriginal History	7
Aboriginal Land Rights	8
The Jabiluka Project	9
CHAPTER 3	13
ENVIRONMENTAL IMPACT ASSESSMENT - PRELIMINARY	13
Overview	13
The Legislative and Regulatory Framework for Uranium Mining in Kakadu	15
Environmental Impact Assessments and Approvals for Jabiluka	16
CHAPTER 4	23
ENVIRONMENTAL IMPACT ASSESSMENT – THE ISSUES	23
The Jabiluka EIA Process: Flaws and Uncertainties	23
<i>Overview</i>	23
<i>Run-off Containment and Management</i>	25
<i>Tailings Disposal and Hydrology</i>	26
<i>Radiological Protection</i>	33
<i>The Scope for Public and Aboriginal Input to the EIA Process</i>	37
<i>Cultural Heritage and Sacred Sites</i>	39
<i>The Social Impacts of Uranium Mining</i>	47
<i>World Heritage Protection</i>	56

The Regulation and Oversight of Uranium Mining in Kakadu	57
The Government's Decision-making	64
Should there be an Inquiry into the Jabiluka Project under s. 11 of the EPIP Act?	73
CHAPTER 5	75
THE RIGHTS OF TRADITIONAL OWNERS	75
Introduction	75
The Legislative Framework: <i>Aboriginal Land Rights (Northern Territory) Act 1976</i>	76
Aboriginal Land Ownership and the Jabiluka Mine	77
Jabiluka, Ranger and Change in Kakadu	78
How Fair Was the 1982 Jabiluka Agreement?	80
The Rights of Traditional Aboriginal Owners: Debate and Conclusions	90
CHAPTER 6	99
WORLD HERITAGE ISSUES	99
Kakadu National Park and World Heritage Listing and Criteria	99
Australia's World Heritage Obligations	104
The Government's Response to the World Heritage Committee Mission's Report	114
Should Kakadu National Park Be Given an 'In Danger' Listing?	124
Consequences of an 'In Danger' Listing	126
Conclusion	128
APPENDIX 1	
List of Submissions to the Inquiry	129
APPENDIX 2	
List of Witnesses Who Appeared Before the Committee	139
APPENDIX 3	
Bibliography and References	141
APPENDIX 4	
Executive Summary and Recommendations of the WHC mission to Kakadu	145
GOVERNMENT SENATORS' REPORT	149

ACRONYMS

AAPA	Aboriginal Areas Protection Authority (Northern Territory)
ANU	Australian National University
ARL	Australian Radiation Laboratories
ARR	Alligator Rivers Region
ATSIC	Aboriginal and Torres Strait Islander Commission
CHMP	Cultural Heritage Management Plan
EA	Environment Australia
ECNT	Environment Centre of the Northern Territory
EIA	Environmental Impact Assessment
EIS	Environmental Impact Statement
ER	Environmental Requirement
ERA	Energy Resources of Australia
ERISS	Environmental Research Institute of the Supervising Scientist
ICOMOS	International Council on Monuments and Sites
ICRP	International Commission on Radiological Protection
ICSU	International Council for Science
IGAE	Inter-Governmental Agreement on the Environment
IUCN	International Union for Conservation of Nature and Natural Resources (now the World Conservation Union)
JMA	Jabiluka Mill Alternative
KRSIS	Kakadu Region Social Impact Study
MOU	Memorandum of Understanding
NLC	Northern Land Council
NT	Northern Territory
NTG	Northern Territory Government
NTDLPE	Northern Territory Department of Lands, Planning and Environment
NTDME	Northern Territory Department of Mines and Energy
OSS	Office of the Supervising Scientist
PER	Public Environment Report
RMA	Ranger Mill Alternative
UNESCO	United Nations Educational, Scientific and Cultural Organization
WHC	UNESCO World Heritage Committee

EXECUTIVE SUMMARY

Kakadu National Park is a place of national and international cultural and environmental significance. Kakadu is on the Register of the National Estate and is on the World Heritage List for both its cultural and natural values. Those values are now under threat from the proposed Jabiluka uranium mine, already under construction.

The Alligator Rivers Region has sustained human occupation continuously for at least 50,000 years, and Aboriginal people continue to live there and use the land for practical, cultural and spiritual purposes. The Mirrar-Gundjehmi people are the Traditional Owners of the Jabiluka mine site, the Ranger uranium mine site and the land covered by the town of Jabiru. It is their living culture and deep spiritual interconnection with the land which is endangered by the mine's development.

The *Aboriginal Land Rights (Northern Territory) Act 1976* provides for grants of unalienated land to Aboriginal people in the Northern Territory and for Aboriginal Land Councils to represent the interests of Traditional Owners. It gives Traditional Owners a veto over development on their land, although this can be overridden by 'national interest' provisions. The Jabiluka mine was first approved under a 1982 agreement between Pancontinental Mining and the Northern Land Council (NLC). Serious doubts have been raised about the means by which this agreement was reached.

The beauty and ecological diversity of Kakadu National Park are threatened by contaminated water from the mine site and by the leaching of radioactive mine tailings into the surrounding environment. The visual integrity of the Park is threatened by the mine itself. The assessment of these threats was hasty and inadequate.

A UNESCO World Heritage Committee (WHC) mission visited Australia in October 1998 and presented its report at the 22nd Session of the World Heritage Committee in Kyoto on 29 November 1998. The report stated that the World Heritage values of Kakadu National Park were threatened and made sixteen recommendations to overcome these threats. The World Heritage Committee will decide whether to place Kakadu National Park on the List of World Heritage in Danger at the 3rd Extraordinary Session of the World Heritage Committee in Paris on 12 July 1999.

Environmental Impact Assessment

A primary aim of this inquiry has been to assess the process of environmental impact assessment (EIA) and government decision-making applied to the Jabiluka project. The EIA process should result in the highest level of scrutiny of development proposals and the establishment of failsafe environmental protection measures, and should also yield important data about the affected ecosystem and social structure in order to allow for continuing assessment and monitoring.

Major concerns raised in relation to the project, and which the assessment process was to address include:

- Potential damage to the ecology of the Park from contaminated water from the mine site;
- The disposal of tailings and the leaching of uranium from the tailings into the water system of the Park;
- Threats to the health of workers and the local population from radiation;
- Threats to the cultural heritage of the Aboriginal population, including possible damage to significant art, archaeological and sacred sites; and
- The potential for damaging social impacts on Aboriginal people and culture.

The Committee found serious flaws in the EIA process applied to the Jabiluka project. These related to the quality of the environmental impact statements prepared by Energy Resources of Australia (ERA), their assessment by government agencies, and the level of assessment applied to the consideration of continuing scientific and project uncertainties. The Committee also found serious flaws in the consideration of the social and cultural impacts of the project on Aboriginal communities, and in the protection of the World Heritage values of Kakadu National Park. Most disturbing to the Committee was a consistent pattern of rushed and premature ministerial approvals given to the construction of the mine while outstanding concerns about tailings disposal, radiological protection, project design and cultural heritage protection remained unresolved.

ERA's original proposal was to mine ore at Jabiluka and truck it to Ranger for milling at its existing plant (the Ranger Mill Alternative, or RMA). This proposal was subject to an Environmental Impact Statement. When the Traditional Owners refused to give consent for the construction of a haulage road the company proposed the Jabiluka Mill Alternative (JMA), involving the construction of a mill and associated facilities, and the disposal of mine tailings, at Jabiluka. This was subject to a Public Environment Report.

The Committee believes that the Jabiluka Mill Alternative should have been subject to a full Environmental Impact Statement as a result of its far greater impact on the mine site than the Ranger Mill Alternative, and that the grounds on which a lower level of assessment, a Public Environment Report, was justified were spurious. When inadequacies in that assessment were revealed, the further examination of the relevant issues was subject to an even less rigorous and less public scrutiny, until the report of the World Heritage Committee mission compelled the Government to undertake further studies.

The Committee acknowledges that some aspects of the process have been covered in detail, but significant concerns remain in relation to the totality of the assessment that occurred. The Committee believes that the process has not met the highest standards at every level and at every stage.

While there are advantages in having the proponent prepare the original environmental impact statement, such as demonstrating the environmental competence and intentions of the company, the fact that government has imposed 94 conditions on the project suggests that the environmental impact statements prepared by ERA were inadequate in many crucial areas.

The Committee is particularly concerned that Aboriginal people were given little opportunity to make effective comment on the environmental impact statements prepared by ERA. A plain English version of the EIS was only made available to Aboriginal people a month prior to the close of comments, and no oral or Gundjehmi version was made available. Recent ministerial decisions ensure that there will be no public or Aboriginal input to the assessment of outstanding tailings disposal and radiological protection measures at Jabiluka.

Scientific Concerns About the Jabiluka Project

Scientific concerns about the project have principally arisen in three areas:

- The management and containment of contaminated run-off;
- The management and disposal of radioactive and acidic tailings; and
- The provisions for radiological protection of mine workers and Aboriginal communities.

A group of scientists from the Australian National University (ANU) made a submission to the World Heritage Committee in 1998 questioning the scientific assumptions and containment measures proposed for managing run-off. They argued that inappropriate modelling, which took insufficient account of possible variations in weather patterns, evaporation rates or climate change, meant that the design of water retention ponds was inadequate.

The World Heritage Committee considered these issues of such importance that it asked the Supervising Scientist to prepare a report responding to these concerns. The Supervising Scientist's report supported the analysis of the ANU scientists in the area of evaporation and rainfall, and recommended a number of changes to the site's design in order to improve its safety over the very long term. It is disturbing that these matters were only addressed in response to the international pressures of the UNESCO mission.

The Committee believes that it was inappropriate for the Northern Territory Government to approve construction of the mine before the Commonwealth Minister for the Environment had advised the Minister for Resources and Energy on the outcome of the Public Environment Report, and when a tailings disposal option for Jabiluka had yet to be finalised. The proposed design and technology of tailings disposal at Jabiluka continues to be the subject of considerable scientific uncertainty. Assessment reports and scientific consultants have expressed serious concern about ERA's preferred option of putting half the tailings in the mined-out voids underground, and the remaining half in two purpose-built pits on the surface. While

ERA can resubmit this proposal to the Government for approval, it will not be subject to any higher level assessment or public examination.

It is of particular concern to the Committee that the Commonwealth Government approved the mine on the basis that 100 per cent of the tailings would be placed underground, despite the company having released no details or scientific examination of this option, and despite its clear preference for the less costly and technologically simpler option. It remains uncertain whether ERA will proceed with the Minister's recommended option or continue to press for the 50-50 option.

Serious uncertainties remain about the level of radiological protection at the mine. Possible levels of radiation both within the mine workings and outside the mine area remain unclear, and could be close to international limits. This could pose serious dangers to mine workers and prevent Aboriginal people from using parts of their land in the mine vicinity. This will exacerbate the already negative cultural impacts of the mine proposal.

Social and Cultural Impacts

The Committee believes that the EIA process has been inadequate in addressing the potentially grave social and cultural impacts of the Jabiluka project on the Aboriginal community in the region. In fact, company and government actions have exacerbated these problems.

The company has continued mine construction and blasting in the face of the very serious concerns of the Mirrar people about the impact of these works on the Boiwek-Almudj sacred site complex, and thus on the survival of their living culture. In its attempts to discredit the Mirrar's concerns about the site the Australian Government has shown a disrespect for Aboriginal culture and a reluctance to take seriously the deeply held beliefs of the Traditional Owners of the area. Evidence provided to the Committee of serious anthropological work, undertaken over a period of twenty years by pre-eminent experts in the field, conclusively refutes government claims, and yet despite a condition of the mine's operation being the completion of a cultural heritage management plan *before* project construction began, the Government has taken no action against the company.

The Committee found that the mine could have serious social impacts on Aboriginal people and culture, arising from their marginalisation amidst a larger non-Aboriginal population, the pressure of meetings and administration, and adverse effects on food gathering and the transmission of culture. Most profound was the demoralisation caused by the refusal to acknowledge the rights of traditional Aboriginal people over land, which has been unfairly alienated in the cases of the Ranger and Jabiluka mines and the town of Jabiru.

There has been no dedicated social impact study of the Jabiluka project. The Kakadu Region Social Impact Study was specifically prevented from examining the impacts of mining, and its recommendations are still to be implemented, nearly two years after its findings were made public.

Government Decision-Making, Regulation and Enforcement

Of most concern to the Committee has been the pattern of rushed and premature ministerial approvals given to the construction of the mine before outstanding scientific, social and cultural concerns about the mine were resolved. The Committee is also concerned about the inappropriate levels of assessment given to those outstanding issues.

In particular, the Committee believes that the approval for mine construction issued in June 1998 was premature, given that the assessment of the Jabiluka Mill Alternative had not been completed. The level of assessment applied to the JMA was also inappropriate, given that it would have a far greater impact on the site and on the surrounding World Heritage area and Aboriginal population than the Ranger Mill alternative. The approval of the Jabiluka Mill Alternative in August 1998, immediately prior to the calling of the Federal Election, was also premature given that no assessment had been made of the approved tailings option.

This incremental pattern of approvals has placed further pressure on Traditional Owners to support the project, and created an appearance that the EIA process has become politicised. The Committee also believes that departmental assessments of both the EIS and the PER indicated strong grounds for caution in issuing approvals before outstanding concerns had been dealt with.

The Committee is also concerned that the enforcement and regulatory regime which will apply to the mine is inadequate. Day-to-day regulation of the mine rests with the Northern Territory Department of Mines and Energy, which has a demonstrably poor record of environmental regulation. Commonwealth powers are limited to ministerial discretion in the issuance of export licences well after mine construction and operation has begun. The Commonwealth has avoided creating stronger regulatory mechanisms, such as the incorporation of environmental requirements into a Deed with ERA.

The Committee is concerned that in lobbying for Government policy positions before the World Heritage Committee and in other forums, the independence of the Office of the Supervising Scientist may have been compromised. It is also concerned that the complete withdrawal of its presence from Jabiru will further limit its effectiveness in monitoring uranium mining in the Alligator Rivers Region. The Committee believes that its statutory independence from Government, and its role in environmental enforcement, should be clarified and strengthened.

The Need for a Public Inquiry

The Committee believes that the manifest flaws in the process of environmental impact assessment of the Jabiluka project, and the sensitivity of its location in the midst of Aboriginal land and a World Heritage area, require further examination by a public inquiry established under Section 11 of the *Environmental Protection (Impact of Proposals Act) 1974* (or under the equivalent provision of the Environment Protection and Biodiversity Conservation Bill, when proclaimed).

The Rights of Traditional Owners

Considerable dispute and bitterness has arisen over the rights of the Traditional Owners in relation to the Jabiluka project. The Traditional Owners of the Jabiluka area, the Mirrar-Gundjehmi clan, are vehemently opposed to mining on their land and have undertaken extensive lobbying, legal and protest action in an effort to stop the Jabiluka project.

Energy Resources of Australia and the Australian Government contend that the Traditional Owners have legally consented to the project, under the terms of an agreement negotiated between the Northern Land Council and Pancontinental Mining in 1982. One of the signatories to that agreement was a Mirrar elder and former Senior Traditional Owner.

The Committee believes that the 1982 Jabiluka Agreement was negotiated under questionable circumstances. The Traditional Owners presented the Committee with extensive and persuasive evidence, taken from relevant documents and the records and minutes of meetings, which suggests that the circumstances surrounding the Agreement were deeply unfair and that the Northern Land Council failed in its duty under Section 23 of the *Aboriginal Land Rights (Northern Territory) Act 1976* to fully inform, consult and act on the instructions of Traditional Owners.

In defence of the Agreement, the Australian Government asserts that it has never been legally challenged, and the Northern Land Council also maintains that the 1982 negotiations were fair. The Committee was told, however, that even if it were proven that the NLC *had* failed in its duty to Traditional Owners, discriminatory provisions in the Land Rights Act would mean that the Agreement would still stand. Similarly, the laws of equity would protect ERA from legal action. For these reasons the Mirrar have never undertaken legal action against the Agreement.

The Committee believes that there is a *prima facie* case for a review of the 1982 Jabiluka Agreement. It also supports the views of many witnesses, including the Northern Land Council, that a new agreement should have been sought with Traditional Owners in 1996 because of the lapse in time and the dramatic changes to the nature and scope of the project proposal. The Committee points to an inconsistency between the requirement that a new environmental impact assessment be undertaken without a corresponding consultation of Traditional Owners.

These issues were brought into stark relief by the recommendation of the 1998 World Heritage Committee mission to Australia that the 1982 Agreement be reviewed. In response, ERA and the Australian Government have argued that to review the agreement would bring uncertainty into contracts negotiated with Aboriginal people, jeopardise the credibility of land rights law, unjustly privilege one set of acquired property rights over another, and bring the very foundations of contract law into question.

While acknowledging the principles of contract law and the need for certainty in dealings with Aboriginal people, the Committee rejects these arguments. It points out

that the 'acquired rights' of Aboriginal people derive from an ancient and irrefutable interconnection with the land, a fact which is only imperfectly recognised in Australian law. The provisions of the Land Rights Act, in which Traditional Owners are not parties to contracts negotiated on their behalf, already create scope for those rights to be unfairly alienated within contracts which may otherwise be technically legal.

Further, the Committee is of the view that it is other discriminatory provisions of the Land Rights Act, such as the 'national interest' clause, not demands to review the 1982 Agreement, which undermine both the credibility of the Act and of agreements reached with Aboriginal people under that Act. The Committee believes that it is the very framework under which those agreements are reached which undermines the principles the Australian Government claims would be damaged by a review of the 1982 Agreement. Certainty cannot be guaranteed without fairness.

The Committee believes that the Land Rights Act should be reformed to ensure that traditional Owners are fully consulted and informed about developments on their land, that their views are allowed to prevail, and that their agreement to significant changes in scope is also required. The 'national interest' provisions of the Act should be removed, and consideration should also be given to deeper reform which makes contracts accord more closely with traditional law and authority.

The Committee believes that it is crucial that the linkages between the continuing dispossession of Aboriginal people, as represented by the 1982 Agreement and its aftermath, and their deep social distress and demoralisation, be understood. Aboriginal people see their basic rights in relation to land, the protection of sacred cultural heritage, and the survival of their living culture, as parts of a seamless continuum. By disregarding these rights, and this interconnection, the Jabiluka process has placed the survival of the Mirrar's culture and tradition, and perhaps of the Mirrar themselves, in grave danger. The Committee believes that until the fundamental human and cultural rights of Aboriginal people are recognised, in law, in administrative structures and in the Jabiluka process, there will not be any fundamental change.

The Committee believes that the Government has demonstrated a fundamental reluctance to address complex and difficult issues in relation to the rights of Traditional Owners. It is precisely because they are complex and difficult that these issues must be addressed if there is to be any hope of a long-term solution to the problems of the region, which are closely related to, but extend well beyond, the issue of a particular mine.

World Heritage Issues

The issues associated with the Jabiluka uranium mine project were brought into sharp focus by the World Heritage Committee mission in October 1998. The mission's report included sixteen recommendations to the Commonwealth Government, the most important of which stated that the proposal to mine and mill uranium at Jabiluka should not proceed. Although the World Heritage Committee cannot enforce its

recommendations, it may choose to draw international attention to the issue by placing Kakadu National Park on the List of World Heritage in Danger. An extraordinary meeting of the WHC, to be held in Paris on 12 July 1999, will determine whether that is necessary.

The Committee agrees with the WHC that the Jabiluka uranium mine poses a serious threat to the natural and cultural World Heritage values of Kakadu National Park and urges the WHC to place the Park on the List of World Heritage in Danger at its extraordinary meeting. Such a listing, the Committee believes, would send a powerful message to the Commonwealth Government that its current support for the Jabiluka uranium mine is harming the natural and cultural values of Kakadu National Park, and that only a decision to halt the mine would ensure that the World Heritage values of the Park can be safeguarded.

The measure of Kakadu National Park's World Heritage standing is immediately apparent from the five criteria that it currently satisfies for World Heritage listing. In addition, the Committee believes that there is a very strong case for renominating Kakadu National Park to reflect more properly recent modifications to World Heritage criteria. The World Heritage Committee's cultural criteria have changed to reflect the importance of 'living tradition', and the concept of 'cultural landscape' has also been included. The Committee believes that Kakadu National Park satisfies these revised criteria. It believes that renomination of the Park is appropriate and that the Jabiluka mine represents a proven danger to the World Heritage values that the Park embodies.

In its response to the WHC mission's report, the Commonwealth Government argued that it had stringently met its World Heritage obligations in relation to Kakadu National Park and that the processes it had established in relation to the Jabiluka mineral lease ensure that the values and attributes of the Park have been protected. The Committee does not share that view. On the contrary, it found that the majority of submissions and evidence presented to it supported the opposite view: that because of its continuing support for uranium mining at Jabiluka the Government had failed to meet Australia's World Heritage obligations in relation to the protection of Kakadu National Park.

The Government has failed to meet these obligations in relation to the natural values of Kakadu National Park by continuing to assert that mining in the midst of a World Heritage area was acceptable. The Committee rejects that view and believes that questionable standards of assessment and protection were applied to a mine in a very sensitive World Heritage area, failing to take into account the high value placed by the international community on a World Heritage property of such significance. The effects of the mine on areas downstream of the Jabiluka project have yet to be properly assessed in a Kakadu-wide context.

The Government has also failed to meet its obligations in relation to the cultural values of the Park by unduly neglecting these values in the Jabiluka mineral lease area. The Committee accepts the evidence of relevant experts that Jabiluka is set in a major and intermeshed cultural landscape which is continuous with the areas outside

its arbitrary base boundaries and is adjacent to several dreaming places. The Committee notes that there is a strong possibility that there are indigenous sites of significance in the Jabiluka mineral lease areas which have not yet been recorded or detected.

The Committee believes that the Commonwealth Government has repeatedly dismissed the views of the Traditional Owners in relation to the significance of the cultural values of the Jabiluka mineral lease, and diminished the rights and interests which are an integral part of Mirrar law and custom. The Committee also believes that the Commonwealth Government has failed to meet its World Heritage obligations by failing to understand and dismissing the nature of living tradition associated with World Heritage cultural values. Both the EIS and PER approvals processes for the Jabiluka uranium mine failed to address adequately the issues related to living tradition. Of particular concern to the Committee was the Commonwealth Government's failure to consult the Traditional Owners or to make a genuine attempt to understand their concerns in relation to cultural values.

It is clear from evidence provided to the Committee that the three mining leases inside the boundaries of Kakadu National Park - Ranger, Jabiluka and Koongarra – despite being legally excised enclaves, are an integral part of the natural and cultural heritage of the Park. Such boundaries, the Committee believes, are artificially imposed on a landscape, or 'country', with links that cannot be separated and which are socially, culturally and ecologically integrated.

The Committee examined the responses of the Commonwealth Government to the WHC mission's recommendations and found many of these to be at best inadequate and at worst misleading and deceptive. The Committee believes that these responses will fail to satisfy the mission's concerns.

The Committee disputes the Commonwealth Government's response to the WHC's recommendations dealing with the visual encroachment of the integrity of Kakadu National Park through both uranium mining and the expansion of the town of Jabiru. In relation to the former, the excision of the Jabiluka and Ranger areas from the Park to facilitate mining at those areas is a highly artificial action and has a deep visual impact on the Park. In relation to the latter, the Committee took note of documentary evidence presented by the Mirrar people that the Northern Territory Government and ERA plan to expand considerably the size and type of development in Jabiru.

In relation to the Commonwealth Government's response to several WHC recommendations dealing with threats to cultural values, the Committee once again believes that the Government has failed to satisfy the mission's concerns. The Committee is highly critical of the continuing absence of a cultural heritage management plan, and places the blame for this squarely at the feet of the Government. The Government and ERA have also failed to conduct the necessary exhaustive cultural mapping of the Jabiluka mineral lease and the Boiwek site and its boundaries. The current audit of cultural mapping on the Jabiluka lease area is shallow and has led to simplistic and misleading conclusions.

Despite the WHC mission's call for the immediate and effective implementation of the Kakadu Regional Social Impact Study (KRSIS) recommendations, the Committee noted from witnesses that as yet no proposal detailing how and when the KRSIS recommendations might be implemented has yet been submitted by the Government to the Northern Land Council. Finally, despite its clear statement that there has not been a general breakdown in communication and trust between Aboriginal people and the Government in relation to the Jabiluka project, the Committee heard that a very severe breakdown has indeed occurred. This breakdown is so severe that the Traditional Owners of the Jabiluka area, the Mirrar people, have claimed that the Australian Government is presiding over the potential destruction of an entire clan.

Contrary to the Commonwealth Government's view that Kakadu National Park should not be placed on the WHC's List of World Heritage in Danger, the Committee believes that such a listing may be the only way of changing the Government's present support for mining at Jabiluka. It therefore strongly supports such a listing.

CONCLUSION

The Committee believes that the Jabiluka uranium mine poses a grave threat to the natural and cultural heritage values of Kakadu National Park. The Traditional Aboriginal Owners see the land, their sacred heritage and their living culture as one. The continued development of the mine is dangerous, threatening the very survival of a culture that has existed in Kakadu for 50,000 years. The mine should not be allowed to proceed.

The Jabiluka Uranium Mine Project - Chronology

	1970	Uranium discovered at Ranger
	1971	Pancontinental discovered Jabiluka uranium deposit and made an application to mine
	1975	Ranger Uranium Environmental Inquiry (Fox Inquiry) established
	1976	<i>Aboriginal Land Rights (Northern Territory) Act 1976</i> (Cth)
	1978	Ranger Agreement between mining consortium and the Northern Land Council (on behalf of traditional owners)
	1979	Stage I of Kakadu National Park proclaimed
	1979	Construction at Ranger begun
	1979	EIS submitted for development of Jabiluka mine by Pancontinental
	1981	World Heritage listing of Stage I of Kakadu National Park
	1981	Operations began at Ranger
July	1982	Agreement on mining at Jabiluka between Pancontinental and the Northern Land Council (on behalf of traditional owners)
August	1982	Jabiluka mineral lease granted by the NT Government
	1983	Election of ALP Government – ‘three mines policy’ halted further development
	1984	Stage II of Kakadu National Park proclaimed
	1987	World Heritage listing of Stage II; Stage III (Phase 1) proclaimed
	1989	Stage III (Phase 2) proclaimed
	1991	Stage III (Phase 3) proclaimed
	1991	Jabiluka Lease transferred to ERA with the agreement of the Northern Land Council, on condition that the milling of Jabiluka ore at Ranger would require further consent from the traditional owners
	1992	World Heritage listing of renominated Kakadu National Park
March	1996	Election of Coalition Government
	1996	ERA proposal for underground mine at Jabiluka and milling at Ranger
October	1996	IUCN resolution opposing the development of Jabiluka if World Heritage values were shown to be threatened
June	1997	EIS for the Ranger Mill Alternative (RMA) forwarded to NT and Commonwealth Environment Ministers
August	1997	Cth Environment Minister forwarded the RMA EIS to the Minister for Resources and Energy, recommending 77 environmental conditions
October	1997	Minister for Resources and Energy approved the RMA subject to requirements based on the Environment Minister’s recommendations
June	1998	Public Environment Report on Jabiluka Mill Alternative (JMA) with 50-50 option for disposal of tailings underground and in surface pits
June	1998	NT Government authorised construction of common elements of the RMA and JMA proposals; construction work began
August	1998	Minister for the Environment reported to the Minister for Resources and Energy on the JMA Public Environment Report
August	1998	Minister for Resources and Energy gave ERA conditional approval for the JMA, with 100 per cent underground disposal of tailings
September	1998	Blasting and excavation of the decline (tunnel) began
October	1998	Federal Election; World Heritage Committee mission to Australia
December	1998	Report of the World Heritage Committee mission
April	1999	Australian Government’s response to the World Heritage Committee

RECOMMENDATIONS

Recommendation 1

The Committee recommends that the environmental impact assessment process be reformed to ensure that consideration is given, both in impact statements and subsequently, to *whether* a project should proceed.

Recommendation 2

The Committee recommends that all relevant MOUs between State and Commonwealth Government agencies regarding environmental impact assessment be made public.

Recommendation 3

The Committee recommends that all further construction of the Jabiluka mine be suspended until cultural mapping of the site area can be conducted in cooperation with the Traditional Owners and recognised custodians of the Jabiluka area.

Recommendation 4

The Committee recommends that the issues of Aboriginal people's access to, and perception of, country as a result of development projects, be addressed in a holistic process which links environmental impact assessment with questions of Aboriginal land rights, sovereignty and cultural survival.

Recommendation 5

The Committee recommends that a new inquiry be conducted to assess the specific social and cultural impacts of the Jabiluka project on the Aboriginal communities of the Alligator Rivers Region. The Committee also recommends that the social and cultural impacts of mining be given greater attention in ministerial decision-making.

Recommendation 6

The Committee recommends that powers of day-to-day regulation of uranium mining in the Alligator Rivers Region be removed from the Northern Territory Department of Mining and Energy and restored to the Office of the Supervising Scientist.

Recommendation 7

The Committee recommends that the Office of the Supervising Scientist be removed from the corporate structure of the Department of Environment and Heritage and reconstituted as an independent regulatory authority of uranium mining in the Alligator Rivers Region. It should retain a carefully defined capacity to receive references from, and provide advice to, the Environment Minister and make recommendations. The funding of the Office of the Supervising Scientist should be increased so that it is able to conduct its own monitoring and research.

Recommendation 8

The Committee recommends that should the project proceed, further assessment of Jabiluka tailings management, waste rock disposal, run-off containment and radiological protection measures be subject to a public process at the level at least of a Public Environment Report, and that such revised proposals be subject to peer review by scientists.

Recommendation 9

The Committee recommends that in the event that the Jabiluka project proceeds, the enforcement regime should be strengthened by the implementation of a deed between ERA and the Commonwealth incorporating all the conditions put forward by the Commonwealth to this date, along with those recommended by the Supervising Scientist following further assessments. These conditions should also be made the explicit conditions of the issue of export licences by the Commonwealth.

Recommendation 10

The Committee recommends that in view of the inadequate level of assessment applied to the Jabiluka proposals and the premature decision-making of the Action Minister, the Minister for Environment and Heritage establish a Commission of Inquiry into the Jabiluka project under Section 11 of the *Environmental Protection (Impact of Proposals Act) 1974* (or under the equivalent provision of the Environment Protection and Biodiversity Conservation Bill, when proclaimed).

Recommendation 11

The Committee believes that the circumstances surrounding the negotiation of the 1982 Jabiluka Agreement, the changes made to the proposal following its original negotiation, and the clear opposition of the Traditional Owners to the project were extraordinary and unfair. The Committee therefore recommends that ERA seek a new mining agreement from the Northern Land Council and the Mirrar-Gundjehmi under Section 46 of the *Aboriginal Land Rights (Northern Territory) Act 1976* before further construction or operation of the Jabiluka mine occurs.

Recommendation 12

The Committee recommends that consideration be given to repealing Section 48D(3) of the *Aboriginal Land Rights (Northern Territory) Act 1976*.

Recommendation 13

The Committee recommends that Section 40(b) of the *Aboriginal Land Rights (Northern Territory) Act 1976* be repealed.

Recommendation 14

The Committee recommends that consideration should be given to further reform of the *Aboriginal Land Rights (Northern Territory) Act 1976* in order to ensure that the rights of Traditional Owners are protected during negotiations, and to ensure that their agreement to substantial changes in scope be required.

Recommendation 15

The Committee recommends that in view of the inadequate recognition of Aboriginal rights in Australian law, the Australian Government recognise the fundamental human and cultural rights of Aboriginal people in all laws applying to their lands and cultures.

Recommendation 16

The Committee recommends that the Government seek a new inscription for Kakadu National Park to enable the listing to reflect the living traditions and cultural landscape of the Park more accurately.

Recommendation 17

The Committee recommends that the Government ensure that the future expansion of Jabiru takes place in accordance with the Kakadu Plan of Management and the full endorsement of the Kakadu Board of Management.

Recommendation 18

The Committee recommends that the Government develop a broader, more appropriate and more effective participatory approach to the development of a cultural heritage management plan with Aboriginal stakeholders.

Recommendation 19

The Committee recommends that the Government take appropriate steps immediately to implement the recommendations of the UNESCO World Heritage Committee's report on Kakadu National Park. The Committee does not believe that the Commonwealth Government has adequately addressed the major findings and recommendations in that report.

Recommendation 20

The Committee recommends that the UNESCO World Heritage Committee place Kakadu National Park on its List of World Heritage in Danger.

Recommendation 21

The Committee recommends that the UNESCO World Heritage Committee proceed to place Kakadu National Park on its List of World Heritage in Danger without State Party consent.

Recommendation 22

The Committee recommends that the Government note the damage to Australia's reputation in relation to the human rights of indigenous peoples as a result of its lack of respect for the legitimate participation of indigenous people in issues affecting their daily lives and living culture.

Recommendation 23

The Committee recommends that the Government examine the possible impact on the Australian tourism industry of an In Danger listing of Kakadu National Park.

Recommendation 24

The Committee recommends that the Jabiluka uranium mine should not proceed because it is irreconcilable with the outstanding natural and cultural values of Kakadu National Park. Every effort must be made to ensure that these values are protected.

CHAPTER 1

INTRODUCTION

Reference to the Committee

1.1 On 27 April 1999, the Senate referred the Jabiluka uranium mine project to the Committee for inquiry and report by 30 May 1999. (The full terms of reference are set out at the beginning of this report.) The reporting date was subsequently extended to 30 June 1999.

Conduct of the Inquiry

1.2 The Committee advertised the inquiry in *The Weekend Australian* and the *Northern Territory News* on 1 May 1999, with a nominated closing date for submissions of 21 May 1999. The Committee wrote to the Department of the Environment and Heritage and to a number of organisations, seeking written submissions. The Committee received 373 submissions, of which 320 were in the form of a standard letter. All submissions are listed in Appendix 1. Copies of non-confidential submissions were made available on request. A number of those making submissions also provided the Committee with copies of their submissions to the Jabiluka environmental assessment process and the World Heritage Committee.

1.3 The Committee held public hearings in Canberra on 11 June 1999 and in Darwin on 16 June 1999. The Committee also inspected the Jabiluka mine site on 15 June 1999. A list of witnesses who gave evidence to the Committee at public hearings, and the dates on which they were heard, is set out in Appendix 1.

Acknowledgments

1.4 The Committee wishes to thank all those who contributed to the inquiry by preparing written submissions, by giving oral evidence, by providing additional information and material where requested or by assisting with arrangements for public hearings and inspections.

CHAPTER 2

BACKGROUND¹

Introduction

2.1 At the twenty-first and twenty-second sessions of the UNESCO World Heritage Committee (WHC) and its Bureau, in 1997 and 1998, reports were received from the World Conservation Union (IUCN) concerning the state of conservation of the Kakadu National Park World Heritage area. These reports noted potential threats to the natural and cultural values of the Park resulting from the proposal to commence construction of a uranium mine on the Jabiluka mineral lease ‘within an enclave of the World Heritage property’.²

2.2 In October 1996, IUCN’s World Conservation Congress passed a resolution to oppose the development of the Jabiluka and Koongarra uranium mines if it should be shown that such mining would threaten Kakadu’s World Heritage values. This resolution and a statement from IUCN were presented to the Bureau at its twenty-second session in June 1998.

2.3 In 1997 and 1998, the Commonwealth Government provided reports to the WHC and the Bureau to demonstrate its commitment to the conservation of the World Heritage values of Kakadu National Park. These reports detailed the assessment and approvals process involving the Commonwealth and Northern Territory Governments which allowed the development of the Jabiluka uranium mine to proceed. They also outlined the assessment process being conducted to determine the milling and tailings management options for the Jabiluka mine.

2.4 The WHC considered the technical data and information concerning the Jabiluka proposal and its environmental and cultural impacts voluminous and complex. Additionally, ‘different stakeholders [held] diverse and often contradictory views on the potential impacts which the mining proposal would have on the World Heritage Values of Kakadu National Park’.³ For these reasons the Bureau of the World Heritage Committee at its twenty-second session requested the Chairperson of the Committee to lead a mission to Australia and Kakadu National Park.

1 Information in this chapter has been drawn from a variety of sources, including material published by the UNESCO World Heritage Committee, Environment Australia, the NT Department of Lands, Planning and Environment and the Kakadu Board of Management. A list of general references is included as Appendix 3 to this report.

2 UNESCO World Heritage Committee, *Report on the mission to Kakadu National Park, Australia, 26 October to 1 November 1998*, p 1:
<http://www.biodiversity.environment.gov.au/kakadu/pdfs/inf18e.pdf>

3 UNESCO World Heritage Committee, *Report on the mission to Kakadu National Park, Australia, 26 October to 1 November 1998*, p 1.

2.5 The mission was originally scheduled for 4 to 10 October 1998 but was postponed at the request of the Commonwealth Minister for the Environment and Heritage. It subsequently took place from 26 October to 1 November 1998.

2.6 The mission team consisted of Professor Francesco Francioni (Chairperson, World Heritage Committee), Dr Bernd von Droste (Director, UNESCO World Heritage Centre), Dr Patrick Dugan (IUCN), Dr Patricia Parker (International Council on Monuments and Sites – ICOMOS), Dr John Cook (US National Park Service) and two Australian nationals, Professor Jon Altman and Dr Roy Green.

2.7 During their stay in Australia, the mission team visited Kakadu National Park, including the Jabiluka and Ranger mine sites, Darwin and Canberra. They met, and heard the views of, the Commonwealth Government; the Government of the Northern Territory; representatives of affected Aboriginal people, including the Traditional Owners of the Jabiluka mineral lease area, the Mirrar-Gundjehmi people; Australian non-Government organisations and other relevant national and local groups representing academia, the mining industry and others.

2.8 Prior to the mission, the WHC received a number of additional submissions from a variety of interested parties, including conservation groups, Aboriginal groups and others. Those opposed to the uranium mine on the Jabiluka mineral lease requested that the WHC place Kakadu National Park on the List of World Heritage in Danger in order to send the strongest possible message to the Australian Government that the mining of uranium at Jabiluka threatened the natural and cultural values of the Park:

[We] ... ask you to place the World Heritage listed Kakadu National Park on the list of 'World Heritage in Danger', on account of plans to proceed with a large uranium development at Jabiluka.⁴

2.9 Following its mission to Kakadu National Park, the WHC concluded that as a result of mining activities on the Jabiluka mineral lease, 'Kakadu National Park is exposed to a number of serious threats which are placing it under both ascertained and potential danger'.⁵ It made sixteen recommendations in its report on the mission, presented at the twenty-second session of the WHC at Kyoto, Japan between 30 November and 5 December 1998, including 'that the proposal to mine and mill uranium at Jabiluka should not proceed'.⁶

4 Friends of the Earth, Environment Centre of the Northern Territory and The Wilderness Society, Letter to WHC Chairperson, Teresa Franco, 1997, p 1, quoted in: Environment Centre of the Northern Territory, Submission 38, p 8.

5 UNESCO World Heritage Committee, *Report on the mission to Kakadu National Park, Australia, 26 October to 1 November 1998*, p v.

6 UNESCO World Heritage Committee, *Report on the mission to Kakadu National Park, Australia, 26 October to 1 November 1998*, Recommendation 1, p v.

2.10 Of the seven members of the Mission, the two Government-appointed Australian members did not endorse four of the recommendations in the report and had reservations about a further three recommendations.

2.11 The World Heritage Committee requested Australian authorities to provide, by 15 April 1999, a report on their efforts to prevent further damage and to mitigate all the threats identified in the UNESCO mission report. The Australian Government's response to the mission's findings are contained in two documents: *Australia's Kakadu: Protecting World Heritage*, Response by the Government of Australia to the UNESCO World Heritage Committee Regarding Kakadu National Park; and the Supervising Scientist's *Assessment of the Jabiluka Project: Report of the Supervising Scientist to the World Heritage Committee*. These were submitted to the WHC in April 1999.

2.12 Other interested parties in Australia, and the WHC's own advisory bodies, the IUCN, ICOMOS and the International Council for Science (ICSU), have subsequently commented on the documents provided to the WHC by the Commonwealth Government. The World Heritage Committee will consider the issues and make a decision on whether to place Kakadu National Park on the List of World Heritage in Danger at its 3rd Extraordinary Session in Paris on 12 July 1999.⁷ This issue is discussed further in Chapter 6, below.

Kakadu National Park

2.13 Kakadu National Park is a place of national and international cultural and environmental significance. Located in the Alligator Rivers Region of the Northern Territory, east of Darwin, it covers an area of 19,804 square kilometres. It extends from coastal areas in the north to hills and basins in the south, and from the western rim of the Arnhem Land plateau and escarpment complex in the east to wooded savannas and rivers in the west.

2.14 Major landforms and habitats within the Park include the sandstone plateau and escarpment, extensive areas of savanna woodlands and open forest, rivers, billabongs, floodplains, mangroves and mudflats. The sandstone escarpment and plateau have shallow, strongly leached infertile soils, while the coastal riverine plains and the lowlands have acidic soils which support extensive wetlands.

2.15 The Park is renowned for its biodiversity; it has the widest range of habitats and the greatest number of species of any similar-sized area in monsoonal north Australia. It is representative of ecosystems across northern Australia but also contains unique and threatened areas and species.

7 UNESCO World Heritage Committee, *Report on the mission to Kakadu National Park, Australia, 26 October to 1 November 1998*.

2.16 Approximately 1,700 species of plants have been recorded in Kakadu, many of which are unique to the region. More than a third of Australia's migratory bird species are found in Kakadu: two and a half million birds flock in the wetlands of the Magela and Nourlangie floodplains alone. There are over sixty mammal species and a wide range of reptile, fish and insect species.

2.17 Kakadu is on the Register of the National Estate and is listed on the World Heritage List for both its cultural and natural values. Its wetlands are recognised under the Convention on Wetlands of International Importance (the Ramsar convention). Other international treaties for the protection of wildlife and habitats relevant to the management of Kakadu include:

- The agreement between the Government of Australia and the Government of Japan for the protection of Migratory Birds and Birds in Danger of Extinction and their Environment (JAMBA). Forty six of the 76 birds listed under this agreement occur in the Park;
- The agreement between the Government of Australia and the Government of the People's Republic of China for the protection of Migratory Birds and Birds in Danger of Extinction and their Environment (CAMBA). Fifty of the 81 birds listed under this agreement occur in the Park; and
- The Convention on the Conservation of Migratory Species of Wild Animals (Bonn Convention). Twenty-one of the species listed under this convention are found in the Park.

2.18 Kakadu was declared a national park under the *National Parks and Wildlife Conservation Act 1975* in three stages, from 1979 to 1987. Supplementary proclamations were added in 1989 and 1991. The areas covered by the Koongarra, Ranger and Jabiluka mineral leases are not part of Kakadu National Park. They are geographically surrounded by the Park but have been excised from the Park since its inception and thus from the World Heritage Area.

2.19 The Ranger and Jabiluka leases, located in the north-east area of the Park, together comprise 152 square kilometres. The Jabiluka mineral lease contains areas of the Magela wetlands, sandy plains and escarpment outliers of the Arnhem Land plateau. The uranium ore body is located beneath an outlier of Kombolgie sandstone. The lease area is no different from the surrounding country in terms of landforms and vegetation; it is an integral part of the landscape rather than being something distinct simply because it overlies a body of uranium ore.

2.20 Approximately fifty per cent of Kakadu National Park is owned by Aboriginal people who live there and continue to use the land for practical and spiritual purposes. Title in the Aboriginal land is held by Aboriginal land trusts. These trusts have leased the land to the Director of National Parks and Wildlife. The Park is jointly managed by the Aboriginal Traditional Owners and the Director of the National Parks and Wildlife Service.

2.21 The township of Jabiru, within the Park, was established in 1981 to house people associated with uranium mining in the region. It has also become an important tourist centre. An upper limit of 3,500 was placed on its population and in June 1998 it was populated by 1,480 people.

2.22 Major pieces of Commonwealth legislation which influence the management of Kakadu National Park and the mineral leases include the *National Parks and Wildlife Conservation Act 1975*, under which the Park was established and which provides for joint management with the Traditional Owners, and the *Aboriginal Land Rights (Northern Territory) Act 1976*. The *Environment Protection (Alligator Rivers Region) Act 1978* provides for the appointment of a Supervising Scientist to monitor the environmental effects of mining operations in the region.

2.23 Projects likely to have significant environmental impacts are subject to assessment under the *Environment Protection (Impact of Proposals) Act 1974*.⁸ This Act specifies the environmental impact evaluation processes which are required for major projects to proceed. The Jabiluka proposal has also been subject to Northern Territory impact assessment under the *Environmental Assessment Act 1982* (NT).

2.24 Other relevant Commonwealth environment and heritage legislation includes the *Australian Heritage Commission Act 1975*, the *World Heritage Properties Conservation Act 1983* and the *Endangered Species Protection Act 1992*.

Kakadu and World Heritage

2.25 Kakadu National Park was inscribed on the World Heritage List, for both its natural and cultural values, in three stages: 6,144 square kilometres of Stage I in 1981, a further 6,929 square kilometres of Stage II in 1987, and Stage III in 1992, which brought the total area to 19,804 square kilometres.

2.26 The Stage I and II nominations were inscribed on the basis of cultural heritage criterion (iii), for outstanding art and archaeological sites; and natural heritage criteria (ii), (iii) and (iv), for a wide range of ecosystems of high integrity, habitats and species, scenic values and scientific research and educational values.⁹ The Stage III nomination was made on the basis of cultural heritage criteria (i) and (vi) and natural heritage criterion (ii), (iii) and (iv). (See Chapter 6, below.)

Aboriginal History

2.27 Archaeological records indicate that the Alligator Rivers Region has sustained human occupation continuously for at least 50,000 years, from the earliest date that humans are thought to have arrived in Australia.

8 On 23 June 1999 the Environment Protection and Biodiversity Bill 1998 was passed by the Senate. It contains provisions for environmental assessment and when proclaimed will supersede the EPIP Act.

9 UNESCO World Heritage Committee, *Report on the mission to Kakadu National Park, Australia, 26 October to 1 November 1998*.

2.28 Kakadu National Park contains some of the oldest and best preserved archaeological sites in Australia, including extensive galleries of rock art. There are numerous outstanding art and archaeological sites with a high concentration of sites along the Arnhem Land escarpment. There are also many sacred sites of great religious significance to the Aboriginal people.

2.29 More than two hundred Aboriginal sites, relating to habitation and shelter, art, religion and burial have been identified within the Jabiluka lease area.¹⁰ Malakunanga II, possibly one of the earliest sites of human occupation in Australia, providing some of the world's oldest evidence for the use of grindstones for food preparation, edge-ground axes and the preparation of pigments, is located in the Jabiluka mineral lease area, approximately two kilometres from the mine site.

2.30 It is estimated that the Aboriginal population of the Kakadu area when Europeans first came to the area was approximately 2,000, which subsequently declined to approximately 140 in 1979 as a result of disease and social dislocation. Following the creation of the Kakadu National Park this increased to 533 Aboriginal people living in the Park in 1996. There are ten or more permanent Aboriginal living areas in the Park.

2.31 There are currently sixteen clans of Traditional Owners of Kakadu. Three groups which have a direct interest in land decisions and management of Jabiluka are the Gagudju Association, the Djabulukgu Association and the Gundjehmi Aboriginal Corporation. The Mirrar-Gundjehmi people are the Traditional Owners of the Jabiluka mine site, the Ranger uranium mine site and the land covered by the town of Jabiru.

Aboriginal Land Rights

2.32 In 1973 the Commonwealth Government established a Commission of Inquiry, headed by Mr Justice Woodward, to consider appropriate ways and means to establish Aboriginal land rights in the Northern Territory. The Commission considered how to recognise Aboriginal land interests while providing for conservation management of the land.

2.33 Following Justice Woodward's second report, delivered on 3 May 1974, the *Aboriginal Land Rights (Northern Territory) Act 1976* (the Land Rights Act) was passed. The Act provided for grants of unalienated land to Aboriginal people in the Northern Territory and established Aboriginal Land Councils to represent the interests of Traditional Owners. It also gave Traditional Owners a veto over development on their land, although this could be overridden by 'national interest' provisions.

2.34 The Ranger Uranium Environmental Inquiry (the Fox Inquiry) was established in July 1975 to inquire into the environmental consequences of mining uranium in the Alligator Rivers Region. Most of the recommendations of the inquiry were accepted

10 Environment Australia, *Australia's Kakadu: Protecting World Heritage*, Response by the Australian Government to the World Heritage Committee Regarding Kakadu National Park, April 1999, p 36.

by the Commonwealth Government, including the granting of Aboriginal title and the establishment of both a national park and a uranium industry. The Office of the Supervising Scientist was established to monitor the effects of uranium mining on the environment.

2.35 Under the Land Rights Act the Northern Land Council was established to represent the Traditional Owners of the region. Various land trusts were also set up to hold title to land on behalf of the Traditional Owners.

2.36 Most of the land that was to become Kakadu National Park Stage 1 was granted to the Kakadu Aboriginal Land Trust in September 1978. In November 1978 the Trust leased the land to the Director of the Commonwealth National Parks and Wildlife Service for the purpose of a National Park and in April 1979 Stage 1 of Kakadu National Park was declared.

2.37 In June 1982 the Jabiluka project area, 73 square kilometres, was granted to the Jabiluka Aboriginal Land Trust.

2.38 In March 1978 an Aboriginal land claim was lodged for the land to be included in Stage 2 of Kakadu National Park. Stage 2 was proclaimed in February 1984. The claim was partially successful and a lease agreement was signed between the Director of the National Parks and Wildlife Service and the Jabiluka Aboriginal Land Trust in March 1991. Claims for the areas not granted have yet to be determined.

2.39 In June 1987 a land claim was lodged for land in the proposed Stage 3 of Kakadu National Park. Stage 3 was declared in stages in June 1987, November 1989 and June 1991. In January 1996 approximately half of the land claimed was granted to the Gunlom Aboriginal Land Trust and in March of that year the Trust leased its land to the Director of the National Parks and Wildlife Service.¹¹

2.40 Thus, in 1998 approximately fifty per cent of the land in Kakadu National Park was Aboriginal land under the *Aboriginal Land Rights (Northern Territory) Act 1976*. Most of the remaining area is under Aboriginal Land Claim.

2.41 In addition to the Land Rights Act there is a range of Commonwealth and Northern Territory legislation relating to aboriginal land, sacred sites and native title, including the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984*, the *Native Title Act 1993*, the *Northern Territory Aboriginal Sacred Sites Act 1989 (NT)* and the *Aboriginal Land Act 1978 (NT)*.

The Jabiluka Project

2.42 Uranium was first mined in Australia in the 1930s. A number of small uranium mines operated in the Alligator Rivers Region in the 1950s and 1960s. In the late 1960s and early 1970s Australia underwent a commodities boom and this prompted a

11 Environment Australia, *Australia's Kakadu: Protecting World Heritage*, April 1999, pp 18-19.

period of intense exploration. The uranium deposits at Ranger, Jabiluka and Nabarlek were discovered at this time. Following the report of the Ranger Uranium Environmental Inquiry (the Fox Report) in 1977, the Nabarlek mine commenced operations in 1979, followed by the Ranger mine in 1980.

2.43 The Jabiluka site contains one of the world's largest high-grade deposits of uranium. It is believed that the deposit could yield over 90,000 tonnes of uranium oxide (at an average grade of 0.46 per cent) over a 28 year mine life. Some estimates put the possible sales of the mine over its life at \$8 billion, dependent on world uranium prices. *The Australian*, citing an Access Economics study, estimated in 1996 that assuming 'unconstrained growth in an expanding market' new uranium developments would add a maximum \$800 million a year to the 1994-95 exports of \$188 million.¹² However, there are differing views in relation to the true value of the mine to the Australian economy.¹³

2.44 The Jabiluka mine is located inside the geographical boundaries of the Kakadu National Park, though legally excised from the Park area since its inception. This excision frees the site from the *National Parks and Wildlife Conservation Act 1975*, which prohibits mining within the Park. The uranium deposit lies close to the floodplain of Magela Creek, a tributary of the East Alligator River, beneath an escarpment twenty kilometres north of the Ranger uranium mine.

2.45 The Jabiluka deposit was first discovered in November 1971 by Pancontinental Mining and Getty Oil Development Ltd. An environmental impact statement for the project was submitted in 1979 but further development of the mine was stalled in 1983 when the newly elected Hawke Labor Government restricted uranium mining to three mines: Ranger mine south of the Jabiluka deposit, Nabarlek in Arnhem Land, and Olympic Dam in South Australia.

2.46 The approval of the Ranger mine was coincident with the initial establishment of Kakadu National Park in 1978, and occurred two years after the enactment of the *Aboriginal Land Rights (Northern Territory) Act 1976*. The Park was then inscribed onto the World Heritage list in three stages (see above).

2.47 The Jabiluka uranium mine was first approved under a 1982 agreement between Pancontinental Mining and the Northern Land Council, subject to the provisions of the *Aboriginal Land Rights (Northern Territory) Act 1976* having been satisfactorily adhered to. Key among these was a provision (in Section 48A) which stated that an agreement would only have legal force if the Minister for Aboriginal Affairs was satisfied that the Northern Land Council (NLC) had negotiated according to the wishes of the Traditional Owners, and that 'the traditional Aboriginal owners of

12 Nicolas Rothwell, 'Yellowcake Dreaming', *The Australian*, 27 April 1996; Energy Resources of Australia, Jabiluka Overview, <http://www.energyres.com.au/jabiluka/overview.html>

13 For example: Mr Rob Gillespie, Gillespie Economics, Submission 3; The Wilderness Society (NSW), Submissions 47 and 47A.

the land understand the nature and purpose of the agreement and, as a group, consent to it'. This is now the subject of dispute.¹⁴

2.48 In 1991 Pancontinental informed the Northern Land Council (NLC) that it wished to sell its interest in Jabiluka to Energy Resources of Australia (ERA) Ltd, which operated the Ranger mine. Under the 1991 Deed of Transfer negotiated with the NLC, one key term stated that ERA would have to obtain the consent of Traditional Owners before it could mill Jabiluka ore at Ranger.

2.49 When the Liberal-National Coalition was elected in 1996, it removed Labor's limitations on the number of mines. Henceforth, development would be subject to the existing suite of environmental and land rights legislation and, indirectly, to Australia's international obligations regarding World Heritage protection and the sale and export of uranium.

2.50 The original Pancontinental proposal was for an open cut mine, with a tailings dam and milling facilities located on the Jabiluka lease. In 1996 ERA submitted a revised proposal for an underground mine, from which the ore would be trucked to Ranger for milling there. Tailings would be disposed of in the mined-out pits at Ranger. This new proposal would entail the construction of a 22 kilometre road between the two sites, and require the consent of the Traditional Owners. This option was known as the Ranger Mill Alternative (RMA) and was outlined in a 1997 Environmental Impact Statement (EIS) prepared by ERA.

2.51 When it became clear that the Traditional Owners of the Jabiluka lease, the Mirrar-Gundjehmi, would refuse to allow the construction of the access road or milling at Ranger, ERA developed a second option which involved the milling of mined ore and tailings disposal at the Jabiluka site. ERA's preferred option, outlined in a Public Environment Report (PER) of 1998, was for the disposal of half the tailings underground in mined-out shafts, and the remainder in purpose-built pits near the surface. A second option was for the whole of the tailings to be disposed of underground, which would involve the excavation of more rock to create room. These options were known as the Jabiluka Mill Alternative (JMA).

2.52 Construction work on the mine began in June 1998. It is projected that the first uranium will be recovered in 2001. The blasting and excavation of the tunnel to the underground ore body (known as a 'decline') began in September 1998 and is now complete. Excavation for the water containment pond was completed in August 1998 and a pond liner (which has been the target of vandalism) installed in September. Erosion control work has also been undertaken. The operations phase of the mine is expected to be up to 28 years, with extraction commencing at 100,000 tonnes per annum in year one, increasing to a rate of 900,000 tonnes per annum from year fourteen on.

14 *Aboriginal Land Rights (Northern Territory) Act 1976*, s. 48A(4); Gundjehmi Aboriginal Corporation, "We are not talking about mining": *The History of Duress and the Jabiluka Project*, July 1997, at: http://www.mirrar.net/index_main.htm

2.53 As a result of opposition to the development of the mine, representations from non-government organisations were made to the Bureau of the UNESCO World Heritage Committee to place Kakadu National Park on the List of World Heritage In Danger. Concerns which were raised included the impact of the Jabiluka mine on the integrity of World Heritage values of the Park and on the heritage of the Mirrar, Traditional Owners of the Jabiluka site. These concerns, and others, are discussed in the following chapters.

CHAPTER 3

ENVIRONMENTAL IMPACT ASSESSMENT - PRELIMINARY

Overview

3.1 The environmental impact assessment (EIA) process is intended to be one of the key decision-making elements in the consideration of any project. Ideally, it results in the highest level of scrutiny of development proposals and the establishment of failsafe environmental protection measures, and also yields important data about the affected ecosystem and social structure in order to allow for ongoing assessment and monitoring. It is intended to create scope for the expression and incorporation of meaningful public input, with a high priority being given to the views of key stakeholders and affected communities.

3.2 In the case of the Jabiluka uranium mine – a project constructed on Aboriginal land, in the midst of a World Heritage area, and with a range of potentially damaging environmental, social and cultural impacts – the EIA process has been of particular importance.

3.3 Major concerns raised in relation to the project, and which the assessment process was to address include:

- The potential damage to the ecology of the Park from contaminated water from the mine site;
- The disposal of tailings and the leaching of uranium from the tailings into the water system of the Park;
- Threats to the health of the local population from radiation;
- Threats to the cultural heritage of the Aboriginal population, including possible damage to significant art, archaeological and sacred sites; and
- The potential for damaging social impacts on Aboriginal people and culture.

3.4 However, the Committee received a great deal of evidence from the public, non-government organisations, scientists and Aboriginal organisations that in relation to Jabiluka the EIA process itself failed to meet the highest standards in many crucial respects. Similar concerns have been raised internationally, by the World Conservation Union (IUCN), the International Council on Monuments and Sites (ICOMOS) and the UNESCO World Heritage Committee.

3.5 While the Committee acknowledges that some aspects of the process have been thorough and of a high quality – such as the assessment reports of Environment Australia and the Northern Territory's Environmental Assessment Branch, and the most recent report to the World Heritage Committee by the Supervising Scientist – significant concerns about the totality of the EIA process remain. Submissions also

identified serious policy concerns about the legislative provisions and administrative conventions which currently frame the EIA process.

3.6 The EIA process, particularly when dealing with a project of such cultural and international sensitivity as this, must meet the highest standards at every level and at every stage. This includes the original environmental impact statements by the company, the level of assessment required, the time and scope provided for public comment, the assessment reports by the Commonwealth and Northern Territory, and the timing, appropriateness and enforceability of ministerial decisions based on those assessments. The EIA process must ensure that ecological, cultural and social impacts are all given due weight and understood in their interaction.

3.7 Broad concerns raised in submissions to the Committee included:

- The adequacy of the EIA process in allowing for public input and examination of proposals;
- The timing and content of ministerial decisions, particularly construction approvals, while the design and approval of specific environmental protection measures (and approval for the project as a whole) remained outstanding;
- Whether ministerial conditions placed on the mine's development can be meaningfully enforced;
- Difficulty in refining crucial run-off containment and tailings disposal measures;
- The exclusion of key environmental and policy questions from the EIA process, such as the appropriateness of uranium mining in the Kakadu region, the potential cumulative impacts of multiple uranium developments in the area, or Australia's role in the nuclear fuel cycle;
- Whether the EIA process properly took account of the mine's location within the cultural and ecological landscape of the Kakadu World Heritage area;
- The adequacy of the EIA process in identifying and protecting cultural heritage values, including the values of living Aboriginal cultures;
- Whether the assessment process incorporated an understanding of the mine's potential social impacts on Aboriginal people; and
- The resentment felt by Traditional Landowners against the EIA process as a whole, which they see as entrenching their marginalisation, given that it is weighted towards evaluating the conditions under which a project will be developed rather than considering whether it should proceed at all.

Recommendation 1

The Committee recommends that the environmental impact assessment process be reformed to ensure that consideration is given, both in impact statements and subsequently, to *whether* a project should proceed.

The Legislative and Regulatory Framework for Uranium Mining in Kakadu

3.8 Environmental approvals for the mine have been subject to a range of legislation, which provides for only two major stages of development permissions – the construction and export stages – which can be separated by a number of years. The Committee found that there was considerable concern about the adequacy of this environmental control regime, particularly as it applied to the approval of the Jabiluka project.

3.9 Relevant Commonwealth legislation includes the *Environment Protection (Impact of Proposals) Act 1974* (EPIP Act), which triggers environmental assessments of developments which might affect the environment to a significant extent and where a Commonwealth decision or action is involved, and governs ministerial decision-making¹; the *Environment Protection (Alligator Rivers Region) Act 1978*, which established the Office of the Supervising Scientist (OSS); and the *Atomic Energy Act 1953*.

3.10 Applicable Northern Territory legislation includes the *Mining Act 1982*, the *Environmental Assessment Act 1982*, and the *Uranium Mining (Environment Control) Act 1979* (UMEC Act).

3.11 Guidelines for the Commonwealth to require environmental impact assessment of development projects are contained in the Administrative Procedures of the *Environment Protection (Impact of Proposals) Act 1974*. Proposals are designated for environmental impact assessment by the Commonwealth ‘action minister’ or authority empowered to give final approval to the proposal. In the case of uranium mining that minister is the Commonwealth Minister for Industry, Science and Resources (formerly the Minister for Resources and Energy). Designation for many projects is discretionary, although this discretion is limited by the MOUs agreed between the Commonwealth Environment Protection Agency and other agencies, which contain guidelines for the identification of projects of environmental significance. However, no such MOU exists with the Commonwealth Department of Industry, Science and Resources.²

Recommendation 2

The Committee recommends that all relevant MOUs between State and Commonwealth Government agencies regarding environmental impact assessment be made public.

1 On 23 June 1999 the Environment Protection and Biodiversity Bill 1998 was passed by the Senate. It contains provisions for environmental assessment and when proclaimed it will supersede the EPIP Act.

2 Bernard Dunne, ‘Uranium Mining and the Commonwealth EIA Process’, *Australian Environment Review*, Vol 11 No 5, June 1996.

3.12 The EPIP Act allows for four levels of possible environmental impact assessment. These are:

- (1) Ministerial and departmental consideration of the project using information supplied by the proponent, without public review, and advice to the action minister about any recommendations which must apply. This level has been applied to further assessment of tailings disposal and radiological protection at Jabiluka;
- (2) A Public Environment Report (PER) ordered by the Minister, which is open to public comment. This level was applied to the assessment of the Jabiluka Mill Alternative.
- (3) An Environmental Impact Statement (EIS) which is open to public comment, and in which the proponent is required to respond to public comment prior to submitting the final EIS. This level was applied to the assessment of the Ranger Mill Alternative.
- (4) A public inquiry conducted by a Commissioner appointed by the Minister.³

3.13 In relation to projects in the Northern Territory, projects are jointly assessed under a cooperative arrangement between the NT Department of Lands, Planning and Environment (NTDLPE) and the Commonwealth Department of Environment and Heritage. The NTDLPE forwards its assessment of the EIS or PER to the Commonwealth Minister, who then takes into account the assessment of his or her own Department before making recommendations for conditions, and action, to the action minister.

Environmental Impact Assessments and Approvals for Jabiluka

Summary

3.14 The Jabiluka lease was originally granted to Pancontinental in August 1982 under Section 64 of the NT Mining Act. 38 Environmental Requirements were simultaneously placed on the project under the NT *Uranium Mining (Environment Control) Act 1979* (UMEC Act). In 1996, when ERA indicated that it wished to develop the mine under the changed policy of the Liberal-National Government, the company was instructed to prepare a new Environmental Impact Statement (EIS) on the mine proposal. This was triggered and framed by the Commonwealth *Environment Protection (Impact of Proposals) Act 1974* and the Northern Territory's *Environmental Assessment Act 1982*.

3.15 The proposal advanced by ERA at this time was substantially different from the Pancontinental proposal which had been given environmental approval under the UMEC Act in 1982. It involved a new underground approach to the orebody, a different site for the entrance portal and mine workings, and the trucking of ore along

3 Administrative Procedures under the *Environment Protection (Impact of Proposals) Act 1974*.

a new, purpose-built road for milling at Ranger. Tailings disposal was also to take place at Ranger.

3.16 ERA prepared the EIS for this option, which was termed the Ranger Mill Alternative (RMA), despite the fact that under the 1991 Deed of Transfer negotiated between ERA and the Northern Land Council the consent of Traditional Owners to milling at Ranger had to be sought, and that that consent was being withheld. When the company then altered plans to the Jabiluka Mill Alternative (JMA) as a result of the refusal of the Traditional Owners to approve the RMA, it was instructed to prepare a Public Environment Report (PER) on the changed environmental implications of that operation.

3.17 On 2 June 1998, following the conclusion of the EIS process for the Ranger Mill Alternative, but prior to the conclusion of the PER process for the new Jabiluka Mill Alternative, the Northern Territory granted an authorisation under the UMEC Act allowing the construction of those parts of the project 'common' to both the RMA and JMA, including the portal, access decline and associated infrastructure. This construction has proceeded and is now largely complete. Further construction, mining and milling operations remain contingent on the outcomes of additional environmental impact assessment and ministerial approval.

The Ranger Mill Alternative EIS

3.18 The draft guidelines for the first EIS were made available for public comment for four weeks. The draft EIS was prepared for ERA by consultants Kinhill Engineers Pty Ltd, and released for public comment for twelve weeks between 17 October 1996 and 9 January 1997. Public meetings were held in Darwin (100 people) and in Jabiru (60 people), and 85 written submissions were received and forwarded to ERA.

3.19 Taking into account concerns raised in these submissions, ERA prepared a supplement to the draft EIS. Both documents were then forwarded as the final EIS to the Commonwealth and Northern Territory Environment Ministers on 17 June 1997. A copy of the Northern Territory's report on the assessment, which made 40 recommendations, was in turn provided to the Commonwealth Minister, Senator Robert Hill. After examining the submissions from his own Department and the Northern Territory Government, Senator Hill wrote to the Minister for Resources and Energy, Senator Warwick Parer, recommending 77 conditions on the project proceeding. These included changes to the proposal, further research and monitoring, and the development of management strategies for groundwater, tailings and flora and fauna.

3.20 The Minister for Resources and Energy included most of these recommendations as conditions on the grant of an export licence to ERA. However, twenty-two of the recommendations appear to have been qualified, with words requiring ERA to 'take into account the intent of' the recommendation, while the terms of a few others were altered. This has raised doubts about the enforceability of the requirements; there appear to be no other enforcement mechanisms envisaged other than the conditionality of the export licence.

3.21 Key among the conditions recommended by both the Northern Territory Government and Environment Australia was a requirement that if ERA sought to modify the preferred proposal in the EIS (the Ranger Mill Alternative) ‘further environmental assessment should be required, including provision of further mine site design, processes and impacts before any export approval is given by the Commonwealth’.⁴ The Northern Territory stated that the EIS ‘lacks specific technical and background data in its discussion of the Jabiluka Mill Alternative. Submissions have cited lack of technical data, tailings dam seepage and hydro-geological modelling as inadequate.’⁵

3.22 However, Senator Parer modified the recommendation to require ERA only to ‘provide further information to the Minister for Resources and Energy regarding mine site design, processes and impacts to allow consideration of the necessity for any further environmental assessment of the Jabiluka Mill Alternative.’ The Minister then stated that:

There is no impediment from an environmental perspective that would not allow ERA to commence work on elements common to both proposals subject to compliance with the recommendations contained elsewhere in this document that impact on those parts of the project common to both proposals.⁶

The Jabiluka Mill Alternative PER

3.23 In May 1998 the Minister for the Environment received a referral from Senator Parer requesting him to determine the level and scope of environmental impact assessment of the JMA proposal. Supervising Scientist Dr Peter Bridgewater has been cited as pressing Senator Hill ‘in the strongest possible terms’ for a full EIS on the Jabiluka Mill Alternative.⁷ The Minister decided that a more limited level of assessment, a Public Environment Report (PER), should be prepared by ERA. The PER was the most appropriate level of assessment, he explained, ‘for the situation where public comment is required but impacts are expected to be focused on a restricted number of specific issues ... issues covered in the EIS need not be re-examined in the PER. Such matters may be cross-referenced within the PER.’⁸

3.24 While the Northern Land Council (NLC) and the Aboriginal and Torres Strait Islander Commission (ATSIC) made submissions to the JMA PER, the Mirrar-

4 Government of Australia, Submission to World Heritage Committee, *Appendix 9.11: Summary Table of Ministers Hill and Parer EIA conditions and ERA progress*.

5 Northern Territory Department of Lands, Planning and Environment, *Jabiluka Number 2 Uranium Mine Proposal: Environmental Assessment Report and Recommendations*, August 1997, p 23.

6 Government of Australia, Submission to World Heritage Committee, *Appendix 9.11: Summary Table of Ministers Hill and Parer EIA conditions and ERA progress*.

7 Uranium Research Group, *Submission to the World Heritage Committee*, p 65.

8 Environment Australia, *Guidelines for a Public Environment Report on the Proposed Development of the Jabiluka Mill Alternative at the Jabiluka No 2 Uranium Mine*, June 1998.

Gundjehmi people refused to participate in the process, presumably because of their fundamental opposition to the project. The Government received 2,204 submissions on the PER, 72 of them being substantive. According to Environment Australia, a majority of submissions expressed unhappiness with the level of the assessment.⁹

3.25 ERA's proposals for the JMA now included the construction of a mill on the Jabiluka lease with the partial disposal of tailings within the mined-out stopes and the remainder deposited in purpose-built pits on the surface (the 50-50 Option). These would then be capped with clean waste rock. The tailings would be mixed with a cement paste with the aim of reducing the viscosity of the tailings and increasing their stability and impermeability.¹⁰ The JMA clearly involved the disturbance of a far greater surface area of the Jabiluka mine site, raising new challenges for rehabilitation and run-off management, and new concerns about the potential leaching of tailings into the surrounding ecosystem.

3.26 The Northern Territory's assessment report of the JMA recommended that the project proceed with the implementation of seventeen recommendations. Key uncertainties identified related to:

- The location of the pits in which tailings would be stored, concerning their ability to prevent the leaching of sulfates and radionuclides over the long term; and
- The long-term behaviour and characteristics of the cement paste tailings mass, which was a new technology and which had never been trialed with uranium.

3.27 Environment Australia's assessment report endorsed and amplified these concerns, and recommended further assessment of these risks before the project be allowed to proceed. The Minister then commissioned a study from scientists at the University of NSW (Unisearch Ltd) which argued that the proposed location of Pit No 1 was unsuitable, and identified additional assessment and design work that was needed.

3.28 At this time, ERA made reference to a third tailings management option in which all tailings paste would be returned underground to the mined-out pits; this would in turn require the excavation of unmineralised rock from silos adjacent to the decline and its permanent storage on the surface as artificial landforms.¹¹

3.29 Senator Hill wrote to the Minister for Resources and Energy, Senator Parer, on 25 August 1998, and said that Environment Australia had advised that 'this option would avoid the uncertainties associated with ERA's preferred option'. A key recommendation in this letter stated that there was insufficient information to make a

9 Environment Australia, *Environment Assessment Report: The Jabiluka Mill Alternative at the Jabiluka No 2 Uranium Mine*, July 1998, p 11.

10 Kinhill in association with ERA, *The Jabiluka Mill Alternative Public Environment Report*, pp 4.1- 4.17.

11 Senator Robert Hill, letter to Senator Warwick Parer, 25 August 1998, tabled correspondence.

decision on whether ERA's preferred option for the JMA was environmentally acceptable, but that if 100 per cent of tailings were placed underground in the mine void, and a further series of recommendations were complied with, 'the milling of uranium ore at Jabiluka will be environmentally acceptable'.¹²

3.30 The Minister told Senator Parer that the JMA could proceed and export licences be granted, if ERA prepared an amended proposal for the underground tailings disposal and if that proposal was approved by the Supervising Scientist and the Northern Territory Government. Thus, the most limited level of assessment under the EPIP Act was to be applied; there was to be no EIS or PER, or public consultation, for the revised proposal. The Committee believes that this level of assessment is inadequate.¹³

3.31 On 27 August 1998, the Minister for Resources and Energy wrote to ERA indicating conditional approval for the Jabiluka Mill Alternative (JMA), subject to the conditions recommended by Senator Hill. That is, approval would be given for the final option of complete disposal of tailings into the mined-out shafts (and newly excavated underground silos) after ERA had supplied more detail. Alternatively, if ERA wished to continue with the 50-50 option, it could submit a new assessment to the Environment Minister for consideration, with guidelines to be developed in consultation with the Commonwealth and NT, to address the identified inadequacies.¹⁴ Again, there was to be no higher level environmental impact assessment, or public consultation, for such a revised proposal.

3.32 However, during the course of this inquiry it became clear to the Committee that ERA has no intention of pursuing this (conditionally approved) proposal. Its preferred proposal remains the Ranger Mill Alternative or, if permission still cannot be obtained from the Mirrar, the original JMA proposal to dispose of part of the tailings in surface pits on site.¹⁵

3.33 Thus, ERA appears set on pursuing options for which no approval, from the Mirrar and the Government respectively, has been given. The Committee heard evidence that considerable scientific doubt remains that the 50-50 JMA option could ever be made environmentally acceptable. This directly contradicts the recent assurances provided to the World Heritage Committee by the OSS, which bases its claims that the natural values of Kakadu are not threatened on an assumption that 100 per cent of tailings will be disposed of underground.

12 Senator Robert Hill, letter to Senator Warwick Parer, 25 August 1998, tabled correspondence.

13 Senator Robert Hill, letter to Senator Warwick Parer, 25 August 1998, tabled correspondence.

14 Letter from Senator Warwick Parer to ERA, 27 August 1998, tabled correspondence.

15 Philip Shirvington, Energy Resources of Australia, *Proof Committee Hansard*, Canberra, 11 June 1999, p 95.

CHAPTER 4

ENVIRONMENTAL IMPACT ASSESSMENT – THE ISSUES

The approvals process has been designed to facilitate development rather than examine the nature of that development in any adequate way.¹

4.1 This chapter discusses the environmental impact assessment process followed for the Jabiluka project, analysing problems and uncertainties that the Committee has identified in relation to radiological protection, run-off containment, tailings disposal, and in the identification and mitigation of negative social and cultural impacts on Aboriginal people. Further problems include a lack of scope for public comment and examination of the proposals, particularly by Aboriginal communities, and an inappropriate level of assessment of outstanding tailings disposal and mine design issues. The chapter argues that ministerial approvals for the mine's construction have been premature, and that administrative arrangements for the monitoring and regulation of uranium mining in Kakadu National Park are inadequate.

The Jabiluka EIA Process: Flaws and Uncertainties

Overview

4.2 Many submissions to the Committee expressed the view that a significant flaw in the EIA process was that the proponent of the mine developed the environmental impact statement or public environment report. For example, the Gundjehmi Aboriginal Corporation argued that both the EIS and PER were 'clearly mining advocacy documents which make little or no attempt to examine the impact of mining from an Aboriginal perspective ... The entire purpose of these documents is to achieve an economic objective for a publicly listed mining company.'²

4.3 They also argued that:

The EIS/PER process is one in which proponents develop a project advocacy document which plays down or deliberately ignores detrimental aspects of their proposal. The 'burden of proof' is then on others, including illiterate Traditional Aboriginal people, to show that the position advocated by the proponent is flawed. In this way the proponent sets the parameters of debate in a way which greatly disadvantages those affected by the proposal.³

4.4 No submissions made definite suggestions about how this arrangement should be reformed. In the Committee's view, there are both advantages and drawbacks in having the company develop the original EIS. It demonstrates the technological and

1 Environment Centre of the Northern Territory, Submission 38, p 1.

2 Gundjehmi Aboriginal Corporation, Submission 48, p 4.

3 Gundjehmi Aboriginal Corporation, Submission 48, p 12.

design competence of the company in relation to environmental protection, and provides an overview of the measures the company is willing to implement, which can then be evaluated by experts. However, if the proposed environmental protection measures are found wanting in substantial ways, the company's willingness and ability to comply with recommended modifications, particularly if they involve substantial project redesign or additional cost, may be the subject of some uncertainty. Similarly, the current regulatory regime under which these recommendations can be enforced is also inadequate.

4.5 A very real test of this process is the quality of the environmental impact assessments that ERA actually produced, and the extent of project modification that was subsequently required. The assessment of the Ranger Mill Alternative EIS resulted in approval being given subject to 77 conditions. The assessment of the Jabiluka Mill Alternative PER resulted in approval being ventured subject to a further 17 conditions, substantial project redesign and further assessment. The large number and scope of these conditions suggest that the EIS and PER were deficient in a range of crucial areas, and bring the adequacy of the proponent's role in the EIA process into question.

4.6 In the case of the Jabiluka Mill Alternative, which remains the only viable option given the Traditional Landowners' opposition to the RMA, the Government has required substantial project redesign and further assessment, and there remains considerable scientific uncertainty about whether it can be made environmentally acceptable and therefore approved. Meanwhile, mine construction costing hundreds of millions of dollars has already progressed. Given these problems, the Committee believes that there are grounds for further inquiry into the current EIA process, including the question of whether the proponent should prepare the EIS. These grounds are discussed further in the final part of this chapter.

4.7 In addition, a group of scientists from the Australian National University, in a 1998 submission to the World Heritage Committee, exposed serious deficiencies in both the EIS/PER and its assessment by the NT and the Commonwealth in relation to run-off and waste containment and groundwater hydrology and rainfall, and in assessing the impact of the mine in a Kakadu-wide context.⁴ Only after the report of the WHC Mission did the Supervising Scientist conduct further study and assessment which confirmed many of the ANU scientists' concerns, and make a further series of recommendations for project redesign.⁵ It remains unclear whether these will be incorporated as binding conditions on the mine's further development.

4.8 As indicated above, submissions also detailed a range of concerns about the EIA process, which are dealt with individually below.

4 Professor R J Wasson, Professor I White, Dr B Mackey and Mr M Fleming, *The Jabiluka Project: Environmental Issues that Threaten Kakadu National Park*, October 1998.

5 Office of the Supervising Scientist, *Assessment of the Jabiluka Project: Report by the Supervising Scientist to the World Heritage Committee*, April 1999.

Run-off Containment and Management

4.9 Apart from the disposal of tailings, the linked problem of run-off from the mine site is one of the most serious potential threats to the surrounding environment. Water from tailings can leach radionuclides, sulfates and other contaminants into the ecosystem, and stored rock can cause acid mine drainage, threatening the survival of flora and fauna. The assessment and management of these threats requires attention to the design of the mine site, measures for water containment, recycling and channelling, and extensive knowledge of weather patterns such as rates of evaporation and levels of rainfall. In the case of a project which involves the surface storage of radioactive tailings, these rainfall and evaporation statistics must be known so that containment measures can be designed to preserve the surrounding environment for thousands of years.

4.10 In an effort to manage these threats, ERA devised a series of measures to contain run-off. These essentially involved the division of the mine-site into three zones:

- A 'catchment run-off zone' in which clean run-off will be diverted away from mine facilities to undisturbed catchment in the project area;
- A 'sediment control zone', in which turbid run-off from roads and surface facilities is treated before release to the catchment; and
- A 'total containment zone' (TCZ) in which all waters are directed to a retention pond and permanently segregated from the catchment. At Jabiluka this includes any area where rock containing more than 0.02% uranium is mined, stockpiled, stored or handled.⁶

4.11 The retention pond was designed for a theoretical extreme wet season that would occur once in ten thousand years. However dispute has arisen about the models that were used to calculate weather probabilities and evaporation rates, and which governed the design of containment facilities.

4.12 In 1998, a group of scientists from the Australian National University (ANU) made a submission to the World Heritage Committee questioning the assumptions used for these factors in the EIS and PER. They argued that:

- The design of water containment structures was flawed because of the use of a design method which was based on the assumption of statistical stationarity in rainfall, which over 10,000 years would be negated by greenhouse-driven climate change;
- Other inadequacies in calculations and modelling generated an underestimation of maximum run-off and flaws in the construction of surface retention ponds.

6 Environment Australia, *Environment Assessment Report: Proposal to Extract, Process and Export Uranium from Jabiluka Orebody No 2*, August 1997, pp 40-41.

They stated that ‘the recent 1998 extreme rainfall event at Katherine, 100 kilometres south of Jabiluka, probably exceeded the calculated extreme rainfall at Jabiluka.

- Evaporation calculations, both from the retention pond and from the mine air stream, were seriously in error; all these factors would require new calculations and a redesign of the containment ponds.⁷

4.13 The World Heritage Committee considered these issues of such importance that it requested the Supervising Scientist to prepare a report responding to the concerns put by Professor Wasson and his colleagues. The Supervising Scientists report supported the analysis of the ANU scientists in the area of evaporation and rainfall. The report recommended that Bureau of Meteorology estimates and records from Oenpelli be used in the estimation of rainfall, and that either a humidifier system be installed in the mine to assist evaporation or the retention pond be expanded in area from 9 hectares to 13 hectares.⁸

4.14 The Committee concurs with the view of Professor Wasson and his colleagues, who praised the overall quality of the Supervising Scientist report but argued that these issues should have been resolved at the EIS stage, rather than be resolved after the mine’s approval, if at all.⁹

Tailings Disposal and Hydrology

4.15 Many submissions to the Committee, and both assessment reports on the Jabiluka Mill Alternative, by Environment Australia (EA) and the Northern Territory Department of Lands, Planning and Environment (NTDLPE), identified serious problems with ERA’s proposals for tailings management. In the Committee’s view, this in turn raises concerns about the precipitate approval of the project by the Minister and the inadequate level of further assessment of new proposals.

The Jabiluka Mill Alternative – ERA’s preferred option

4.16 One key recommendation, No 2, of the NTDLPE was that ERA should ‘demonstrate to the supervising authority that the cement paste technology and location of the tailings pits constitutes Best Practice Technology for the management of uranium tailings and potential leachate ... prior to the grant of an export licence’. Recommendation 9 also stated that research into the chemical stability and local

7 Professor R J Wasson, Professor I White, Dr B Mackey and Mr M Fleming, *The Jabiluka Project: Environmental Issues that Threaten Kakadu National Park*, October 1998, p 4.

8 Office of the Supervising Scientist, *Assessment of the Jabiluka Project: Report by the Supervising Scientist to the World Heritage Committee*, April 1999.

9 *Proof Committee Hansard*, Canberra, 11 June 1999, p 25.

suitability of the process was to be presented 'to the supervising authority prior to approval of tailings disposal operations'.¹⁰

4.17 In its assessment report, Environment Australia also identified significant flaws and uncertainties in the PER. It identified the need for further hydro-geological investigation of the area proposed for the tailings pits, and sought further research to resolve scientific uncertainties about ERA's preferred method of tailings disposal. These latter concerns included:

- The newness of the proposed paste-fill technology, with ERA indicating there was no previous experience of its use with uranium or in tropical climates;
- Uncertainty as to how acid levels would affect the curing and integrity of cement paste fill, with further test work being required; and
- Problems with the design and location of the pits. ERA had no plans to line the pits (which raised concerns about possible seepage), while the proposed site of one pit was in an area with fractured and weathered material and possible faults and joint planes (which raised concerns about possible contamination of Swift Creek and groundwater within 10-50 years). EA stated that the PER had failed to consider that the fractures in the sandstone might form potential contaminant pathways.¹¹

4.18 EA also cast doubt on ERA's proposal to manage possible seepage in the below ground pits by blocking cracks in the pit walls with a cement-based grout: 'Whilst this might provide a suitable physical barrier in the short term, it would be relatively brittle and will be subject to chemical reactions potentially allowing mobilisations of contaminants.' In addition, EA expressed doubts about 'the long-term chemical integrity of the cement-hardened tailings mass' which was 'unknown'. This raised the danger of radionuclides being released into groundwater.¹²

4.19 Environment Australia thus argued for a 'precautionary approach' to be taken, and for 'the risk posed by these contaminants to be more adequately assessed before the Government commits to a decision.' This was important because 'once the project is under way corrective action may be difficult'. EA considered the paste fill technology to be 'somewhat experimental for the Kakadu region. We do not regard this as best practice nor believe that it should be trialed in such an environmentally significant area.' The report concluded that it was 'a matter of judgement as to the

10 Northern Territory Department of Lands, Planning and Environment, *Assessment Report 26 Jabiluka Mill Alternative*, July 1998, p 23; Environment Australia, *Environment Assessment Report: The Jabiluka Mill Alternative at the Jabiluka No 2 Uranium Mine*, July 1998.

11 Environment Australia, *Environment Assessment Report: The Jabiluka Mill Alternative at the Jabiluka No 2 Uranium Mine*, July 1998, pp 33-50.

12 Environment Australia, *Environment Assessment Report: The Jabiluka Mill Alternative at the Jabiluka No 2 Uranium Mine*, July 1998, p 69.

seriousness of environmental harm and degree of irreversibility of potential harm involved in allowing the JMA to proceed at this time.’¹³

4.20 In response to this uncertainty, the Minister for the Environment commissioned an independent review of the tailings management proposals from scientists at Unisearch Ltd. Their report argued that the proposed location of Pit No 2 was unsuitable and identified additional assessment and design work that was needed.

4.21 In particular, they found that the high concentrations of sulfate and magnesium in the tailings water might degrade the curing, strength and impermeability of the cement paste. Possible measures to avoid this included the investigation of alternative binding agents or, if that proved unsuccessful, the minimisation of the use of sulfate in ore processing and the removal of contaminants from the tailings water prior to paste formation and cement addition. They commented that both of these latter strategies ‘would impose significant cost and technological challenges’.¹⁴

4.22 Other problems with the tailings paste involved the ‘critical’ dewatering step prior to cement addition, which they thought could be prone to failure; and the proposed method of underwater emplacement of the cemented tailings mass which could ‘create problems with segregation of paste components and insufficient compression’. Because scientific literature was not definitive in relation to the likelihood of the paste immobilising contaminants, further mineralogical and microscopic investigations were required.¹⁵ Thus, it appears that significant scientific (and technological) uncertainties remain about the environmental safety of the cement paste technology when used with Jabiluka ore tailings.

4.23 The Unisearch team also identified significant uncertainties in regards to the proposed tailings pits. While they stated that the permeability of the Kombolgie sandstone in which the pits would be dug was ‘low to negligible’, they added that ‘extensive and persistent jointing, faulting and weathering has resulted in secondary porosity in the form of fissures which allow water to flow through the rock mass’. They stated that the location of Pit 1 was unsuitable because it was in a zone affected by faulting and deep weathering, would suffer pit slope stability problems and allow excessively high water flow past the tailings. While the location of Pit 2 might be suitable, they stated that ‘relatively high permeable rock can be expected in the upper 30m highly weathered zone and in fracture zones in the rock at depth’.¹⁶

13 Environment Australia, *Environment Assessment Report: The Jabiluka Mill Alternative at the Jabiluka No 2 Uranium Mine*, July 1998, p 70.

14 T. D. Waite, C. Dudgeon and R. Fell, *Review of Jabiluka Mine Alternative Tailings Management Proposal*, 19 August 1998, p 3.

15 T. D. Waite, C. Dudgeon and R. Fell, *Review of Jabiluka Mine Alternative Tailings Management Proposal*, 19 August 1998, p 3.

16 T. D. Waite, C. Dudgeon and R. Fell, *Review of Jabiluka Mine Alternative Tailings Management Proposal*, 19 August 1998, p 3.

4.24 They recommended further extensive drilling and testing and possible changes to the dimensions and shapes of the pits in order to avoid joints, faults and shear zones. They concluded that:

It is essential that a monitoring system and program commensurate with the level of assurance normally expected of the uranium industry be established as soon as possible to collect baseline data, assist with the design, construction and operation of tailings disposal pits and monitor developing conditions around the pits as they are filled, capped and subsequently left to interact with the groundwater system.¹⁷

4.25 At this time ERA also made reference to a third tailings management option which would involve returning all tailings paste underground to the mined-out underground stopes. This would in turn require the excavation of underground silos in unmineralised rock adjacent to the decline and the indefinite storage of that rock on the surface as artificial landforms.

The Jabiluka Mill Alternative – The Government’s preferred option

4.26 Reflecting the obvious scientific and technological uncertainties attending the 50-50 option, Senator Hill wrote to the Minister for Resources and Energy, saying that there was insufficient information to decide whether ERA’s preferred option for the JMA was environmentally acceptable, but that if 100 per cent of tailings were placed underground in the mine void, and a further series of recommendations were complied with, ‘the milling of uranium ore at Jabiluka will be environmentally acceptable’. The Minister wrote that Environment Australia had advised him that ‘this option would avoid the uncertainties associated with ERA’s preferred option’ and told Senator Parer that the JMA could proceed and export licences be granted if ERA prepared an amended proposal for the underground tailings disposal, and if that proposal was approved by the Supervising Scientist and the Supervising Authority (the Northern Territory Government).¹⁸

4.27 The Committee shares the concerns of many witnesses that this decision was premature, given that ERA had supplied virtually no detail to the Government about the 100 per cent option and that it had not been the subject of any further environmental impact assessment. Doubts remained about the cement paste process, and the hydrology of the rocks surrounding the mine stopes was unknown. Similarly, the placement of vast amounts of waste rock on the surface would create impacts which needed further assessment. The ANU scientists have also argued that the construction of artificial landforms with this rock could have substantial cultural effects, given that the mine is located in an area of enormous cultural significance.¹⁹

17 T. D. Waite, C. Dudgeon and R. Fell, *Review of Jabiluka Mine Alternative Tailings Management Proposal*, 19 August 1998, pp 3-4.

18 Senator Robert Hill, letter to Senator Warwick Parer, 25 August 1998, tabled correspondence.

19 Professor Robert Wasson, *Proof Committee Hansard*, Canberra, 11 June 1999, p 29.

4.28 The basis for the Minister's advice to Senator Parer appears to be the August 1998 ERA paper, *Jabiluka Mill Alternative: Synopsis of Key Issues and Processes*, which included a paragraph discussing the possibility of returning 100 per cent of tailings into the mine void, but indicated that *this would be an expensive and less desirable option*. No further information about this proposal, nor any technical detail, was included.²⁰ Apparently on the basis of this information, Environment Australia advised the Minister that this alternative 'would completely avoid the uncertainties associated with the previous proposal to use open cut pits in the Kombolgie sandstone.'²¹

4.29 In evidence to the Committee, Government witnesses insisted that the option of storing all tailings underground is the only one that ERA will pursue. Supervising Scientist Dr Arthur Johnston relied on this claim to dismiss the concerns expressed in 1998 by Professor Wasson and his ANU colleagues.²² Secretary of the Department of Environment and Heritage, Mr Roger Beale, also sought to discredit the ANU scientists by insisting that returning all tailings underground 'is, in fact, the only approved process. That is why the long-run climate change effects were not relevant'.²³ In response to questioning from the Committee, Dr Johnson reiterated his view:

we have not said that we are assuming that 100 per cent of tailings is going into the ground. We are saying that that is precisely what has been required by the Government in giving its approval, and therefore, yes, that is what has been approved, and that is what will happen.²⁴

4.30 Clearly, Dr Johnston and Mr Beale are confident that this option will be pursued. However the Committee does not share that confidence, having received evidence which raises serious doubts about ERA's intention to pursue this option. It seems clear that the Company's preferred options remain firstly, the Ranger Mill Alternative and secondly, the earlier JMA option using surface pits.²⁵ The Committee's visit to the mine on 15 June 1999 also confirmed that the constructed layout of the mine portal, rock stockpiles, storage tanks and retention pond exactly conforms with the design of the Ranger Mill Alternative as presented in the EIS. A great deal of reconstruction of the area will have to occur if the JMA has to proceed.²⁶

20 Energy Resources of Australia, *Jabiluka Mill Alternative: Synopsis of Key Issues and Processes*, August 1998.

21 Minute from Assistant Secretary, Environment Assessment Branch, to Minister, 20 August 1998.

22 *Proof Committee Hansard*, Canberra, 11 June 1999, p 3.

23 *Proof Committee Hansard*, Canberra, 11 June 1999, p 37.

24 *Proof Committee Hansard*, Canberra, 11 June 1999, p 5.

25 Committee Notes, Meeting with ERA executives at Ranger, 15 June 1999.

26 See the map on p 6.3 of Kinhill in association with ERA, *The Jabiluka Mill Alternative Public Environment Report*.

4.31 The possibility of resubmitting the preferred JMA option for approval was specifically left open by Senator Parer. On 27 August 1998, he wrote to ERA Chief Executive Philip Shirvington indicating conditional approval for the Jabiluka Mill Alternative, subject to the conditions recommended by Senator Hill. That is, approval would be given for the final option of complete disposal of tailings into the mined-out shafts or, if ERA wished to continue with the 50-50 preferred option, it could submit a new assessment to the Environment Minister for consideration, with guidelines to be developed in consultation with the Commonwealth and NT, to address the identified inadequacies.²⁷ He commented that:

I note that the Minister for the Environment believes, nevertheless, that there is every prospect that further assessment can identify design amendments to your preferred option which ensures tailings can be adequately managed and disposed of in this way.²⁸

4.32 The Committee possesses a copy of the advice provided to the Environment Minister in relation to these options, and has formed the view that his confidence in a successful redesign of the 50-50 proposal was premature. Environment Australia told the Minister that ERA had presented three possible revised options which could be assessed in a 'fallback' approach:

- Proving up an unlined pit option as proposed in the PER;
- A pit option with clay lining and other barriers to be determined; and
- 100 per cent of the tailings going back into the ground ... with a new barren waste rock strategy to be developed.²⁹

4.33 The EA minute continues by saying that the 100 per cent underground option would 'be an expensive option and there would still be a small risk to the surrounding environment related mainly to the disposal of the excavated material and its subsequent rehabilitation. However, it appears superior to in-ground pit disposal in terms of isolation of radionuclides.'³⁰ These unknowns did not prevent EA from suggesting that this proposal 'would completely avoid the uncertainties associated with the previous proposal'.³¹ The Committee believes that the Department's confidence in an option which had been the subject of no scientific assessment was premature.

4.34 At no point did EA suggest that successfully redesigning the 50-50 option (or a 70 per cent underground option also put forward by ERA) would be easy; they continued to suggest that if ERA wanted to pursue either of these options the concerns

27 Letter from Senator Warwick Parer to ERA, 27 August 1998, tabled correspondence.

28 Letter from Senator Warwick Parer to ERA, 27 August 1998, tabled correspondence.

29 Minute from Assistant Secretary, Environment Assessment Branch, to Minister, 20 August 1998, p 4.

30 Minute from Assistant Secretary, Environment Assessment Branch, to Minister, 20 August 1998, pp 4-5.

31 Minute from Assistant Secretary, Environment Assessment Branch, to Minister, 20 August 1998, p 2.

of EA and the Unisearch scientists would have to be addressed and that: ‘should the additional studies and investigations fail to define a technology which, in the opinion of the Supervising Scientist, is likely to adequately protect the environment, then ERA must commit to 100 per cent disposal of tailings back underground in the mine voids’.³²

4.35 The Committee is concerned that this revised 50-50 option, when resubmitted, will be subject to the minimum level of assessment allowed under the EPIP Act or its equivalent; there is to be no higher level environmental impact assessment or public consultation. More detailed consideration of this decision-making process is continued later in this chapter (4.147-4.181).

4.36 The Supervising Scientist’s report to the World Heritage Committee did make further assessment of the likely movement of tailings contaminants from the mine voids using existing hydro-geological data. The OSS recommended that new silos be dug in the Kombolgie sandstone to the east of the ore body and found that the quality of groundwaters in the vicinity of the Jabiluka ore body was high, indicating that ‘there is very little movement of radionuclides into the groundwater aquifer from the orebody’. Modelling of the dispersion of contaminants in groundwater indicated that the maximum distance uranium could move east under the most extreme conditions was 300 metres in 1,000 years, but was more likely to be 50 metres. Movement of solutes west through the schists would be faster, some 500 metres in 200 years.³³

4.37 However, this was of little concern given the presence of clays underneath the Magela floodplain which would limit upward migration of groundwater, and the continual dilution of solutes to levels less than naturally occurring concentrations in the region. The OSS concluded that: ‘the wetlands of Kakadu will not be harmed as a result of the dispersal of tailings constituents in groundwater,’ a conclusion which the ANU scientists accepted. However, the OSS did state that a full risk assessment has not been carried out and would require further analysis and hydro-geological data collection.³⁴

4.38 Despite endorsing the OSS analysis, the ANU scientists expressed a range of other concerns about both JMA options. Professor Wasson expressed doubts about the likelihood of ERA implementing the 100 per cent underground option. He stated that he and his colleagues continued to disagree with the OSS about:

32 Minute from Assistant Secretary, Environment Assessment Branch, to Minister, 20 August 1998, p 3.

33 Office of the Supervising Scientist, *Assessment of the Jabiluka Project: Report by the Supervising Scientist to the World Heritage Committee*, April 1999, p 11.

34 Office of the Supervising Scientist, *Assessment of the Jabiluka Project: Report by the Supervising Scientist to the World Heritage Committee*, April 1999, p 11.

whether or not above-ground storage of tailings is likely ... We remain sceptical of blanket promises. This country is littered with abandoned mine sites. This is a World Heritage property, I repeat, not just any old mine.³⁵

4.39 Their submission also drew the attention of the Committee to the possibility that:

in the future, this approved plan may be changed. Over the 30 year lifespan of the mine there will be ample opportunity for new plans to be approved, including the storage of tailings on the surface. If this possibility can be ruled out with complete confidence ... then our concerns about the calculation of risk for the stability of surface storages vanish. If the possibility of a renegotiated disposal plan cannot be ruled out, then we remain concerned that the actual extremes of rainfall and run-off may substantially differ from those modelled and calculated.³⁶

4.40 The ANU's Professor Ian White also cited the failure of the BHP mine at Beenup where the cost and technological challenge of dewatering tailings (as ERA proposes in forming the cement paste) caused the mine to be abandoned. Professor Wasson stated that the uncertainties identified in regards to the 50-50 option suggested that it could not be successfully redesigned:

Storing tailings at the surface is really not an environmentally sound option.³⁷

4.41 The ANU scientists' submission also expressed dissatisfaction with the lack of public scrutiny of the proposal, associated with the 100 per cent underground option, to excavate inert rock from the mass adjacent to the decline to create room for the extra tailings: 'Again the Supervising Scientist asks us to trust the details of this procedure, the details of which remain unclear.'³⁸

Radiological Protection

4.42 Radiological protection challenges arise in two main areas:

- The exposure of mine workers to radiation, particularly given that the operating environment is underground and that much of the uranium ore is of a very high grade, from 0.2 per cent U₃O₈ to 0.65 per cent;
- The possible exposure of nearby populations, particularly the Aboriginal settlement at Mudginberri, to airborne radiation.

35 *Proof Committee Hansard*, Canberra, 11 June 1999, p 25.

36 Professor R. Wasson, Professor I. White, Dr B. Mackey, Mr P. Fleming, Submission 50, pp 2-3.

37 *Proof Committee Hansard*, Canberra, 11 June 1999, pp 26-27.

38 Professor R. Wasson, Professor I. White, Dr B. Mackey, Mr P. Fleming, Submission 50, p 3.

4.43 Environment Australia appeared to endorse the radiation limits used by ERA, which accorded with the then published limits from the International Commission on Radiological Protection (ICRP). These were:

- Doses to designated workers to be limited to 100 millisieverts (mSv) in a 5-year period, which is an average of 20 mSv per annum, with a subsidiary limit of 50 mSv in any one year;
- Doses to members of the public to be limited to less than 1 mSv per annum during mine operation and after its closure.

4.44 The EIS and the PER modelled the dose rates predicted in the mine and public environments and outlined a range of measures to protect workers and minimise levels. These models and techniques were reviewed by the Supervising Scientist, Australian Radiation Laboratories (ARL) and by other specialist consultants.

4.45 The evaluations conducted by Environment Australia appear to demonstrate that the modelling and measures initially outlined by ERA were inadequate. Its EIS and PER assessment reports include very extensive and detailed recommendations in relation to the collection of further baseline data about pre-mining background levels, the monitoring of radiation levels and forms in the mine workings, new modelling, and the redesign and reassessment of shielding equipment for workers and of the mine ventilation system.³⁹

4.46 Concerns about the ventilation system and its assumptions were confirmed by analysis of Dr M J Howes, an internationally recognised expert in uranium mine ventilation. The Environment Australia assessment said that workers would be exposed to doses of 9.4 mSv to 14 mSv per annum, which approach legislated maximum levels, and remarked that it was essential that underground workers be protected. According to Environment Australia, comparison with the underground uranium mine currently operating at Olympic Dam:

indicates that the dose estimated from modelling is less than might be expected from actual operation ... given that the largest predicted annual radiation doses approach the annual dose limit, it is essential that an exhaustive radiation protection program be planned and implemented to verify the methodologies employed to estimate effective doses to mine workers, and to accurately quantify the radiation doses incurred as a result of each work function at the mine.⁴⁰

4.47 Dr Alan Roberts of Monash University stated in his submission that the richness of the uranium ore at Jabiluka was of particular concern. It contains about six times more uranium than the ore from Olympic Dam; in other words, there is six times

39 Environment Australia, *Environment Assessment Report: Proposal to Extract, Process and Export Uranium from Jabiluka Orebody No 2*, August 1997, pp 91-2.

40 Environment Australia, *Environment Assessment Report: Proposal to Extract, Process and Export Uranium from Jabiluka Orebody No 2*, August 1997, p 91.

the amount of radiation source for each ton of ore mined, which could produce a greatly increased dose for workers. Dr Roberts said that while the EIS had dealt with this issue, it did not do so in sufficient detail and left important questions unanswered.⁴¹

4.48 Also of serious concern to the Committee are the predicted effects of airborne radiation (through the inhalation of radon progeny) on the surrounding public area – that is, on Mirrar lands. Environment Australia's assessment stated that, depending on the calculations used, exposure rates at Mudginberri could vary from 0.12 mSv pa (12 per cent of the current ICRP dose limit) to as high as 49 per cent of the dose limit. Environment Australia commented that:

It should be noted that, even if these dose rates at Mudginberri are below the public dose limit, there will be regions in the vicinity of Jabiluka at which restrictions on permanent occupancy might have to be placed (e.g. Ja Ja) – that is, the annual radiation dose to occupants in some areas near to the mine may be over the 1 mSv limit.

The potential for members of the public to be exposed to levels above the recommended dose is viewed as an unacceptable impact and would be of particular concern to Traditional Owners.⁴²

4.49 When the PER assessment report was prepared, these uncertainties still remained. The Office of the Supervising Scientist and the ARL both stated that while they did not expect doses to people at Mudginberri to exceed the legal limits, they had significant questions about the modelling used by ERA to predict doses, which they thought produced 'unexpectedly low dose rates'. Environment Australia thus recommended further research and monitoring of airborne radiation, with the results to be submitted to the Supervising Scientist and the NT *prior* to the mining and processing of ore.⁴³

4.50 Many submissions to the Committee argued that there is no actual 'safe' level of radiation exposure, and that dose levels as set by bodies like the ICRP are a trade-off between possible casualty rates and the perceived economic benefits of mining employment and access to the products of the nuclear industry. The Jabiluka Action Group (QLD) submitted that the ICRP has steadily been revising downwards safe permitted levels of exposure to radiation as more information emerges over time. It cited a 1997 article in the *New Scientist* in which:

41 Dr Alan Roberts, Submission 19, p 1.

42 Environment Australia, *Environment Assessment Report: Proposal to Extract, Process and Export Uranium from Jabiluka Orebody No 2*, August 1997, p 95.

43 Environment Australia, *Environment Assessment Report: The Jabiluka Mill Alternative at the Jabiluka No 2 Uranium Mine*, July 1998, p 65.

The ICRP now admits there is no safe lower limit of radiation exposure. Low levels of exposure over a period of time are as dangerous to health as high dose levels.⁴⁴

4.51 The Jabiluka Action Group also told the Committee that the ICRP revised its limits for exposures to uranium workers from 50 mSv pa to the current 20 mSv pa in 1990. Other countries have far lower dose limits for the public than the current ICRP and Australian level of 1 mSv per year. The US limit is 0.25 mSv, Germany 0.30 mSv and the UK 0.30 mSv.⁴⁵ The Committee notes that Environment Australia's EIS assessment speculated that annual doses to the residents of Mudginberri could be between 0.25 and 0.49 mSv per annum, well over the overseas limits.⁴⁶ The Australian Conservation Foundation put the question as to 'how, over time, the [Jabiluka] project would be able to come in under what are bound to be an ever increasing tightening of ICRP standards'.⁴⁷

4.52 The Committee has three major concerns about radiological protection at Jabiluka:

- Environment Australia's analysis indicates that significant uncertainties remained at the time of the EIS about the modelling used to predict radiation doses on the mine workers and that the design of crucial control measures, such as the mine ventilation system, was unresolved. These uncertainties combine, over time, with the likelihood of ICRP limits falling. In the Committee's view, this raises serious questions about the ministerial approvals given to the Ranger Mill Alternative in June 1998.
- The regulatory regime relies on the Northern Territory Government to enforce Government recommendations about radiological monitoring and protection, given that they must be completed *before mining begins*. While the Supervising Scientist has the skills to assess the studies it is unclear whether further scientific peer review would be involved. Should the Northern Territory's oversight be inadequate, the Commonwealth has no direct power to intervene until ERA applies for an export licence for its first yellowcake shipments. The Committee heard serious concerns about the regulatory record of the NT, which are detailed below (4.125-4.134).
- The potential for public access to areas around the mine to be banned is of grave concern. If ICRP recommendations about permissible levels fall further this is more likely to occur. This possibility needs to be considered in relation to the very serious potential social and cultural impacts of the mine on Aboriginal

44 The Jabiluka Action Group (QLD), Submission 46, p 13.

45 The Jabiluka Action Group (QLD), Submission 46, p 13.

46 Environment Australia, *Environment Assessment Report: Proposal to Extract, Process and Export Uranium from Jabiluka Orebody No 2*, August 1997, p 95.

47 Mr Dave Sweeney, Australian Conservation Foundation, *Proof Committee Hansard*, Canberra, 11 June 1999, p 95.

people, whose culture and tradition may suffer if they are discouraged, through anxiety or regulation, from visiting and using their lands for traditional purposes. This concern, in its broader context, is discussed further below (4.60-4.115). The Committee feels that these concerns were not given adequate consideration by the Government in its decision-making, and should have contributed to a decision to delay, rather than approve, the mine's construction.

The Scope for Public and Aboriginal Input to the EIA Process

4.53 The Committee acknowledges that formal requirements for public comment and participation in the EIA process have generally been met. However, submissions raised substantial concerns with some elements of the process. Of most concern to the Committee was the lack of scope for Aboriginal people to understand and comment on the assessments.

4.54 Concerns were raised that opportunities for public comment on the Jabiluka Mill Alternative were compromised by the level of assessment of the PER. According to Environment Australia, a majority of submissions expressed unhappiness with the level of the assessment. These submissions argued that 'for a project of this nature with potential impacts on an area of international significance, at least an EIS with its enhanced opportunities for public input was warranted'. A substantial number of others argued that the assessment of the JMA warranted a Commission of Inquiry. A great majority, including ATSIC and the NLC, also argued that the period of public consultation (four weeks) was insufficient, and did not allow for 'appropriate consultation with key indigenous stakeholders'.⁴⁸

4.55 The level of assessment required by the Minister for Resources and Energy of the final proposal for the disposal of tailings under the Jabiluka Mill Alternative has also been raised in many submissions. Further assessment of the proposal for the disposal of all tailings underground, which involves the excavation of massive amounts of waste rock which will need to be permanently stored on the surface, is limited to the Supervising Scientist, who will report to the Commonwealth and the Northern Territory. There will be no public consideration of this proposal. Similarly, the further assessment of ERA's preferred Jabiluka Mill Alternative option, which involves the partial disposal of tailings in surface pits and about which there remains significant scientific uncertainty, will receive no public consideration.

4.56 The Committee believes that this level of assessment is inadequate, and also that at the very least the proposals should be subject to a new PER and be open to scientific peer review.

4.57 In its submission to the EIS the Northern Land Council stated that it had made its comments under protest because of the inadequate consideration of Aboriginal concerns. The NLC's concerns took two forms:

48 Environment Australia, *Environment Assessment Report: The Jabiluka Mill Alternative at the Jabiluka No 2 Uranium Mine*, July 1998, p 11.

- The Mirrar had refused to participate in consultations about the mine until their concerns about the unfairness of the 1982 Agreement and the company's refusal to reopen negotiations were addressed; and
- The EIS guidelines were flawed in that they did not require the company to produce the EIS in a format accessible to the Aboriginal community. The documents were neither produced in the Gundjehmi language nor plain English. ERA released a plain English version, 'The Jabiluka Project – The Project in Pictures,' which was only made available to the community a month before comment was due. The NLC requested an audio tape of the plain English version, which was not supplied before comments were due.⁴⁹

4.58 The Gundjehmi Corporation argued that the entire approach of the EIS and PER to Aboriginal socio-cultural issues was flawed because, as a process, it entrenched the original denial of the rights of Traditional Owners to make fundamental decisions about their land. They expressed concern that 'there were no Aboriginal contributors to either the EIS or PER', and argued that:

The entire purpose of the documents is to achieve an economic objective for a publicly listed mining company. This objective is to develop a uranium mine on Mirrar land. The Mirrar are fundamentally opposed to this objective. To this end, the EIS and PER processes have disempowered the Mirrar from the outset ... as soon as the Mirrar engage in the process of correcting or providing new information to the EIS or PER the Mirrar are effectively legitimising and contributing to this appropriation.

The EIS and PER processes are not about *whether* the project should proceed but *how* it should proceed.⁵⁰

4.59 The Committee acknowledges and sympathises with these concerns. It is a mark of the way in which the basic conflict with the Mirrar over the mining of their land has coloured the whole Jabiluka assessment process. Bearing these concerns in mind, the Committee has nonetheless sought to conduct a careful assessment of the totality of the EIA process in relation to the project. It is of major concern to the Committee that an appearance that the process has functioned not to decide whether the project should proceed but how it should proceed, has been created. This is a concern that relates to issues considered throughout this chapter, and has some legitimacy. The process of Government decision-making which has provoked this concern is discussed further later in this chapter (4.147-4.181).

49 Northern Land Council, *Comments on the Environmental Impact Statement for the Jabiluka Uranium Mine Proposal*, p 1.

50 Gundjehmi Corporation, Submission 48, p 5.

Cultural Heritage and Sacred Sites

4.60 Requirements to assess and report on the potential cultural impacts of the Jabiluka mine for Aboriginal communities were given high priority in the draft guidelines for both the EIS and PER. The EIS guidelines required ERA to develop baseline descriptions of Aboriginal land uses, food gathering and ceremonies, of sites of significance to Aboriginal population and culture, and of Kakadu as a cultural landscape.⁵¹ The PER guidelines involved even more detailed requirements to assess the impacts of the JMA on:

- Traditional Owners' use of the land after the proposed mill has been completed;
- The social and cultural lifestyle of Traditional Owners and the broader Aboriginal community, including customary practices, resource sharing and food gathering; and
- Impacts of milling activity upon Aboriginal values of the region, sites of significance and Aboriginal culture (including the views of Traditional Owners on impacts).⁵²

4.61 In the two years since the EIS was prepared, attention has fallen on the requirement of ERA to develop a comprehensive cultural heritage management plan in consultation with Traditional Owners, and on disputes about how the extraction of ore will affect the Boiwek-Almudj sacred site complex (which the Traditional Owners believe to overlay and include the orebody).⁵³ The Australian Government and ERA are disputing the claims of the Senior Traditional Owner about the extent and significance of the site, and ERA has refused to cease construction of the mine in order to complete the cultural heritage management plan. These disputes have become particularly bitter and have soured relations between the Mirrar and ERA.

4.62 The EIS identified a need for further archaeological surveys of the project area and conceded that the project layout may need to be reviewed in the light of those studies. Environment Australia's assessment report on the EIS specifically recommended that:

ERA must develop a cultural heritage management plan in consultation with Traditional Owners, and Environment Australia and relevant NT authorities, prior to project construction commencing.⁵⁴

51 Environment Protection Agency and NT Department of Lands, Planning and Environment, *Jabiluka: Draft Guidelines for an Environmental Impact Statement on the proposed development of Jabiluka No 2 uranium mine*, June 1996, p 8.

52 Environment Protection Agency and NT Department of Lands, Planning and Environment, *Guidelines for a Public Environment Report on the proposed development of the Jabiluka Mill Alternative at the Jabiluka No 2 uranium mine*, June 1998, p 7.

53 Spellings of Boiwek vary considerably from source to source, as a result of differing transcriptions from an oral culture.

54 Environment Australia, *Environment Assessment Report: Proposal to Extract, Process and Export Uranium from Jabiluka Orebody No 2*, August 1997, p 112.

4.63 The Northern Land Council confirmed to the Committee that it received an interim cultural heritage management plan six months after construction had started. A completed plan, it told the Committee, 'would have served to clarify a number of issues, including the extent of sites in the lease area ahead of development being undertaken'.⁵⁵

4.64 The Committee views the fact that the cultural heritage management plan has not been completed with great concern. It believes that the Government's approval for construction of elements 'common' to the Ranger Mill Alternative and Jabiluka Mill Alternative was premature, given that the plan had not been completed. Concerned about the damage construction could do to the Boiwek-Almudj sites, the Mirrar have refused to cooperate with the development of the plan until construction was suspended for a period of between four and six months.⁵⁶ Such a suspension could have allowed for the credible cultural mapping of the area in consultation with Traditional Owners.

4.65 The Environment Australia assessment report also identified the Boiwek (knob-tailed gecko) site, a 'soak' on the edge of the Magela wetlands across the Oenpelli road, as 'of particular concern and was raised as such in a submission by the NLC. This site would appear to be a "danger" site which could be compromised if development proceeds'. The assessment report felt that the proposal to draw groundwater for mine workings may affect the site, and recommended that if a program to monitor its impact could not be established, alternative water sources would need to be sought.⁵⁷

4.66 Both the EIS and the assessment report failed to document the further information which was now being revealed about the site by the Senior Traditional Owner and other custodians. Presumably under the pressure of the mine's imminent construction, they had revealed that the site was linked easterly through the mine valley to the Almudj (Dreaming Serpent) site by a dreaming track to form a single complex. This site was *djang andjamun* (dangerous and restricted) and had sub-surface manifestations.

4.67 In its response to the Report of the World Heritage Committee mission, the Australian Government argued that it was not aware of claims that the Boiwek site had an 'extended area' or underground manifestations. It stated that: 'The recent claims are not consistent with anthropological records or the previous statements and permissions given between 1976 and 1997 by Traditional Owners'. These instances were said to include the 1982 Jabiluka agreement, the 1977 Fox Inquiry, the claim book for the Stage II Alligators Rivers stage two land claim, and research for the

55 Mr Norman Fry and Mr Jeff Stead, Northern Land Council, *Proof Committee Hansard*, Darwin, 16 June 1999, pp 133, 140.

56 'Questions raised about ERA eligibility to export uranium,' ABC News, 21 May 1999.

57 Environment Australia, *Environment Assessment Report: Proposal to Extract, Process and Export Uranium from Jabiluka Orebody No 2*, August 1997, p 113.

registration of sites on the National Estate. In all of these instances, the Government claims, Boiwek was defined as a small discrete soakage or swamp and was not classified as ‘dangerous’.⁵⁸

4.68 Professor John Mulvaney, an eminent archaeologist and former Australian Heritage Commissioner, told the Committee that the site complex had, in fact, been identified as early as 1978 in the course of a study by George Chaloupka and other anthropologists.⁵⁹ Chaloupka’s report includes extracts from a survey of the Jabiluka area that was undertaken by Dr Ian Keen, who recorded the Boiwek and Almudj sites and the dreaming track extending between them. His notes state that at Almudj was a series of paintings, including a design of the Buyweg figure: ‘Almudj is said to have made the place and travelled to Buyweg where it made permanent freshwater springs’. He quotes the traditional custodian who accompanied him as saying:

That one went right through to Buyweg – where that Buyweg are – that’s dreaming. I don’t reckon – spring water is that bit of ground there. Buyweg make it that way.⁶⁰

4.69 Intimating the underground manifestations denied by the Government, Keen then noted:

These springs associated with Buyweg and Almudj are located in the Pancontinental deposits, and test drillings have been made immediately beside it.⁶¹

4.70 Chaloupka’s notes accompanying a photograph of Boiwek add further weight to the Mirrar Senior Traditional Owner’s account of the site. He writes:

Plate 10. This is Bojweg Bagolu, *djang*, a dreaming site of *Bojweg*, a knob-tailed gecko ... an actual animal, but also a dangerous mythological being. The soak never dries up, even when during extreme drought the wetlands dry out. This is believed to be because Almudj, the Rainbow Snake, is below the ground here.⁶²

4.71 Legalists might point to the reference to the site as *djang*, which indicates that it is sacred, rather than to a specific reference to it as *djang andjamun*, or sacred and dangerous. However, there is also reference to the Bojweg creature as ‘a dangerous mythological being’ and that the Almudj figure exists below ground. Keen’s notes

58 Environment Australia, *Australia’s Kakadu: Protecting World Heritage*, Response by the Government of Australia to the UNESCO World Heritage Committee regarding Kakadu National Park, April 1999, p 64.

59 *Proof Committee Hansard*, Canberra, 11 June 1999, p 61.

60 Ian Keen, *Sites of Significance in the vicinity of the proposed Arnhem highway extension: A report to the Northern Land Council*, ANU, 22 August 1978, pp 5-6.

61 Ian Keen, *Sites of Significance in the vicinity of the proposed Arnhem highway extension: A report to the Northern Land Council*, ANU, 22 August 1978, pp 5-6.

62 George Chaloupka, *Djawumbu-Madjawarnja Site Complex*, October 1978.

also suggest that the Almudj figure, which created and perpetuates the springs, exists in a location generally coterminous with the ore body.

4.72 This statement alone, from one of the most widely respected anthropologists to have worked in the region, should be sufficient to dispel any doubt about the nature of the site and to cause the Government to reassess its approach to the issue and to the current mine proposal. The Committee believes that this record strongly suggests that the current Senior Traditional Owner, Yvonne Margarula, is not engaging in wilful fabrication in her recent accounts of the site and its location, as the Government appears to be suggesting. In evidence to the Committee she stated that:

What I will tell you today will be the same thing which I have been talking about for years. I want to assure you that when we talk about these things, we don't make them up; we don't change them from time to time to suit the occasion. It is something we always talk about in the same way. When Aboriginal people talk about sacred sites, it is a historical thing which goes back into our ancestral past ...

this particular site we are talking about here [Boiwek-Almudj] is a dangerous site. We just don't go there and sing out any old way or call out any old thing or behave in any sort of informal fashion ...

those of us today know and understand what our ancestors explained to us. We hold that knowledge and know it to be true.⁶³

4.73 Professor Mulvaney told the Committee that it was not unusual for new details about sacred sites to emerge over time. In fact, he argued, it was quite normal and in accordance with the rules in Aboriginal law which govern the transmission and revelation of secret knowledge:

It is essential to acknowledge that Aboriginal practice and European legal understanding differ. While company officials might assume that all details have been revealed [to Pancontinental for the purposes of the 1982 Jabiluka Agreement], elders would not have felt any obligation to disclose all esoteric details. Indeed, the reverse is the case. In Aboriginal law only appropriate persons may be told details, and those are revealed progressively through their life cycles at specified rituals. It should neither surprise nor anger industry and government when new attributions emerge in the face of dire actions which force revelations.

Access to stories by non-indigenous people is severely restricted and may become public only when every other course of action proves impossible.⁶⁴

4.74 In defence of its argument about the site, the Government has cited the actions of the Northern Territory's Aboriginal Areas Protection Authority (AAPA), which

63 *Proof Committee Proof Committee Hansard*, Jabiru, 15 June 1999, p 15.

64 Professor John Mulvaney, Submission 30, p 3.

declined to register the site formally after an application was made by the Northern Land Council in 1997. The AAPA's Chief Executive Officer, Dr David Ritchie, told the Committee that it declined to register the site because:

What emerged ... was that, while there is no doubt that Boyweg and Al mudj are very significant sites, and clearly sacred sites within the meaning of the Land Rights Act and hence the Sacred Sites Act, there was considerable disagreement – and by considerable I mean a large range of views – over how big the sites are, what features comprise and the stories associated with, those particular sites ... So the authority resolved that it could not enter the Boyweg-Al mudj site as requested on the register of sacred sites; but it made the point – this is again a legal point – that it in no way was a statement that the area was not a sacred site.⁶⁵

4.75 In the Committee's view this last statement discredits the Government's attempt to use the AAPA decision to defend its position. Dr Ritchie also told the Committee that similar levels of uncertainty, this time working in the opposite direction, influenced its decision at the same time to refuse an application by ERA for an authority certificate to carry out works in the mine valley:

The Sacred Sites Act says that the Authority, before issuing an approval, must be satisfied that the proposed works do not pose a substantial threat of damage to interference with sites on or in the vicinity of the application – so again, there was substantial doubt.⁶⁶

4.76 It appears to the Committee that Ms Margarula's claims about Boiwek-Al mudj were sufficiently credible for the AAPA to refuse an Authority to ERA to undertake *underground* works in the mine valley, which included the construction of ventilation shafts from the mine tunnels. However, the disagreement among custodians did not provide enough legal certainty for the site to be registered.

4.77 Of some interest to the Committee is the test the AAPA uses to evaluate the knowledge and standing of custodians it consults. If Professor Mulvaney's evidence about the rules governing what custodians may know and reveal is to be taken seriously, it is possible that some were not in possession of the full 'story' about the sites. The Gundjehmi Corporation states that in 1980 the then Senior Traditional Owner identified Mr Jimmy WogWog as the elder responsible for sacred sites in the area. On a survey with George Chaloupka in 1992, he had identified the Boiwek-Al mudj area as a 'dangerous proximity'. They also claim that the evidence of five senior Mirrar custodians to the AAPA was contradicted 'by a person not considered to be a custodian for the Jabiluka land'.⁶⁷ Unfortunately, the Committee was unable to pursue these points with Dr Ritchie.

65 *Proof Committee Hansard*, Darwin, 16 June 1999, p 173.

66 *Proof Committee Hansard*, Darwin, 16 June 1999, p 173.

67 *Submission from the Mirrar people to the UNESCO World Heritage Committee ICCROM and ICOMOS in relation to the Australian Government's Report, 'Australia's Kakadu'*, pp 22-25.

4.78 The Gundjehmi Corporation has assembled a history of the recording of sacred sites in the Jabiluka area which clarifies many of the statements which the Government has made about existing site records. It makes the following points:

- It is true that George Chaloupka's research for the Fox Inquiry identified only one site in the entire Jabiluka project area. However Chaloupka attributes this to the fact that the Fox Inquiry was focussed on Ranger which threatened sites in the southern part of Mirrar land.
- In 1976 Chaloupka did further cultural mapping with two custodians for an application to have the Djawumbu-Madjawarnja site complex listed on the National Estate. The custodians referred to the Boiwek-Bagaloi soak and the Almudj rock art site as sacred and dangerous places, along with the dreaming track which connected them. Chaloupka included the Boiwek-Almudj site complex in the listing application, but after representations from the mining company the Heritage Commission excised the extent of Jabiluka mining activity from the area to be protected, which was listed in 1980.
- In 1978 Chaloupka made representations to the Australian Government that Pancontinental's claim – in an EIS for the proposed Arnhem highway extension – that there were no known sites in the area of the proposed road was misleading. Dr Keen's studies at this time, referred to above (4.68), specifically refuted the company's claims.
- Dr Keen included the full reference to the Boiwek-Almudj complex and dreaming track in the Alligator Rivers Stage II land claim, in explicit contradiction of the Australian Government's recent claims. The hearings however incorrectly recorded the sites, noting that Boiwek stood alone and recording a non-existent site called 'Berewuk'.
- In 1982, following serious desecration of sacred sites attributed to Pancontinental personnel, including the theft of human remains, local Aboriginal people requested at 18 separate meetings that sacred sites *not* be identified in the 1982 Jabiluka agreement. Despite this, and the fact that no project-specific anthropological work was carried out during the negotiations, a highly erroneous sites map appeared in the Agreement, transcribing the mistakes made in the record of the 1980 land claim.
- In early 1982 a well-known anthropologist wrote to Pancontinental to warn the company of serious concerns within the Aboriginal community that appropriate custodians had not been consulted about sacred sites in the Jabiluka area and that sites underground could be disturbed by mining activities with severe consequences.⁶⁸

68 *Submission from the Mirrar people to the UNESCO World Heritage Committee ICCROM and ICOMOS in relation to the Australian Government's Report, 'Australia's Kakadu', pp 22-25.*

4.79 This is an extensive and compelling record when one considers the claims made by the Government and ERA in relation to the Boiwek-Almudj sites. The Committee believes that for the Australian Government to use an obviously flawed process, which included the desecration of sacred sites and the wilful disregard of known information, in an attempt to discredit the claims of custodians about the Boiwek-Almudj complex, is grossly disrespectful. Whatever the legal uncertainties surrounding the site complex, the Committee believes that the claim of the Australian Government that the extent and meaning of the sites has recently been changed cannot be sustained.

4.80 Widespread evidence exists to show that a recorded description of the sites as sacred and dangerous and linked by a dreaming track, had appeared as early as 1978 and has been repeated on many occasions since. The rules governing the revelation and transmission of secret knowledge, and caution about revealing knowledge to non-Aboriginals until absolutely necessary, explains the absence of the site from the 1982 Agreement and the public statements about its nature since the Jabiluka development was revived in 1996. The Committee believes that it is a matter of respect for traditional law and culture that this information be accepted. The Committee calls on ERA to enter into new negotiations with the Mirrar with the aim of protecting the site from the impacts of mining.

4.81 Ms Margarula told the Committee, in response to a question citing the assurances of ERA about the eventual rehabilitation and return of the mine site to the Traditional Owners, of the irreversible damage already wrought by the mine's construction:

That idea [rehabilitation] is no good. They will interfere with the integrity of the site, they will take parts of it away, deposits in the ground made by the dreaming ancestor will be removed, they will do all sorts of explosions and crush the ground with forces of all description and then cover up all the dangerous things and leave it alone and go away. It is too late ... Once you destroy a sacred site that is the end of it.

We Aboriginal people believe that the wet seasons are intimately connected to this site and we do not know what bad things are going to happen with respect to the weather or the water. This will affect other Aboriginal people in the area as well.⁶⁹

Recommendation 3

The Committee recommends that all further construction of the Jabiluka mine be suspended until cultural mapping of the site area can be conducted in cooperation with the Traditional Owners and recognised custodians of the Jabiluka area.

69 *Proof Committee Hansard*, Jabiru, 15 June 1999, p 24.

The Social Impacts of Uranium Mining

Overview

4.82 Requirements for ERA to address the broader social impacts of the Jabiluka mine were included in the guidelines for both the EIS and PER. These included:

- The effects on employment, education, health and health services, safety, law and order;
- Possible adverse impacts upon Traditional Owners' social and cultural lifestyle, including customary practices and resource sharing; and
- Cumulative impacts, including the combined impacts of the Ranger and Jabiluka mines upon the Kakadu region.⁷⁰

4.83 The Committee heard a great deal of evidence about whether or not ERA, and the Commonwealth and Northern Territory Governments, had adequately assessed and attempted to mitigate these potential impacts both in the EIS and PER and in later initiatives.

4.84 Possible social impacts were thought to arise from a variety of causes:

- The influx of a large number of non-Aboriginal people during the mine life. The EIS stated that operation of the mine would result in an approximate ten to fifteen per cent increase in the population of the region, with a total possible mining workforce of over 200;
- The replacement of Government funding for basic services and programs with mining royalties;
- Adverse effects on food gathering and land usage through real or perceived contamination of the environment;
- The encroachment of non-Aboriginals onto restricted Aboriginal land;
- The pressure of participating in meetings and administrative arrangements; and
- Aboriginal perceptions of marginalisation, as a result of either the increasing numbers of non-Aboriginal people in the area or the denial of sovereignty over land and development. The extension of the life of the Ranger mine and of the town of Jabiru were important considerations here.

4.85 From the outset, the question of social impacts and their consideration within the EIA process has been coloured by the opposition of the Mirrar to the mine and the company's determination to hold them to the terms of the 1982 Agreement between Pancontinental and the NLC. The NLC, on behalf of Traditional Owners, restricted

70 Environment Protection Agency and NT Department of Lands, Planning and Environment, *Jabiluka: Draft Guidelines for an Environmental Impact Statement on the proposed development of Jabiluka No 2 uranium mine*, June 1996, p 9.

access to the lease area by the company, which ERA claims prevented the EIS from presenting sufficient or reliable information on social impacts on Aboriginal people.

4.86 Ms Jacqui Katona, Executive Officer of the Gundjehmi Aboriginal Corporation which represents the Mirrar, told the Committee that the dispute over the 1982 Agreement already had powerful social effects:

The most fundamental impact ... is the fact that their decisions were ignored by Government, that governments totally overrode Aboriginal people's opposition to uranium mining ... It has set up a power relationship where Aboriginal people are powerless and all the rest are powerful.

The poverty is phenomenal and all the other social and economic symptoms of that – like alcoholism, poor health and domestic violence – are just that: symptoms.⁷¹

4.87 The Senior Traditional Owner, Yvonne Margarula, was asked by the Committee whether the mine had brought any benefits to her community:

I can't think of anything good. I would like to think of something but I really can't.

Just look at the history of what has happened here with the mining. In the beginning when mining negotiations actually started and when mining first started, there was money coming out everywhere. There were houses built for people – promises of this, that and the other thing. But look what came with all this development – the alcohol, all sorts of unhappiness. We stand to lose our sacred sites but get a lot of money.⁷²

Time demands, cultural stress and administration

4.88 The Northern Territory's EIS assessment report stated that the process of negotiation, and the pressure and complexity surrounding development, also had powerful social effects:

Aboriginal people, individually and in communities, have become subject to increasing pressures to change and to information overload so there is often sufficient stress to cause social disruption. The people are currently receiving complex information on many topics from a variety of sources, but the information they receive is often incomplete and conflicting. Added to this are time pressures to make rapid decisions in a manner not consistent with Aboriginal approaches, which require a high degree of consensus arising from considered discussion from all parties concerned.⁷³

71 *Proof Committee Hansard*, Jabiru, 15 June 1999, pp 8-9.

72 *Proof Committee Hansard*, Jabiru, 15 June 1999, p 17.

73 Northern Territory Department of Lands, Planning and Environment, *Jabiluka Number 2 Uranium Mine Proposal: Environmental Assessment Report and Recommendations*, August 1997, p 62.

4.89 Environment Australia's EIS assessment also commented that dealing with mining companies, Park management and participation in Aboriginal organisations produced added stresses for Aboriginal people. Environment Australia noted that if the Commonwealth approved the project such pressures could increase.⁷⁴

Access to country and risk perception

4.90 Environment Australia's EIS assessment noted that the Ranger operation and Jabiru already took up a large part of Mirrar land. 'While access to most of the lease will remain,' they stated, 'it will potentially be less attractive. Even after rehabilitation, the land may have reduced value because of perceived association with radioactivity. While ERA's commitments to consultation ... would reduce this impact, the impact may remain significant.'⁷⁵

4.91 Echoing the NT's assessment, Environment Australia also noted that:

perception of risk may exist after an issue has been demonstrably dealt with to the satisfaction of the company and regulatory agencies. Risk perceptions may be due to issues of trust in scientific data collection and in the company ...

The impacts of these fears have not been well documented, other than reports (including in the NLC submission) of reduced usage of the Magela floodplain. Possible social impacts of these fears can include the psychological and health effects of suffering fear, reduced use of the area concerned and of species normally hunted from it. Over a very long period there is a risk of gradual attrition of knowledge of these areas if they become less frequented and children are taken there less often for socialisation into traditional ecological knowledge.⁷⁶

4.92 The Committee applauds the acuteness and sensitivity of this analysis. However, it is also concerned that such a profound series of potential impacts, which affect the very survival of Aboriginal tradition and are compounded by the Mirrar's fears for the integrity of the Boiwek-Almudj complex, were not reflected in a stronger recommendation. The Department merely recommended that ERA and the Supervising Scientist aim for better levels of communication about and participation in environmental monitoring, including providing data in forms which assist Aboriginal people to evaluate it for themselves.⁷⁷

74 Environment Australia, *Environment Assessment Report: Proposal to Extract, Process and Export Uranium from Jabiluka Orebody No 2*, August 1997, p 118.

75 Environment Australia, *Environment Assessment Report: Proposal to Extract, Process and Export Uranium from Jabiluka Orebody No 2*, August 1997, p 113.

76 Environment Australia, *Environment Assessment Report: Proposal to Extract, Process and Export Uranium from Jabiluka Orebody No 2*, August 1997, pp 113-114.

77 Environment Australia, *Environment Assessment Report: Proposal to Extract, Process and Export Uranium from Jabiluka Orebody No 2*, August 1997, p 114.

4.93 This recommendation is laudable in itself, but will be counteracted by the growing pattern of distrust and hostility which marks relations between the Mirrar and ERA. This has only been exacerbated by the arrest and prosecution of Yvonne Margarula for trespassing on the mine site in May 1998, which marked a new low in relations with the Mirrar, and by ERA's refusal to respond to the concerns about Boiwek-Almudj. Environment Australia stated that, ERA's commitment to cooperate and communicate with community groups in order to increase mutual trust and cooperation:

may reduce perceptions of perceived risk, [but] if such perceptions continue to exist so long after the commencement of mining at Ranger, it is unlikely that they could be easily banished.⁷⁸

4.94 It is the Committee's view that such impacts cannot be adequately dealt with in discrete measures arising from the EIA process. They must be addressed in the context of broader issues about sovereignty, consent and justice in relation to the approvals process and the legal rights of Traditional Owners.

Recommendation 4

The Committee recommends that the issues of Aboriginal people's access to, and perception of, country as a result of development projects, be addressed in a holistic process which links environmental impact assessment with questions of Aboriginal land rights, sovereignty and cultural survival.

Marginalisation and disempowerment

4.95 Environment Australia's assessment acknowledges this aspect of the social impacts of mining. It commented that marginalisation occurred through unequal power relations and the alienating daily experience of being a minority among non-Aboriginal people:

It affects people's ability and sense of effectiveness to pursue their own planning and development agendas (including visions of their country and futures) rather than be forced to adapt to the agendas of others.⁷⁹

4.96 Environment Australia stated that evidence dating from the Fox Inquiry confirmed the high level of Aboriginal marginalisation and that 'approval of the Jabiluka project would continue this degree of marginalisation over a far longer period (46-48 years post-1977). It stated that while approval would cause 'additional pain', non-approval 'would simplify the stakeholding relationships in the region after Ranger

78 Environment Australia, *Environment Assessment Report: Proposal to Extract, Process and Export Uranium from Jabiluka Orebody No 2*, August 1997, p 114.

79 Environment Australia, *Environment Assessment Report: Proposal to Extract, Process and Export Uranium from Jabiluka Orebody No 2*, August 1997, p 114.

ceases operation around 2008, leaving Aboriginal people in a more influential position overall.⁸⁰

4.97 The Gundjehmi Corporation's Jacqui Katona told the Committee that the impact of such enduring marginalisation was cultural genocide:

We live our culture. So when parts of our culture are being eroded, it is our identity which is being attacked and undermined. It is the future of our children that is being undermined. We might still be living after all this, but there will still have been an act of cultural genocide because the instability caused to our families will mean that the integrity of our culture has been severely affected. We will not have the ability to act as traditional owners.

In the same way that previous policies removed children from their families, that is exactly what is happening here. There is a definite break occurring in the ability that Aboriginal people have to exercise their identity.⁸¹

4.98 The Committee is concerned that neither ERA nor the Australian Government has been able to respond to these concerns with sensitivity. Environment Australia conceded that 'the manner in which the Commonwealth decision-making process is concluded has the potential to influence the extent of marginalisation that may be felt.'⁸² Environment Australia was particularly critical of ERA, saying that ERA's commitments to employment, training and business opportunities for Aboriginal people would be undermined by conflict with the Mirrar. It cited ERA's contention that 'many other Traditional Owners of the region have given strong support to mining and the benefits of mining to the community', and commented:

Given that no formal consultation has taken place, it is difficult to assign any credibility to this statement. It is also important to note that the final EIS does not acknowledge the possibility that, because there has been no formal canvassing of other Aboriginal people with cultural responsibility for the project area, it is equally possible that further opposition to the mine and support for the Senior Traditional Owner's position may be found there.⁸³

4.99 The assessment concluded with the grim statement that, if the opposition of the Mirrar continued, 'a decision to proceed with the project will increase marginalisation and social impact no matter what other measures are put in place.' It is telling, in the Committee's view, that this discussion did not give rise to any formal recommendations. The attitudes and decisions of the Minister also indicate that it has been ignored in the Commonwealth approvals process.

80 Environment Australia, *Environment Assessment Report: Proposal to Extract, Process and Export Uranium from Jabiluka Orebody No 2*, August 1997, pp 114-115.

81 *Proof Committee Hansard*, Jabiru, 15 June 1999, p 13.

82 Environment Australia, *Environment Assessment Report: Proposal to Extract, Process and Export Uranium from Jabiluka Orebody No 2*, August 1997, p 115.

83 Environment Australia, *Environment Assessment Report: Proposal to Extract, Process and Export Uranium from Jabiluka Orebody No 2*, August 1997, p 115.

The Kakadu Region Social Impact Study

4.100 Both Environment Australia's assessment and the EIS refer issues such as the distribution of royalties, alcohol and substance abuse, and cumulative impacts to the Kakadu Region Social Impact Study (KRSIS). KRSIS has been the subject of some controversy and bitterness, particularly over its implementation.

4.101 The Northern Land Council complained that because it was conducted in parallel with the EIS, the KRSIS study had little opportunity to determine outcomes in the EIS process. For this reason, in addition to the fact that the EIS was undertaken before the concerns of Traditional Owners about social impacts had been given consideration, the NLC argued that the EIS was 'fundamentally flawed'.⁸⁴

4.102 The KRSIS took place over an eight month period in two components. The first, the Aboriginal Project Committee (APC), conducted research among Aboriginal Communities and developed the analytical basis on which recommendations and an action plan could be developed. The Study Advisory Group (SAG), which was chaired by Mr Mick Dodson and included representatives of the NLC, ERA, the Northern Territory Government, Environment Australia, and the Office of the Supervising Scientist, oversaw the project and drafted its recommendations.

4.103 The introduction to the APC's report states that the KRSIS has 'been a project oriented less towards past impact causation than to identification of problems and issues that need to be addressed in an action plan for community development.' These included: analysis of servicing regimes, including support for efforts to transmit and strengthen traditional knowledge; the structure and operation of Aboriginal organisations set up to manage the material benefits of mining; and Aboriginal critiques of organisations in the region, such as ERA, ERISS, the NLC, Parks Australia North and the Jabiru Town Council.⁸⁵

4.104 The Committee acknowledges the quality and importance of the APC's report, which was compiled in a short time and created welcome scope for Aboriginal voices to be heard on the future of Kakadu. However, the opening comment about its scope also indicates the enforced limitations which governed its work. Despite being invoked as a necessary accompaniment to the EIA process, the study was not focused on assessing the impact of uranium mining on the region. In particular, it was specifically prevented from examining the potential social impact of the Jabiluka mine. The issues of mining-related disempowerment and sovereignty discussed in the NTDLPE and Environment Australia assessment reports were not discussed in the Kakadu Region Social Impact Study.

4.105 Many submissions to this Committee criticised the lack of specific attention in the Kakadu Region Social Impact Study to the social impacts of Jabiluka, particularly

84 Northern Land Council, Submission 45, p 1.

85 Kakadu Region Social Impact Study, *Report of the Aboriginal Project Committee*, June 1997, p i.

given its establishment in parallel to, but not necessarily as a part of, the EIA process. Thus it possesses an ambivalent status where it is both invoked and disavowed as an element of the Jabiluka EIA process. In the Committee's view, this has been counterproductive in the task of assuring Aborigines that their longstanding concerns about the impact of uranium mining were being addressed.

4.106 Many submissions to the Committee voiced concerns that the KRSIS recommendations were not being implemented. In its submission to the PER, the Northern Land Council said that: 'there continues to be no perceptible movement by the Commonwealth and Northern Territory Governments towards the implementation of its recommendations'.⁸⁶ Environment Australia, in its July 1998 PER assessment, acknowledged that: 'the Commonwealth and NT Governments have not as yet announced any decisions on implementing the recommendations of KRSIS'.⁸⁷

4.107 In its April 1999 reply to the World Heritage Committee mission's report, the Australian Government claimed that it 'has commenced action to implement the recommendations' of the Kakadu Regional Social Impact Study:

In late 1998 the Australian and Northern Territory Governments announced their formal response to the recommendations of the KRSIS Community Action Plan and the appointment of the Honourable Bob Collins as the independent Chair of the KRSIS implementation team. Mr Collins is a well respected former Senator for the Northern Territory with a strong record of working to progress Aboriginal people's interests.⁸⁸

4.108 The Government did not say what that response by the two governments had been, and stated that Mr Collins was still in the process of developing a draft KRSIS Action Plan in consultation with Commonwealth and NT Governments, Aboriginal organisations and individuals in the Kakadu region. Yvonne Margarula was asked by the Committee whether Mr Collins had visited her or her community:

He has been here to do something with the Aboriginal community. I do not understand fully what he is supposed to be doing. I do not know ... he came here once.⁸⁹

4.109 The Gundjehmi Corporation asked why the impact of Jabiluka was specifically excluded from the study, and why the local Aboriginal community was not allowed to decide the study's recommendations.⁹⁰ They have also asked why the Commonwealth and Northern Territory Governments have 'vehemently opposed the

86 Northern Land Council, *Comments in relation to the Jabiluka Mill Alternative Public Environment Review*, p 2.

87 Environment Australia, *Environment Assessment Report: The Jabiluka Mill Alternative at the Jabiluka No 2 Uranium Mine*, July 1998, p 60.

88 Environment Australia, *Australia's Kakadu: Protecting World Heritage*, April 1999, p 86.

89 *Proof Committee Hansard*, Jabiru, 15 June 1999, p 18.

90 Gundjehmi Corporation, Submission 48, p 8.

primary recommendation of KRSIS that Jabiru become Aboriginal land'. The APC report argued that:

All of Kakadu, including Jabiru, should be legally Aboriginal land. If the Aboriginal political position is to be sustained and enhanced, it must be underwritten by that legal recognition. Indeed that legal recognition would probably be seen itself as an act of respect from the non-Aboriginal polity to the Aboriginal culture of Kakadu. It is also seen as a necessary act of empowerment.⁹¹

4.110 The Kakadu Region Social Impact Study contained two recommendations which dealt with mining. One recommended that the definition of the 'area affected' by the Ranger mine for the purpose of the distribution of royalties be widened. The second went to the heart of the dispute over Jabiluka, and appears to have fallen on deaf ears since. It stated, in part, that:

Recognition be given to the special interests of the traditional owners of a mine area. In particular the Traditional Owners should have primacy over decision-making that may impact on their land, while recognising this is different to decisions on area affected moneys which are directed to the whole community.⁹²

4.111 The KRSIS also made reference to the problem of the substitution by Governments of service and welfare funding for royalty payments, by recommending further investigation of and action on the issue. At its hearing in Darwin the Committee was told by a member of the SAG, Mr Stephen Roeger, that the NLC believed that Kakadu communities received less from Government because of a perceived wealth in royalties, but that:

There has not been an objective study of it. The Aboriginal Project Committee in the Kakadu Region Social Impact Study sought to engage in an investigation of that nature. They were encouraged not to do so by the Study Advisory Group – I will not attempt to explain their reasoning ...

One of the most telling findings of the social impact study was that conditions in Kakadu are no better than they are anywhere else in the Territory. Indeed, many would argue that they are considerably worse in many respects.⁹³

4.112 The Committee notes with concern that Mr Collins and the KRSIS implementation team are still in the process of developing a plan to implement the KRSIS recommendations nearly two years after its findings were released. It is also concerned that his consultation with key stakeholders, such as the Mirrar, appears to

91 Kakadu Region Social Impact Study, *Report of the Aboriginal Project Committee*, June 1997, p 73.

92 Kakadu Region Social Impact Study, *Community Action Plan: Report of the Study Advisory Group*, July 1997, p xv.

93 *Proof Committee Hansard*, Darwin, 16 June 1999, p 147.

have been so limited. Given the roles played by the Commonwealth and the Northern Territory in this process to date, the Committee has serious doubts that full implementation of the KRSIS recommendations will ever occur.

The cumulative impact of mining

4.113 Perhaps the most profound impact of the Jabiluka project will be the cumulative effect of the mine developments. In its submission to the World Heritage Committee the Northern Land Council said that:

The approval of Jabiluka means that the affected land will not be returned to the 'Aboriginal domain' for the quiet enjoyment of its traditional owners until about 2035. The mining project will have an impact on a generation who were never intended to be saddled with the impacts of mining.⁹⁴

4.114 The Gundjehmi Corporation's Mr Matt Fagan also outlined this impact, particularly if ERA's preferred option, the Ranger Mill Alternative, proceeds:

If the Ranger alternative goes ahead, Yvonne Margarula, most of her sisters and most people in her family will never see the Ranger project area rehabilitated. It will not be rehabilitated until 2035 or 2040.

Unfortunately, with the life expectancy of Aboriginal people in this area, it is highly unlikely that Yvonne Margarula will ever see that area rehabilitated. That has to be a tremendous concern. Talk about a bigger environmental footprint, if you like, with a JMA; what about the fact that that area will not be rehabilitated?⁹⁵

4.115 The Committee feels that the potential social impacts of mining have only been partially understood and addressed within the EIA process. In particular, they have been inadequately addressed in formal recommendations arising from either the EIS/PER and the Kakadu Region Social Impact Study, and have been disregarded in ministerial decision-making about the mine.

Recommendation 5

The Committee recommends that a new inquiry be conducted to assess the specific social and cultural impacts of the Jabiluka project on the Aboriginal communities of the Alligator Rivers Region. The Committee also recommends that the social and cultural impacts of mining be given greater attention in ministerial decision-making.

94 *Kakadu National Park World Heritage: Submission by the Northern Land Council to the UNESCO World Heritage Mission to Kakadu National Park*, October 1998, p 9.

95 *Proof Committee Hansard*, Jabiru, 15 June 1999, p 12.

World Heritage Protection

4.116 Injunctions for the company to address the potential impacts on the surrounding World Heritage values of Kakadu National Park were contained in the Guidelines to both the EIS and PER. With the report of the World Heritage Committee mission to Australia in November, and the imminent meeting of the World Heritage Committee in Paris to decide whether to list Kakadu as In Danger, these issues have clearly been of concern to the Australian Government as well.

4.117 A detailed discussion of the Jabiluka project and the World Heritage values of Kakadu National Park is contained in Chapter 6 of this Committee's report. That chapter outlines the legislative and administrative arrangements in Australian law which provide for World Heritage protection, and summarises the Government's defence of its record in relation to Jabiluka. The chapter also discusses the many submissions to this Committee which expressed concern about the possible impact of the project on the World Heritage values of the Park. For this reason the Committee refers readers to Chapter 6 for further detail, and makes some brief comments below.

4.118 The World Heritage Committee mission's report already suggests that the company and the Australian Government have failed to protect the World Heritage values of Kakadu National Park adequately throughout the Jabiluka process. It is the view of this Committee that much of the evidence discussed above supports the views of the mission. While the Supervising Scientist's report to the World Heritage Committee has been rightly praised, it does not conclusively dispel uncertainties about the project.

4.119 As the above discussion (4.9-4.41) of the outstanding run-off and tailings management issues shows, substantive scientific and technological uncertainties remain in relation to the cement paste process and the method of tailings disposal. These uncertainties have been compounded by the continuing uncertainty about the option ERA intends to pursue and the inappropriate level of assessment to be accorded the revised proposals. For these reasons it was premature for the Supervising Scientist to argue that 'the natural values of Kakadu National Park are not threatened by the mine and the degree of scientific certainty that applies to this assessment is very high'.⁹⁶

4.120 The Committee also makes the point that the protection of natural values – in this case by no means certain – is only a part of the task of protecting World Heritage values. The World Heritage Committee, in particular, has firmly stated that its consideration of World Heritage protection also takes in the cultural and social protection of living cultures, and must take into account developments in international human rights law regarding the right of indigenous peoples to determine their own

96 Office of the Supervising Scientist, *Assessment of the Jabiluka Project: Report by the Supervising Scientist to the World Heritage Committee*, April 1999, p 99.

futures.⁹⁷ The adequate protection of World Heritage values requires a holistic framework in which environmental protection, the recognition of indigenous rights and the protection of living culture are given equal weight.

The Regulation and Oversight of Uranium Mining in Kakadu

4.121 A number of submissions expressed concern about the regulatory structure for the environmental oversight of both the Ranger mine and the Jabiluka development. Of particular concern were:

- The shift in responsibility for day-to-day regulation from the Office of the Supervising Scientist (OSS) to the Northern Territory Government (NTG);
- The erosion of funding and resources within the OSS; and
- Concerns about the independence of the OSS.

The Office of the Supervising Scientist (OSS) and the Regulatory Regime

4.122 Section 5 of the *Environment Protection (Alligator Rivers Region) Act 1978* specifically established the Office of the Supervising Scientist with the responsibility of ensuring that the region's uranium mines do not damage the environment of Kakadu. From its establishment until recently the OSS has maintained offices in Jabiru and manages an environmental research institute (ERISS). It is required to advise the Minister on matters of environmental protection in relation to uranium mining, and to 'devise and develop' standards and practices for environmental protection. Section 5(d) specifically empowers the OSS to:

coordinate, and supervise the implementation, in relation to uranium mining operations in the region, of requirements of, or having effect under, prescribed instruments in so far as those requirements relate to any matter affecting the environment of the region.⁹⁸

4.123 In its submission to the Committee, the Australian Conservation Foundation (ACF) argued that there have been long standing problems, dating from the establishment of the OSS, 'with the functioning of the OSS and the complicated accountability lines between the Commonwealth, the NT Government, ERA and the Northern Land Council'. They cited the 1988-89 Annual Report of the OSS as stating that the level of cooperation between the OSS and ERA was low and that ERA was seeking to make the role of the OSS in the region redundant.⁹⁹ The ACF also alleged that:

There was also evidence that ERA and the Northern Territory Government were also colluding to reduce the extent to which OSS was directly involved

97 UNESCO World Heritage Committee, *Report on the mission to Kakadu National Park, Australia, 26 October to 1 November 1998*, pp 1-10.

98 *Environment Protection (Alligator Rivers Region) Act 1978*, pp 4-5.

99 Australian Conservation Foundation, Submission 34, p 3.

in decision-making processes concerning the operation of uranium mining in the region.¹⁰⁰

4.124 The 1988-89 Annual Report of the OSS complained that:

Ranger has, by increasingly ignoring OSS advice on environmental issues, appeared to wish to establish that OSS performs no useful function ... it has attempted to impugn the scientific credibility of the office, and has lobbied for its disbandment'.¹⁰¹

The Northern Territory Government as the Supervising Authority

4.125 In 1995 a Memorandum of Understanding between the Commonwealth and the Northern Territory redefined the respective regulatory roles of the NT and the OSS. The MOU shifted primary responsibility for the day-to-day supervision and regulation of uranium mining from the OSS to the NT, which would henceforth rely on the UMEC Act.¹⁰²

4.126 The ACF identified two problems with this new arrangement. First, it stated that the terms of the MOU are not legally binding. Second, it argued that this involved delegating responsibility 'without enforceable controls or accountability mechanisms' to a government with a poor track record in the environmental regulation of mining. In the ACF's view:

This delegation of Commonwealth powers to the NT Minister for Mines directly places environment management of Kakadu at risk. The NT Department of Mines is not an independent body. It is a department which is directly involved in the promotion of mining in the NT. This is a direct conflict of interest and means that environmental management considerations will be subject to distortions caused by the prevailing economic and political aspirations of the NT government.¹⁰³

4.127 As early as 1988-89 the Annual Report of the OSS had identified problems with the Northern Territory as a regulator. In identifying a range of breaches of the Ranger Environmental Requirements (ERs) that year, the OSS said:

These matters are of concern, not so much because of any immediate risk to the environment, but because by slow attrition of the ERs, and the accumulation of numerous uncoordinated small impacts, environmental control of the operation could be compromised. These actions by Ranger [are] too readily accepted by the NT...

100 Australian Conservation Foundation, Submission 34, p 3.

101 Supervising Scientist for the Alligator Rivers Region, *Annual Report 1988-89*, Canberra: AGPS, 1989, p 8.

102 Australian Conservation Foundation, Submission 34, p 3.

103 Australian Conservation Foundation, Submission 34, p 3.

The OSS has expressed its concerns a number of times over the years, that the formulation of NT authorisations has been too imprecise to allow them to be enforced.¹⁰⁴

4.128 The ACF and the Environment Centre of the Northern Territory (ECNT) pointed out that the NT Government has a poor record in the environmental management of mines. In particular, the ECNT told the 1996 Senate Inquiry into Uranium Mining and Milling of pollution episodes at Groote Eylandt, McArthur River, Nabalco and Pine Creek which the NT Government had failed to monitor or prevent.¹⁰⁵

4.129 In 1996 BHP was fined \$45,000 by the NT Government for allowing more than 2 million litres of diesel to leak into Groote Eylandt's water table from stores held at its manganese mine. The NT Government had been warned of this possibility as early as 1991 but had failed to investigate. At the Renison gold mine, local residents detected the pollution of Copperfield and Pine Creeks which the NT had failed to notice; at Mount Isa Mines' lead and zinc mine near Boorooloola, the NTDME failed to ensure that proper safeguards were in place to prevent a large spill of ore into the McArthur River when it was being loaded onto barges; and only after a 1989 study found high levels of heavy metals in oysters at Gove Harbour did the NT institute a tighter environmental regime at the Nabalco mine, despite Justice Fox expressing disquiet about the refusal of Governments to reveal their knowledge of pollution problems.¹⁰⁶

4.130 The ECNT also cited a *Northern Territory News* report of a leaked internal memo drafted by an officer of the NTDME's Environmental Directorate. The officer criticised the Department's lack of preparedness to cope with potential environmental problems arising from the discharges from mine sites, and complained that:

my efforts to implement these [data collection] initiatives in a timely manner have been continually frustrated by internal wrangling, complacency and poorly defined responsibilities ... I am disappointed that approaches designed to develop standardised techniques for environmental protection in the NT have been stymied by the inability of policymakers to make timely decisions.¹⁰⁷

4.131 The ECNT also expressed concern to the 1996 Inquiry about the 'club' which had developed between mining companies and NT regulators:

104 Supervising Scientist for the Alligator Rivers Region, *Annual Report 1988-89*, Canberra: AGPS, 1989, pp 5-6.

105 Australian Conservation Foundation, Submission 34, Attachment I.

106 Australian Conservation Foundation, Submission 34, Attachment I.

107 Australian Conservation Foundation, Submission 34, Attachment I.

There is a revolving door by which staff move from company to supervisory bodies and reverse with alarming regularity. Independent assessment is impossible in these circumstances.¹⁰⁸

4.132 The ACF argued that the 17 August 1998 correspondence from the former Minister for Resources and Energy, Senator Parer, to ERA confirmed the marginalisation of the OSS. Senator Parer told ERA that the Northern Territory Government held responsibility for regulation and monitoring of mining as the ‘supervisory authority’, whereas the Commonwealth, through the OSS, merely provided advice on matters relating to environmental protection. The ACF commented that:

Previously ERA had to convince the OSS that there would be no environmental damage. Now all they have to do is convince the Supervising Authority – the NTG – that there will be no environmental damage. An altogether easier task as the NTG only needs to be convinced that ERA is seeking to protect the environment to an extent that is reasonably practicable.¹⁰⁹

4.133 However, the Minister put the view in his letter that:

Where my requirements relate to regulatory arrangements, I have only referred to the Supervising Authority as the regulator, but this should not be interpreted as minimising the role of the Supervising Scientist in providing relevant advice consistent with working arrangements argued between the Commonwealth and Northern Territory.¹¹⁰

4.134 In the Committee’s view this argument confirms the fact of the transferral of regulatory authority about which the ACF has expressed concern, but attempts to cast it in a different light. The Committee welcomes the vote of confidence placed in the OSS but shares the ACF’s broader concern about the shift in regulatory authority from the OSS to the NTDME, which has a proven record of failing to act on environmental breaches.

Recommendation 6

The Committee recommends that powers of day-to-day regulation of uranium mining in the Alligator Rivers Region be removed from the Northern Territory Department of Mining and Energy and restored to the Office of the Supervising Scientist.

108 Australian Conservation Foundation, Submission 34, Attachment I.

109 Australian Conservation Foundation, Submission 34, Attachment I.

110 Senator Warwick Parer to Mr P. J. Shirvington, tabled correspondence, 27 August 1998, p 2.

The Funding and Operation of the OSS

4.135 The Northern Land Council, in discussing the standards required in relation to radiological protection, expressed concern about the erosion of funding from the OSS:

There is a continuing need for an effective independent monitoring authority to ensure compliance with national and international standards. The progressive weakening of the role of [the OSS] has reduced the level of independent assessment of environmental protection within Kakadu ... Australia could better demonstrate its commitment to such protection by strengthening the role of OSS within Environment Australia.¹¹¹

4.136 The NLC also expressed its concern, at the way the NT assumed the role of regulator and also at a steady withdrawal of resources from the OSS:

We see [the assumption of regulation by the NT] as a substantial reduction in the Supervising Scientist's role and that, from there on forward, the Supervising Scientist's funding and resources have been systematically reduced – and substantially so in 1995, when the organisation was subject to a major review.¹¹²

4.137 The ACF's Mr Dave Sweeney told the Committee that:

the OSS has experienced a major series of financial cutbacks and a major decline in both its autonomy and its resource base. The other thing ... is that the on-the-ground presence is moving away. There are currently detailed negotiations to move the bulk of OSS and ERA offices away from Jabiru and into Darwin. OSS has increasingly moved away from a field presence to a lab or laptop presence where now, instead of collecting its own data, it largely monitors company provided data.¹¹³

How Independent is the OSS?

4.138 Some witnesses also felt that in addition to losing resources and having its permanent monitoring presence scaled back, the OSS had become less independent. Mr John Hallam suggested that:

the annual reports of the [OSS] have become more glossy, thinner and less detailed, and there has been progressively less honest assessment in those reports, particularly over the last ten years. You would have seen a progression from reports that were at times highly critical of the Ranger operation to a tick-a-box exercise where all the boxes are pre-ticked.¹¹⁴

111 Northern Land Council, Submission 45, p 3.

112 Mr Stephen Roeger, *Proof Committee Hansard*, Darwin, 16 June 1999, p 138.

113 *Proof Committee Hansard*, Canberra, 11 June 1999, p 91.

114 *Proof Committee Hansard*, Canberra, 11 June 1999, p 91.

4.139 Legal and Policy Adviser to the Gundjehmi Aboriginal Corporation, Mr Matt Fagan, told the Committee that:

Any notion that the Office of the Supervising Scientist is independent is clearly ludicrous. It takes direction from the Minister. Materials that are produced by [ERISS] are vetted by Environment Australia. The Supervising Scientist has acted as a lobbyist at World Heritage Committee meetings for the Australian Government on the Jabiluka proposal.¹¹⁵

4.140 In contrast the Supervising Scientist, Dr Arthur Johnston, strongly defended the independence of the OSS. While he acknowledged that under Section 7 of the *Environment Protection (Alligator Rivers Region) Act 1978* (EPARR) the OSS reports to the Minister for the Environment and is subject to the direction of the Minister, he stated that the Act also required that the OSS report to Parliament any direction given by the Minister and that any report that results from that direction must be tabled in Parliament. 'This,' he said, 'is a safeguard that essentially ensures the independence of the advice given by the Supervising Scientist.'¹¹⁶

4.141 In relation to the Supervising Scientist's April 1999 report to the World Heritage Committee, Dr Johnston also assured the Committee that:

This report was finalised by the Supervising Scientist without it being seen by the Minister or his staff; and significantly, no request was received by the Supervising Scientist from the Minister or his office to see the report prior to its being submitted to the [World Heritage] Committee.¹¹⁷

4.142 This Committee accepts the assurances of the Supervising Scientist about his statutory independence and the requirement in Section 36 of the EPARR Act for Ministerial directions to be reported to Parliament. It also accepts the assurances that his report to the World Heritage Committee incorporated no material at the request of the Minister. Professor Wasson has also praised the scientific quality of the bulk of that report.¹¹⁸ However, these assurances do not mitigate broader concerns about the decline in the power, resources and independence of the OSS.

4.143 While it would seem proper (and valuable) that the OSS should be required to conduct studies and suggest measures for environmental protection at the recommendation of government, the Committee believes that it is highly inappropriate that the OSS remain an office within the Commonwealth Department of Environment and Heritage, or that it work closely with government in campaigning for, or promoting, policy decisions.

115 *Proof Committee Hansard*, Darwin, 16 June 1999, p 165.

116 *Proof Committee Hansard*, Canberra, 11 June 1999, pp 1-2.

117 *Proof Committee Hansard*, Canberra, 11 June 1999, p 2.

118 *Proof Committee Hansard*, Canberra, 11 June 1999, p 25.

4.144 A broad range of evidence to the Committee has shown that the numerous statements by the OSS about the environmental safety of the mine conflicts with known scientific and project uncertainties. For example, its comment in the April 1999 report that there was a 'very high' degree of scientific certainty that the natural values of Kakadu National Park were not threatened, was based on the assumption that ERA will develop an option (100 per cent underground disposal of tailings) which the company has, in fact, expressed considerable reluctance to pursue.¹¹⁹ Further scientific investigation of the proposed tailings treatment method and disposal remains outstanding, and final approval of the JMA remains contingent on the submission and assessment of these studies. Broad political assertions in the face of such uncertainties dramatically erode the credibility of the Office of the Supervising Scientist.

4.145 Similarly, the Committee feels that the OSS, in arguing that many outstanding environmental issues (as identified by Wasson et al and the WHC mission) could be resolved at the later design stage rather than prior to approval, is taking on an inappropriate role which compromises its independence. The OSS further contended, to the WHC, that this deferral of design and investigation did not prevent it from reaching a conclusion that 'there were no insurmountable obstacles that would prevent a design being achieved that would ensure the highest level of environmental protection in Kakadu National Park'.¹²⁰

4.146 These are highly tendentious policy arguments which have been strongly criticised by many witnesses, and should properly remain for executive government to defend. Making such arguments draws the OSS into defending an incremental approvals process which has been strongly criticised, and which disregarded the continuing possibility that there might never be an environmentally acceptable JMA option proposed by ERA.

Recommendation 7

The Committee recommends that the Office of the Supervising Scientist be removed from the corporate structure of the Department of Environment and Heritage and reconstituted as an independent regulatory authority of uranium mining in the Alligator Rivers Region. It should retain a carefully defined capacity to receive references from, and provide advice to, the Environment Minister and make recommendations. The funding of the Office of the Supervising Scientist should be increased so that it is able to conduct its own monitoring and research.

119 Office of the Supervising Scientist, *Assessment of the Jabiluka Project: Report by the Supervising Scientist to the World Heritage Committee*, April 1999, p 17; Energy Resources of Australia, *Jabiluka Mill Alternative: Synopsis of Key Issues and Processes*, August 1998.

120 Office of the Supervising Scientist, *Assessment of the Jabiluka Project: Report by the Supervising Scientist to the World Heritage Committee*, April 1999, p 13.

The Government's Decision-Making

4.147 Serious concerns were expressed to the Committee about the quality, timing and appropriateness of Government decisions to assess and approve various stages of the Jabiluka project. These concerns included:

- Inappropriate levels of assessment applied to the various Jabiluka Mill Alternative proposals;
- Whether Ministerial decisions reflected environmental assessments;
- The precipitate approval of mine construction before the Jabiluka Mill Alternative had been assessed and approved;
- The politicisation of decision-making to avoid a change of government blocking the project's development; and
- Whether Government conditions placed on the mine's construction and operation can be adequately enforced.

Level of Assessment

4.148 Many of the submissions to the Committee identified problems with the level of assessment applied to the Jabiluka Mill Alternative and, in particular, to the resubmission by ERA of proposals to either put 100 per cent of the tailings underground or a portion in surface built pits. These concerns appeared in submissions by The Wilderness Society, ACF, Friends of the Earth, the ANU scientists, the NLC and the Gundjehmi Corporation.

4.149 The insistence of the former Supervising Scientist, Dr Peter Bridgewater, that the JMA be subject to a full EIS has been cited above (3.23). In evidence, Dr Johnston explained that Dr Bridgewater had used 'a loose phraseology' and that his desire was for 'a public process ... When [the assessment] was a PER rather than an EIS, that in his view was sufficiently a public process, and that was the advice he subsequently gave to the Minister'.¹²¹

4.150 However, some witnesses put the view that the requirement for an assessment of the JMA as a PER, in isolation from the RMA, fractured the process of assessment to the detriment of the EIA process. The Environment Centre of the Northern Territory (ECNT) submitted that the JMA required a full EIS because it involved the consideration of issues wider than those established in administrative guidelines for a PER, which was to be used 'where impacts are expected to be focused on a restricted number of specific issues'. It cited the author of *Environmental Law in Australia*, G. M. Bates, as saying that 'a PER would be directed where it is considered that ... the issues or impacts are likely to be limited ... An EIS would be expected where the

121 *Proof Committee Hansard*, Canberra, 11 June 1999, p 3.

issues are more wide ranging, the impacts potentially great, and the issues themselves requiring clarification.¹²²

4.151 The Committee accepts this view. It is clear that the JMA will have a far greater impact on the Jabiluka site and surrounding area than the RMA. Similarly, the large number and scope of the requirements following the RMA EIS suggest that many issues remained to be clarified. In the Committee's view, a new proposal involving the construction of milling facilities and tailings disposal on site, located inside a World Heritage Area and adjacent to an identified sacred site complex, and which has potentially significant social impacts given the hostility and bitterness of Traditional Landowners, meets the definition of a project requiring a full EIS. The Public Environment Report demonstrates that the surface disruption is far greater, with long-term ore stockpiles and tailings disposal plans creating far greater challenges for managing run-off containment and rehabilitation strategies.

4.152 A further concern about the reduced level of assessment for the JMA is that it creates a further tendency and rationale for the downgrading of subsequent assessments as new options are proposed. This in particular occurred with the requirements for further assessment of the JMA tailings disposal options. ERA is required both to conduct further studies of the cement paste technology before the 100 per cent option can be implemented, or, if it wishes to pursue its preferred 50-50 option, to seek new guidelines for further assessment of that proposal. Further redesign and scientific study is to be assessed by the Supervising Scientist and the Northern Territory Government.

4.153 While the ANU scientists did express their confidence in the abilities of the Supervising Scientist, evidence cited above (4.138-4.146) also reflected concerns about the independence of the OSS and the regulatory record of the Northern Territory Government. Statements by the OSS to the World Heritage Committee, to the effect that there are 'no insurmountable obstacles that would prevent a design being achieved that would ensure the highest level of environmental protection', appear to have prejudged the issues they are being relied on to adjudicate.¹²³ The Committee believes that, at the very least, any further assessment of the tailings disposal options at Jabiluka should be a public process. It should enable expert peer review by scientists, and also require an assessment of the cultural impacts of creating new landforms with excavated waste rock.

122 Environment Centre NT Inc, *Comment on the draft guidelines for a Public Environment Report on the Jabiluka Mill Alternative*, 31 May 1998, pp 1-2.

123 Office of the Supervising Scientist, *Assessment of the Jabiluka Project: Report by the Supervising Scientist to the World Heritage Committee*, April 1999, p 13.

Recommendation 8

The Committee recommends that should the project proceed, further assessment of Jabiluka tailings management, waste rock disposal, run-off containment and radiological protection measures be subject to a public process at the level at least of a Public Environment Report, and that such revised proposals be subject to peer review by scientists.

The Timing and Appropriateness of Approvals

4.154 In evidence to the Committee, Professor Wasson complained that ‘the assessment of the entire Jabiluka project has been piecemeal and very difficult for non-specialists to understand. I think this is a dreadful outcome for such an important area ... we remain concerned, therefore, that possible damage to Kakadu is a reality because a complete risk assessment has not been completed’.¹²⁴ He continued that:

there was a lot of change on the run. A lot of policy decisions seemed to be being made on the run – for example, the below ground disposal requirement by Senator Hill was made only two weeks before the last federal election. We are concerned that there appears to have been somewhat indecent haste in some of these matters before the evidence was in.¹²⁵

4.155 In his submission to the Committee, Professor John Mulvaney argued that the decisions of the Environment Minister to approve the Ranger Mill Alternative and Jabiluka Mill Alternative were ‘premature and counter to the provisions of Section 30 of the *Australian Heritage Commission Act 1975*’ because:

[he] did not have before him, a complete database of the cultural features of the Jabiluka area, or the consequences of dust or vibration upon the art and cultural sites in the mine vicinity ... A cultural management plan, and scientific tests re dust and vibration should have preceded not followed mining impact under the provisions of the heritage legislation.¹²⁶

4.156 Under Section 30(3) of the Act the Minister is required to obtain the advice of the Heritage Commission prior to taking any actions affecting places registered on the National Estate. The Secretary of the Department of the Environment and Heritage told the Committee that that advice had been sought but could not undertake to provide a copy of that advice to this Committee.¹²⁷

124 *Proof Committee Hansard*, Canberra, 11 June 1999, p 26.

125 *Proof Committee Hansard*, Canberra, 11 June 1999, p 28.

126 Professor John Mulvaney, Submission 30, p 2.

127 *Australian Heritage Commission Act 1975*, p 20; Mr Roger Beale, Department of the Environment and Heritage, *Proof Committee Hansard*, Canberra, p 45.

The problem of incremental decision-making

4.157 The Australian Conservation Foundation (ACF) expressed serious concerns about the ‘incremental’ nature of the approvals given by the Commonwealth:

This is perhaps the most insidious of the ways the approvals process has been manipulated. In theory the final approval for the Jabiluka mine has not been given, yet we have extensive underground works – right to the edge of a known sacred site – and extensive surface works and industrial infrastructure. All have been sanctioned by a series of Ministerial decisions a number of which are the subject of ongoing legal action in the Federal Court.¹²⁸

4.158 The ACF argued that precipitate approvals were being given from the earliest stages of the project. When the Traditional Owners refused permission for the Ranger Mill Alternative, ERA was forced to submit a ‘change in scope’ application to the Northern Land Council (NLC) for approval to proceed with the JMA. Even after that was refused by the NLC on behalf of the Mirrar, and the NLC was forced into adjudication under Section 3.2(h) of the 1982 Agreement, the Northern Territory Government approved the construction of a security compound around the mine site.¹²⁹

4.159 Of great concern to many witnesses, including the ACF, Friends of the Earth, The Wilderness Society, the Northern Land Council, the ANU scientists and the Gundjehmi Corporation, were the subsequent approvals given by the Northern Territory Government to the construction of the access portal, decline and other works before the JMA assessment process had even been concluded. This decision flowed from the indications given by Senator Parer and Senator Hill that aspects of the project allegedly ‘common’ to the RMA and JMA could proceed. The ACF commented that:

At this stage ERA had **no** legal mining project because the remote mill option had been rejected and the on site milling at Jabiluka had not been approved under the Environmental Protection (Impact of Proposals) Act.¹³⁰

4.160 The Committee notes that this concern remains current. A final milling and tailings disposal option at Jabiluka has still not been finally developed or approved, and is the subject of continuing scientific uncertainty. Meanwhile the construction of the decline has been completed and ERA is proceeding with further drilling and exploration of the ore body prior to mining.

The politicisation of decision-making

4.161 The ACF further argued that the timing of Government decisions has been deliberately aimed at thwarting possible future courses of action:

128 Australian Conservation Foundation, Submission 34, p 1.

129 Australian Conservation Foundation, Submission 34, p 2.

130 Australian Conservation Foundation, Submission 34, p 2.

Decisions related to the disposal of tailings were being made in the lead-up to the 1998 federal election. There was therefore considerable pressure being exerted on the Government to make a decision about the mine. There was evidence that the Liberal Government could lose power and that the Labor Party had a no new mines policy. Therefore if the approvals for Jabiluka were made prior to the election and if Labor won they could be bound to allow the mine to continue ... The approvals process has been based on political expediency and blatant moves to facilitate a timetable being set by the mining company.¹³¹

4.162 It is obviously difficult to prove such an allegation conclusively. However the Committee concurs with the views of witnesses such as Professor Wasson that the 100 per cent underground tailings option had not been fully assessed before conditional approval for the JMA was given. That the mere appearance of ‘political expediency’ was allowed to occur indicates a serious failure of decision-making. The facts of this issue will probably remain in dispute, but if the allegation were to be true it would indicate a gross perversion of the EIA process.

4.163 The ACF concluded by describing how this ‘incremental’ approach to approvals has damaged the integrity of the EIA process:

Incremental decision-making has a number of impacts. It places the Traditional Owners under increasing pressure as they see their demands regarding the proposal overridden and ignored. Incremental decision-making also strengthens the resolve of the proponents of the mine as it gives them a legal basis to challenge future decisions to prevent the mine or seek compensation for work already carried out, even if that work has been done with the full knowledge that they do not have final approvals.¹³²

Did assessments support approvals?

4.164 Many witnesses raised the problem of whether the environmental impact assessments provided adequate scientific certainty and assurances to support the extension of Government approvals. These concerns have been particularly acute regarding the approvals ventured for the JMA.

4.165 This report has already discussed the substantial scientific uncertainties which attended the JMA proposals for the manufacture of cement tailings paste and its disposal partly in the surface pits. Departmental recommendations would also then have to take into account other objectives of the assessment, such as the discussion of potential social, cultural and World Heritage impacts.

4.166 In its assessment of the Jabiluka Mill Alternative PER, Environment Australia expressed considerable caution about allowing the project to proceed. It is

131 Australian Conservation Foundation, Submission 34, p 4.

132 Australian Conservation Foundation, Submission 34, p 2.

significant that its view took account of the all the major issues – environmental, social, and cultural - raised during the EIA process:

it could be reasonably argued that these key aspects of the proposal [milling and tailings disposal] are not sufficiently advanced or justified to allow either of the JMA proposals to proceed at this time. Such a position is based on the importance and sensitivity of the area within which the Jabiluka lease is located and a conservative precautionary approach in the face of the scientific uncertainty associated with important aspects of the JMA, including the degree of social and cultural impact on the Traditional Owners and other Aboriginal people, whose perception of harmful impacts of uranium mining on the biophysical environment may be as significant as any scientifically measurable impact (or lack thereof) on these attributes.¹³³

4.167 As discussed in the section above (4.15-4.41) dealing with tailings disposal, the Committee feels that, notwithstanding the Environment Minister's reluctance to grant approval for the 50-50 disposal option, it was also the case that insufficient evidence was available either to him or to his Department to approve the JMA on the basis of a complete return of tailings underground.

4.168 The Committee feels that it is of great significance that Environment Australia's caution regarding the JMA referred also to the lack of knowledge about the 'degree of social or cultural impact' on Aboriginal people in the area. The Gundjehmi Corporation, the Northern Land Council, the ANU scientists and others have also offered the view that cultural heritage issues had been inadequately addressed in the EIS and PER. As the NTDLPE and Environment Australia's EIS assessments show, concerns about the potential social impact of the mine's approval were profound. The Kakadu Region Social Impact Study was an inadequate vehicle for the consideration of these concerns and was specifically prevented from dealing with the potential impact of Jabiluka itself. No dedicated social impact study has been commissioned. The Committee believes that the concerns about the mine's social and cultural impact were alone of such significance as to prevent the mine's approval at that time.

4.169 In evidence, and in its recent report to the World Heritage Committee, the Supervising Scientist put the view that many of the outstanding run-off and tailings disposal issues did not need to have been resolved at the EIS stage but could be deferred to the detailed design stage of the project; that is, after formal approvals had been given:

It was our view that, while in some cases there were issues of detail that would need to be pursued by the Supervising Scientist and by the NT regulatory authorities at the detailed design stage, there was adequate

133 Environment Australia, *Environment Assessment Report: The Jabiluka Mill Alternative at the Jabiluka No 2 Uranium Mine*, July 1998, p 67.

evidence that an appropriate final design was achievable that would ensure the protection of the World Heritage values of Kakadu National Park.¹³⁴

4.170 However, Professor Wasson argued that the location of Jabiluka within a World Heritage area required that the mine's environmental technologies should have been fully developed at the EIS stage:

for a project with the potential to impact on a World Heritage property the highest possible standards of assessment should be applicable at the EIS stage, not just in the detailed design stage. Let us be very clear: mining in the midst of a World Heritage area is not normal ... Therefore, to apply to a mine site in the midst of a World Heritage area the same standards of protection and process as we do to any other site seems to miss the point of the very high values that are attributed to a World Heritage property by the international community.¹³⁵

4.171 The ANU scientists further contended that the Supervising Scientist's April 1999 report to the World Heritage Committee confirmed their view that the previous assessments of the EIS and PER 'included key technical errors and omissions, principally related to hydrology, to planned waste disposal and conservation values'. Professor Wasson argued strongly that this pattern of decision-making had brought the key aspects of the project into doubt:

We believe that much closer attention should have been paid to some of these issues - that are now in the OSS report - at the EIS stage. Personally, I find it worrying that the mine has continued to be developed while the very important data on rainfall, flooding, the design of the tailings disposal and all these issues to do with stability are still going on. We are expected to believe a lot in good faith. A lot of the processes we have seen thus far do not give us huge confidence. It is almost as if the cheque is in the mail. Frankly, in our view, that is not good enough in a World Heritage area.¹³⁶

4.172 The Committee shares these concerns. It takes the view that the manifest inadequacies in the assessments, relating not only to the scientific uncertainties but also to the failure of the EIS and PER to take adequate account of social and cultural impacts, ensured that ministerial approvals were bound to be premature. The arguments of the OSS that uncertainties would be resolved in the design stage fail to reflect the degree of uncertainty which still attends the cement paste technology and the possible resubmission of a 50-50 option for the disposal of tailings in surface pits and underground at Jabiluka.

4.173 It is clear to the Committee that the serious problems identified by the ANU scientists were only acted upon following the concerns expressed by the World

134 Dr Arthur Johnston, *Proof Committee Hansard*, Canberra, 11 June 1999, p 2.

135 *Proof Committee Hansard*, Canberra, 11 June 1999, p 25.

136 *Proof Committee Hansard*, Canberra, 11 June 1999, p 29.

Heritage Committee's report and the international publicity that surrounded its mission. The Committee does not accept the assurances that these very serious problems would have automatically been resolved or addressed at a later stage. The Committee believes that environmental impact assessment by government agencies should be improved to ensure that the 'key technical errors and omissions' identified by the ANU scientists do not recur.

Enforcement

4.174 Of significant concern to the Committee in this inquiry has been the issue of whether the conditions placed on the mine's development and operation by the Government can be adequately enforced or, indeed, whether the Government intends that they be enforced.

4.175 It was explained to the Committee that under the EPIP Act and its administrative procedures, the requirements which the Commonwealth Environment Minister wishes to be placed on the mine are forwarded to the action minister, which at the time of the Jabiluka approvals was the Minister for Resources and Energy, Senator Parer. The action minister must then ensure that the suggestions or recommendations of the Environment Minister are 'taken into account in relation to the action'.¹³⁷ This obviously creates legal scope for the action minister to disregard or modify some or all of those recommendations.

4.176 The Committee was also told that, under the joint arrangement between the Northern Territory and the Commonwealth, the recommendations would be 'applied by the Northern Territory in the context of its regulation of uranium mining under the UMEC Act and the NT Mining Act. They would be enforced at a Commonwealth level by making compliance with the requirements a condition of the grant of licences to export milled uranium (yellowcake).'¹³⁸

4.177 Friends of the Earth (FOE) pointed to the way in which at least 22 of the original 77 conditions placed on the mine after the EIS were 'blunted' by the insertion of words requiring ERA to 'take into account the intent of' the recommendation, while the terms of a number of others were altered. FOE also pointed out that the words 'must comply with' were used in relation to only two of the recommendations. They argued that: 'the overall effect of the change in language between the Hill recommendations and the Parer recommendations is undoubtedly to make the "77 stringent requirements" less than binding and probably unenforceable.'¹³⁹

4.178 One example is the Environment Minister's recommendation 56, which stated that 'ERA must develop a cultural heritage management plan in consultation with Traditional Owners, and EA and relevant NT authorities, *prior* to project construction

137 Environment Australia, *Australia's Kakadu: Protecting World Heritage*, April 1999, p 35.

138 Mr Robin Bryant, *Proof Committee Hansard*, Canberra, 11 June 1999, p 38.

139 Friends of the Earth, Submission 43, p 7.

proceeding'. Minister Parer's recommendation, however, stated that: 'In complying with Jabiluka ERs 3, 6 and 32, ERA must take into account the intent of recommendation 56'.¹⁴⁰ The question of the enforceability of this recommendation has been thrown into relief by the decision of the Northern Territory Minister for Resource Development to grant construction permits for the decline and other works before the cultural heritage management plan was completed. The Mirrar-Gundjehmi refused to cooperate in the development of the plan while mine construction, including blasting and drilling, continued. ERA refused to suspend construction in order to complete the plan.

4.179 Evidence from representatives of the Commonwealth Department of Industry, Science and Resources made it clear that enforcement is dependent on ministerial *discretion* in the issuance of export licences and on monitoring by the NT under the UMEC Act. The Department told the Committee that while the Minister had written to the company advising it of the conditions that would need to be met should it wish to export yellowcake, ERA's compliance remained a matter that the Minister would consider when assessing applications for export permits. No formal legal conditions have been or will be incorporated into an export licence.¹⁴¹ In short, enforcement remains a matter of ministerial discretion at a time far removed from the initial construction of the mine.

4.180 The Committee was also told that the Commonwealth did not take up the option recommended by Senator Hill (in his letter to Senator Parer of 25 August 1998, indicating approval of the JMA) that compliance 'should be secured through legally binding arrangements – for example, by requiring ERA to enter into a Deed, by implementing the recommendations in conditions under Commonwealth or Northern Territory legislation, or through a combination of the above'.¹⁴² A Deed (which could have given the Commonwealth the capacity to act on any breach) has not been sought and reliance will instead be on the Northern Territory authorities. The effect of this has been to remove the Commonwealth's capacity to directly enforce the requirements outside the ministerial discretion in the area of export licences.¹⁴³

4.181 The Committee believes that this enforcement regime is manifestly inadequate – far from the 'legally binding' regime suggested by Senator Hill. It recommends that enforcement should be strengthened by:

- drawing up a Deed between ERA and the Commonwealth incorporating all those conditions so far suggested by the Minister arising from the EIS and PER; and
- the direct attachment of conditions to the issue of export licences to limit Ministerial discretion.

140 Government of Australia, Submission to World Heritage Committee, *Appendix 9.11: Summary Table of Ministers Hill and Parer EIA conditions and ERA progress*.

141 *Proof Committee Hansard*, Canberra, 11 June 1999, pp 42-43.

142 Senator Robert Hill, letter to Senator Warwick Parer, tabled correspondence, 25 August 1998.

143 Mr Robin Bryant, *Proof Committee Hansard*, Canberra, 11 June 1998, p 43.

Recommendation 9

The Committee recommends that in the event that the Jabiluka project proceeds, the enforcement regime should be strengthened by the implementation of a deed between ERA and the Commonwealth incorporating all the conditions put forward by the Commonwealth to this date, along with those recommended by the Supervising Scientist following further assessments. These conditions should also be made the explicit conditions of the issue of export licences by the Commonwealth.

Should There be an Inquiry into the Jabiluka Project Under Section 11 of the EPIP Act?

4.182 A key task of this Committee, as set out in paragraph (b) of its terms of reference, has been to ascertain whether an Inquiry under Section 11 of the *Environmental Protection (Impact of Proposals) Act 1974* is warranted in relation to the Jabiluka project.

4.183 A number of submissions to the Committee argued strongly that the Jabiluka project, and the process of its approval, be investigated by such an Inquiry. These included the Gundjehmi Corporation, Friends of the Earth, the Environment Centre of the Northern Territory, the Jabiluka Action Group, the Wilderness Society, the Australian Conservation Foundation, and the Northern Land Council. The Committee also received over 320 submissions from the public arguing for a Section 11 Inquiry. An Inquiry was opposed by ERA, the Northern Territory Government, Mr Mark Sonter and the Commonwealth Government.

4.184 The Committee has sought to make a careful and measured assessment of the evidence available to it. It believes it has identified serious flaws and deficiencies in the original environmental impact statements, in the assessment process applied to the Jabiluka project, in ministerial approvals, and in ongoing levels of assessment and regulation. Significant uncertainties remain in relation to tailings disposal, radiological protection and final project design. Crucial social and cultural impacts of the mine on the Traditional Owners of the Jabiluka area have been poorly assessed and, at worst, exacerbated by company and Government conduct. Australia has failed to fulfil its international obligations to protect the World Heritage values of Kakadu National Park. These problems, as they relate to both the Jabiluka project and the legislative and policy frameworks that govern the assessment and approvals process, require a full public Inquiry if they are to be properly and fairly addressed.

Recommendation 10

The Committee recommends that in view of the inadequate level of assessment applied to the Jabiluka proposals and the premature decision-making of the Action Minister, the Minister for Environment and Heritage establish a Commission of Inquiry into the Jabiluka project under Section 11 of the *Environment Protection (Impact of Proposals Act) 1974* (or under the equivalent provision of the Environment Protection and Biodiversity Conservation Bill, when proclaimed).

CHAPTER 5

THE RIGHTS OF TRADITIONAL OWNERS

Government is shutting out Bininj law, they won't recognise our law.¹

5.1 This chapter analyses the process of consultation with Traditional Aboriginal Landowners that has taken place in regard to the Jabiluka project. It focuses on the negotiations leading up to the 1982 Jabiluka Agreement negotiated between Pancontinental and the Northern Land Council, and also discusses events surrounding the Deed of Transfer in 1991, the negotiations between ERA and the Northern Land Council in 1997 over the 'change in scope' of the project, and recently renewed pressures from ERA for Traditional Owners to agree to the milling of Jabiluka ore at the Ranger mine. The chapter concludes that there is persuasive evidence to suggest that the 1982 Agreement was negotiated unconscionably and that the Northern Land Council failed to fulfil its obligations under the Commonwealth Land Rights Act to properly consult with and act on the instructions of Traditional Owners. The Committee concludes that there is a strong prima facie case for a revision of the Jabiluka Agreement, and it is deeply concerned at indications that ERA may resort to the unwelcome practices of the past to obtain consent for the Ranger Mill Alternative.

Introduction

5.2 Aboriginal rights, and specifically rights accruing to Traditional Owners, exist in relation to the Jabiluka project in two main areas.

- The right to be consulted about, negotiate the terms of or veto development which takes place on or affects their lands; these rights are provided for in the *Aboriginal Land Rights (Northern Territory) Act 1976* and subsequent amendments; and
- Measures for the protection of Aboriginal sacred sites and cultural heritage. These are provided for in the Commonwealth's *Environment Protection (Impact of Proposals) Act 1974*, *Australian Heritage Commission Act 1975*, *Aboriginal and Torres Strait Islander Heritage Protection Act 1984*, and the *NT Northern Territory Aboriginal Sacred Sites Act 1989*.

5.3 These rights are described thus in the context of their artificial separation by Western legal and administrative process. In Aboriginal eyes they are part of a seamless living culture, and much confusion and anguish has arisen from this demarcation. In relation to Jabiluka, the Traditional Owners feel that they have been marginalised and their rights unfairly alienated in the negotiation and approval of the mine agreement. This, and distrust about the intentions of white authorities, has meant

1 A Kakadu Aboriginal quoted in *Kakadu Regional Social Impact Study: Report of the Aboriginal Project Committee*, June 1997, p 50.

that they have been reluctant to cooperate in more limited provisions for the protection of cultural heritage.

5.4 Issues relating to cultural and living heritage are dealt with in Chapter 4, largely because nominal provision is made for the protection of this heritage through the EIA process. However, it is clear to the Committee that the protection of this heritage in the Jabiluka EIA process has already failed. This chapter concentrates on the question of rights in relation to mining and country.

The Legislative Framework:

The Aboriginal Land Rights (Northern Territory) Act 1976

5.5 Aboriginal rights in relation to the Jabiluka development are conferred by the provisions of the *Aboriginal Land Rights (Northern Territory) Act 1976* (the Land Rights Act). This Act purports to give effect to a general objective that any development on Aboriginal lands only occurs with the explicit consent of the traditional owners.

5.6 The Act provides for ministerial consent to mining only after agreement between the miner and a representative of Traditional Owners has been reached. Separate agreements must be reached for the exploration stage and for the full development stage of mines. In the case of Jabiluka, legal status was conferred by the Act on Pancontinental and on the Northern Land Council as the proper negotiating parties. In turn, the Land Council is required to undertake consultations with Traditional Owners affected by the development and to demonstrate that it has acted on their instructions.

5.7 Section 48A of the Act states that an agreement will only have legal force if the Minister for Aboriginal Affairs is satisfied that the Northern Land Council (NLC) has negotiated according to the wishes of the Traditional Owners, and that ‘the traditional Aboriginal owners of the land understand the nature and purpose of the agreement and, as a group, consent to it’. Section 23(3) of the Act also prevents Land Councils from undertaking any action in consent to a development unless it is satisfied that:

- (a) the traditional Aboriginal owners (if any) of that land understand the nature and purpose of the proposed action and, as a group, consent to it; and
- (b) any Aboriginal community or group that may be affected by the proposed action has been consulted and has had adequate opportunity to express its view to the land council.

5.8 These parts of the Act provide for a potential veto of the development by Traditional Owners.² However, this potential veto is weakened by Section 40(b) of the Act, which provides for the grant of a mining or exploration licence by a proclamation

2 *Aboriginal Land Rights (Northern Territory) Act 1976*, Sections 40-48, pp 54-72.

of the Governor General that ‘the national interest requires that the licence be granted’. In such a case, Aboriginal consent to the grant of either an exploration licence or mining interest would not be needed; but negotiations over the terms and conditions of the grant would be required.³

5.9 The Sections are also intended to provide for the adequate consultation of Traditional Owners, and to ensure that they have adequate scope to express their views and have them taken into account. However, the Committee’s attention was drawn to the provisions of Section 48D(3) which, in the view of the Mirrar-Gundjehmi, directly undermines the intent of Sections 23 and 48 and prevents them from making a legal challenge to the 1982 Jabiluka Agreement. This Section states:

Where a Land Council, in entering into an agreement under subsection (1), fails to comply with subsection 23(3) in respect of Aboriginal land to which the agreement relates, that failure does not invalidate the entry by the land council into the agreement.

5.10 The possible effect of these sections of the Land Rights Act is of great concern to the Committee. It feels that they are highly discriminatory. They deny justice to Traditional Owners and bring unnecessary levels of uncertainty into development agreements negotiated with Aboriginal people. These issues are discussed in greater detail below.

Aboriginal Land Ownership and the Jabiluka Mine

5.11 The traditional Aboriginal landowners of the land that includes the Ranger and Jabiluka lease areas are the Mirrar-Gundjehmi people of Kakadu. Their land also includes the town of Jabiru and extends from south of Mt Brockman northwards in a large heart-shape to the southern tip of the Magela floodplain. The Ranger and Jabiluka lease areas take up nearly half the area of their traditional lands. The current Senior Traditional Owner is the Mirrar elder, Yvonne Margarula.

5.12 The Mirrar people have consistently opposed the development of Jabiluka since the project was revived in 1996. Although Ms Margarula’s late father, the former Senior Traditional Owner, signed the original 1982 Jabiluka Agreement negotiated between the Northern Land Council and Pancontinental, she maintains that his agreement was obtained under duress and that before his death he beseeched her to prevent the mine’s development and to protect the Boiwek-Almudj sites. She has undertaken extensive and ongoing legal action in an effort to prevent the mine from going ahead.

5.13 The Committee heard extensive and credible evidence to suggest that undue duress was placed on Aboriginal leaders during the negotiation process and that their wishes were disregarded by the NLC at crucial stages of the process. This pressure was compounded by feelings of futility amongst Aboriginal people given the

3 *Aboriginal Land Rights (Northern Territory) Act 1976*, Sections 23, 40, 43-4.

experience with the Ranger approvals and the legal capacity of the Commonwealth to override Aboriginal objections. The Mirrar have said that they would like to make a legal challenge to the 1982 Agreement but feel that they would be defeated by clauses in the Land Rights Act and by the equity protection afforded Energy Resources of Australia because it was not the original party to the agreement.⁴

5.14 A statement issued by the Gundjehmi Aboriginal Corporation on behalf of the Mirrar Gundjehmi, Mirrar Erre, Bunitj and Manilakarr clan leaders, and signed by Yvonne Margarula, Jacob Nayinggul and Bill Niedjie, outlined their concerns about the Jabiluka mine:

We do not feel that our people or country have been adequately protected since mining came here. Government has forced us to accept mining in the past and we are concerned that you will force mining development on us again. Previous mining agreements have not protected us or given our communities strength to survive the development.

A new mine will make our future worthless and destroy more of our country. We oppose any further mining development in our country...

Our future depends on our culture remaining strong. It is important for our obligations to each other to be recognised and our responsibilities to country to be met. Our cultural values cannot be traded for money...

We say no to mining at Djabulugku.⁵

5.15 In evidence to the Committee, Ms Margarula expanded on her Clan's opposition to the mine. She stated that the integrity of the Boiwek-Almudj sites was under threat, and continued:

In the beginning when mining negotiations actually started and when mining first started, there was money coming out everywhere. There were houses built for people – promises of this, that and the other thing. But look what came with all this development – the alcohol, all sorts of unhappiness. We stand to lose our sacred sites but get a lot of money.⁶

Jabiluka, Ranger and Change in Kakadu

5.16 Witnesses also directed the Committee's attention to the coincidence of the Ranger and Jabiluka agreements with tremendous legal, administrative and social

4 Mr Matt Fagan, *Proof Committee Hansard*, Darwin, 16 June 1999, p 158 and Jabiru, 15 June 1999, pp 22-23. Gundjehmi Aboriginal Corporation, "We are not talking about mining": *The History of Duress and the Jabiluka Project*, July 1997.

5 *Statement from the Gundjehmi Aboriginal Corporation*. <http://www.peg.apc.org/%7Eacfen/tostate.htm> It should be noted that Jonathon Nadji, the son of one of the signatories Bill Niedjie and a Bunitj clan member, wrote to Senator Hill on 25 November 1998 expressing support for the mine's development. *Letter from Jonathon Nadji to Senator Hill*, 25 November 1998, tabled correspondence.

6 *Proof Committee Hansard*, Jabiru, 15 June 1999, p 17.

change in Kakadu. Aspects of this change – which include the enactment of the Land Rights Act, the establishment of Kakadu National Park, and uranium mining and increased tourism – have been beneficial and empowering, while others have been disempowering and corrosive of traditional culture.

5.17 The Kakadu Region Social Impact Study (KRSIS) describes how the impact of colonisation in Kakadu, from the late 19th Century through to the 1920s, caused a ‘radical decline’ in the number of people living in Kakadu, through the decimation of populations by introduced epidemic diseases. It cites the calculations of Ian Keen that populations fell from over 2,000 pre-contact to less than 100 in 1980. Traditional Owners could not recognise the names of some languages recorded in 1912 by Spencer, and at least six other known languages are extinct. The Study speculates that:

Cultural disruption must ... have been serious. The failure of individuals, and of landowning groups, to reproduce broke[n] lines of transmission of knowledge and intimacy with country ... these historical processes had led to a substantially reduced, disconnected and diffused Aboriginal population.⁷

5.18 The Study then described how there was in turn a return of Aboriginal people to Kakadu in the late 1970s and early 1980s after a series of policy developments made the region more accessible to Aboriginal occupation. These developments included the land claims made possible by the enactment of the Land Rights Act. The discovery of uranium deposits in the region led to the Ranger Uranium Environmental Inquiry (the Fox Inquiry), which established the principle of total catchment protection of a major river that underlay the creation of Kakadu National Park, accepted evidence of Aboriginal traditional ownership and recommended sequential development only of uranium mines.⁸

5.19 However, crucially, the Fox Inquiry acknowledged strong Aboriginal opposition to uranium mining but resolved that it ‘should not be allowed to prevail’. It also excluded the town of Jabiru from Aboriginal ownership. Fox wrote:

The reasons for that opposition ... would extend to any uranium mining in the Region ... the Aboriginals do not have confidence that their own view will prevail; they feel that uranium mining development is certain to take place at Jabiru, if not elsewhere in the region as well ... They have a justifiable complaint that plans for mining have been allowed to develop as far as they have without the Aboriginal people having an adequate opportunity to be heard ... There can be no compromise with the Aboriginal position; either it is treated as conclusive, or it is set aside ... we have formed the conclusion that their opposition should not be allowed to prevail.⁹

7 *Kakadu Regional Social Impact Study: Report of the Aboriginal Project Committee*, June 1997, pp 4-5.

8 *Kakadu Regional Social Impact Study: Report of the Aboriginal Project Committee*, June 1997, p 13;

9 *The Ranger Uranium Environmental Inquiry*, Second Report, May 1977, p 9.

5.20 As a result the Fraser Government inserted a clause (Section 40(6), since repealed) in the Land Rights Act. This clause exempted the company from having to seek NLC consent for the Ranger project if it became Aboriginal land following a successful land claim. Thus, the Commonwealth Government avoided having to invoke the national interest provisions of the Act; it had also been party, since October 1975, to a MOU with Peko Mines and Electrolytic Zinc of Australasia to ‘grant any necessary authorities’ for the project.¹⁰

5.21 The Gundjehmi Corporation’s Executive Officer, Ms Jacqui Katona, told the Committee how Aboriginal people had been caught up within this change and how it had brought a profound set of impacts:

The most fundamental impact ... is the fact that their decisions were ignored by Government, that governments totally overrode Aboriginal people’s opposition to Uranium mining ... It has set up a power relationship where Aboriginal people are powerless and all the rest are powerful. It means that every non-Aboriginal agenda is successful and every Aboriginal aspiration is ignored, trivialised or marginalised. Aboriginal people do not trust non-Aboriginal people here because they always believe that in the end the white man will win...

This has been borne out primarily by the way uranium mining came here, because everything else followed. If it were not for the Ranger uranium mine and if it were not for the Inquiry that caused such a controversy in Australia, there would not be Kakadu National Park. There would not be the township of Jabiru. There would not be the Office of the Supervising Scientist. There would not be all this activity on people’s land.¹¹

How Fair Was the 1982 Jabiluka Agreement?

Overview

5.22 Representatives of Pancontinental and the Northern Land Council signed an agreement for the development of Jabiluka in June 1982. ERA and the Australian Government have insisted that the agreement is binding and must stand. Matters are further complicated by Clause 3.2(a) of the original 1982 Agreement, which required the mining leaseholder, in the event of a ‘change of scope’ in the project, to seek the approval of the NLC. (This process is discussed further below.) However, since the revival of the proposal in 1996, the Mirrar clan, the Traditional Owners of the area which includes the Jabiluka lease, have opposed the mine and have undertaken extensive lobbying and legal action to have the lease annulled and to prevent the mine’s construction and development.

10 Gundjehmi Aboriginal Corporation, *“We are not talking about mining”: The History of Duress and the Jabiluka Project*, July 1997.

11 *Proof Committee Hansard*, Jabiru, 15 June 1999, p 8.

5.23 The Senior Traditional Owner, Yvonne Margarula, has pursued legal action in the Federal Court and the High Court of Australia in an effort to stop the mine. The Federal Court's Justice Sackville dismissed the case in March 1998, and her appeal was dismissed in August 1998. In November 1998 the High Court refused Ms Margarula leave to appeal the Federal Court decisions.¹²

5.24 This action did not challenge the substance of the 1982 Agreement, but instead challenged the powers of the Northern Territory Minister for Mines and Energy (as opposed to the Commonwealth) to grant a lease to Pancontinental.¹³ An action in the NT Supreme Court to prevent the construction of the access portal and decline also failed.¹⁴ The Mirrar's legal options, at least with regard to the argument put in these cases, appear to have been exhausted.

5.25 Action in the Federal Court, challenging the ministerial decisions made following the environmental impact assessment process, is continuing: on 1 June the Court granted Ms Margarula leave to challenge the decisions of the Minister for Resources and Energy (on the basis that he was the action minister) but not those of the Minister for Environment and Heritage (who was deemed not to have made 'reviewable decisions' as defined under the *Administrative Decisions (Judicial Review) Act 1977*).¹⁵

5.26 However, the Committee was informed of significant questions about the process of consultation which led to the 1982 Agreement and about the adequacy of the Land Rights Act properly to allow for the gathering and expression of traditional owners' views. The question of the moral and legal status of the 1982 Agreement was brought into sharp relief by the report of the UNESCO World Heritage Committee mission to Australia, which made a formal recommendation stating that:

It is incumbent on the Australian Government to recognise the special relationship of the Mirrar to their land and their rights to participate in decisions affecting them. Therefore the Mission is of the opinion that the Australian Government, along with the other signatories, should reconsider

12 Federal Court of Australia, *Yvonne Margarula v Minister for Resources and Energy, Commonwealth of Australia, Energy Resources of Australia Ltd and Northern Territory of Australia*, NG 186 of 1998, 14 August 1998; High Court of Australia, *Yvonne Margarula v Minister for Resources and Energy, Commonwealth of Australia, Energy Resources of Australia Ltd and Northern Territory of Australia*, application for special leave to appeal, 20 November 1998.

13 Federal Court of Australia, *Yvonne Margarula v Minister for Resources and Energy, Commonwealth of Australia, Energy Resources of Australia Ltd and Northern Territory of Australia*, NG 186 of 1998, 14 August 1998.

14 Supreme Court of the Northern Territory, *Yvonne Margarula v Hon Eric Poole, Minister for Resource Development and Energy Resources of Australia Ltd*, 16 October 1998.

15 Federal Court of Australia, *Margarula v Minister for Environment, Minister for Resources and Energy and Energy Resources of Australia*, 1 June 1999. Decisions of the Minister for Resources and Energy (other than his acceptance of Senator Hill's recommendations) were found not to be reviewable until the issuance of export licences. A reading of the judgment by Justice Sundberg arguably heightens the perception of ambiguity regarding the enforceability of Ministerial recommendations under the EPIP Act.

the status of the 1982 agreement and the 1991 transfer of ownership to ensure maintenance of the fundamental rights of the traditional owners.¹⁶

5.27 In response to this, the Government submitted to the World Heritage Committee that ‘through the Northern Land Council, traditional owners gave informed consent to mining in 1982 and consented to the transfer of those mining rights to Energy Resources of Australia in 1991’. It also argued that to set aside the Agreement as the UNESCO mission recommended, would ‘risk creating a precedent that would unjustly privilege one set of acquired rights over another, to the extent of allowing one party to unilaterally revoke a contract.’¹⁷

5.28 In its submission to the Committee, Energy Resources of Australia argued that:

The consultation that led up to the Mining Agreement in 1982 passes the ultimate test in that it was clearly considered to be adequate by the traditional owners of the time, who went on to enter the agreement. Energy Resources of Australia believes that it is vital for future associations between Aboriginal groups and major projects that a duly negotiated agreement is adhered to. To do otherwise would undermine a fundamental tenet of our legal system and render any agreement made with Aboriginal people implicitly unreliable.¹⁸

5.29 The Mirrar-Gundjehmi and other submitters have raised a number of objections to these arguments. They cite:

- A systematic pattern of harassment and duress during the negotiating process which led up to the 1982 Agreement, along with several breaches by NLC officials of their duty properly to inform Traditional Owners and act on their views;
- The rights accruing in traditional Aboriginal law to the Senior Traditional Owner to make decisions about country, which in the case of the 1982 Agreement had been legally alienated to the Northern Land Council by the provisions of the Land Rights Act. Thus, the Mirrar were in the extraordinary position of not actually being a party to an agreement that they are now being forced to accept;
- The lack of scope for the NLC to reject freely Energy Resources of Australia’s application for a deed of transfer. Thus, claims that Aborigines had freely consented to the transfer of mining rights to Energy Resources of Australia in 1991 are misleading;

16 UNESCO World Heritage Committee, *Report on the mission to Kakadu National Park, Australia, 26 October to 1 November 1998*, p vi.

17 *Australia’s Kakadu: Response by the Government of Australia to the UNESCO World Heritage Committee regarding Kakadu National Park*, April 1999, pp x, xiii.

18 Energy Resources of Australia, Submission 32, p 1.

- The inconsistency between the requirement of the proponent to submit to a new environmental impact assessment process in 1996, given the enormous changes to the original Pancontinental proposal and the fifteen year time lapse, but no requirement to enter new negotiations with the NLC and Traditional Owners; and
- Discriminatory provisions in the Land Rights Act, such as the ‘national interest’ provisions of Section 40 (which added to the duress felt during negotiations) or Section 48D (which undermines the requirement of the NLC properly to consult Traditional Owners). A process so weighted against Aborigines, it is suggested, gravely undermines the moral force of any contract entered into on behalf of Traditional Owners.

The 1982 Negotiations and the History of Duress

5.30 The Committee heard a great deal of persuasive evidence which suggested that the negotiation process leading up to the 1982 Jabiluka Agreement was accompanied by an unacceptable level of duress and deception.

5.31 In evidence to the Committee the Senior Traditional Owner, Yvonne Margarula, described the pressures placed on her father during the process:

In the beginning, around that time, there were lots and lots of meetings, and people would come and collect my father to take him to the meetings. He was the main focus of a lot of this pressure, so there were people coming to pick him up constantly. They gave him a lot of money. He had new cars whenever he wanted it. He was given a lot of good things. He found the pressure overwhelming. He started drinking a lot. He became an alcoholic. They just kept pursuing him until they got what they wanted, and then it stopped.¹⁹

5.32 The Gundjehmi Corporation’s Executive Officer, Ms Jacqui Katona, also outlined the pressure Ms Margarula’s father had been placed under:

Pancontinental ... harassed Yvonne Margarula’s father, the senior traditional owner at that time, to the extent where, even during the rainy season when there is limited or nil access by road, the company used helicopters for the staff to visit him at his place of residence to the point where he had to appeal to the Northern Land Council to in some way restrict permits for the company to prevent them from harassing him and his family.²⁰

5.33 The Gundjehmi Corporation referred the Committee to a document, attached to its submission, in which it had compiled an account of the consultation process that took place prior to the 1982 Agreement. This document is entitled “*We are not talking about mining*”: *The History of Duress and the Jabiluka Project (the Duress*

19 *Proof Committee Hansard*, Jabiru, 15 June 1999, p 18.

20 *Proof Committee Hansard*, Jabiru, 15 June 1999, p 4.

Document).²¹ There, and in evidence to the Committee, they described a series of problems that combine to suggest that Aboriginal people were denied the ability to exercise their consent freely and fairly.

5.34 Ms Katona told the Committee that at the outset of Pancontinental's discussions with Aboriginal people about Jabiluka, which began in the late 1970s:

The opposition to Jabiluka was reportedly stronger than that to Ranger. We know that influenced a train of events which led to the Mirrar people once again being put in an invidious position where they were left with no choice but to agree to a mine going ahead. A land claim known as the Alligator River Stage II land claim was triggered.

...

We believe Pancontinental made their views very well known to the Northern Land Council: that is, they would take the steps Peko Wallsend had taken by lobbying the Government to again create the legal circumstances where Aboriginal people could not withhold their consent to Jabiluka going ahead.²²

5.35 That would occur if the mine site was not on formally recognised Aboriginal land or, if it were, only if the Government then amended the Land Rights Act or invoked its national interest provisions. The *Duress* document outlines how Peko Wallsend had made 'detriment' submissions to the Land Commissioner deciding the claim, outlining the damage its mining interests might suffer. Peko later unsuccessfully sued the Minister for Aboriginal Affairs when the land was granted to a land trust.²³

5.36 At the Committee's hearing in Darwin, the Northern Land Council confirmed the added pressure of this factor. Legal adviser Mr Brett Midena said that:

there is no doubt that there were considerable pressures around. That land was ... under claim under the Land Rights Act – which, at the end of the day, is a political process because it falls to the Minister for Aboriginal Affairs ... to decide whether to grant the land. It was anticipated in that context that he would consider what had been said and whether an agreement had or had not been reached in relation to the mine going ahead. So there were undoubtedly pressures on everybody at that time.

21 Gundjehmi Aboriginal Corporation, "*We are not talking about mining*": *The History of Duress and the Jabiluka Project*, July 1997: http://www.mirrar.net/index_main.htm

22 *Proof Committee Hansard*, Jabiru, 15 June 1999, pp 3-4.

23 Gundjehmi Aboriginal Corporation, "*We are not talking about mining*": *The History of Duress and the Jabiluka Project*, July 1997.

... [the pressure] came from Pancon representatives as well as Commonwealth Government representatives.²⁴

5.37 Ms Katona told the Committee that the land claim problems were raised by the NLC at a meeting which took place at Djarr Djarr on 26 and 27 January 1981:

At least 200 Aboriginal people were in attendance at that meeting and they were requested by the Northern Land Council to give permission to the NLC to discuss the opposing arguments that the mining company was putting to the Alligators Rivers Stage II land claim. It was feared by the Northern Land Council that the opposition put by the Pancontinental mining company, along with Peko Wallsend and the Northern Territory Legislative Assembly, could threaten the success of that land claim.

They received permission from Aboriginal people to approach the company and talk about that document of opposition, known as a detriment.²⁵

5.38 Transcripts of the meeting repeatedly show NLC representatives at the meeting assuring the Aborigines present that they were arguing for discussions with Pancontinental *only* to discuss the land claim:

It's important for everyone to remember. Yesterday and today we are not talking about the mining. We are not talking about whether that mine starts, whether it stops, nothing about that mine. So everyone should feel very strongly that we are not talking about that mining.²⁶

5.39 However, the following day the NLC's legal officer, Philip Tietzel, wrote to Pancontinental's solicitors stating that a meeting with landowners at Djarr Djarr on 26-27 January 1981 had authorised them to 'commence and conduct formal negotiations ... on all aspects of the Jabiluka project'.²⁷ Ms Katona stated that:

from that point on Traditional Owners were in a legal process. Every meeting that they attended contributed to the negotiation of the agreement. There was precious little they could do to halt the process.²⁸

5.40 The process then moved through the negotiation of a draft mining agreement, a round of consultations with Aborigines, and a second round of negotiations and consultations. During this time the Commonwealth Government made a 'conditional' approval for export licences (which allowed the company to begin negotiating sales contracts) *before* an agreement between Pancontinental and the NLC had been signed.

24 *Proof Committee Hansard*, Darwin, 16 June 1999, pp 139, 146.

25 *Proof Committee Hansard*, Jabiru, 15 June 1999, p 4.

26 Gundjehmi Aboriginal Corporation, "*We are not talking about mining*": *The History of Duress and the Jabiluka Project*, July 1997.

27 Gundjehmi Aboriginal Corporation, "*We are not talking about mining*": *The History of Duress and the Jabiluka Project*, July 1997.

28 *Proof Committee Hansard*, Jabiru, 15 June 1999, pp 4-5.

Deputy Prime Minister Doug Anthony stated that: ‘In making this decision I have taken account of the views of the Northern Land Council which has indicated its support for market entry.’ The *Duress* document argues that this raised the spectre of the national interest provisions of the Act being invoked to override Aboriginal opposition and ‘put considerable pressure on the Aboriginal landowners to give their consent to the project’.²⁹

5.41 The Agreement was finally signed on 29 June 1982. The Gundjehmi Corporation’s legal adviser, Mr Matt Fagan, told the Committee that Department of Aboriginal Affairs records show that even on the final day of negotiations Aboriginal people were raising concerns about sacred sites and the appearance of the mine:

At 10.40 a.m. Traditional Owners raised concern about a sacred site called Kungarnbu. They were told that the site would only be disturbed ‘to the extent necessary for the Jabiluka project’. At 11.20 a.m., just forty minutes later, the NLC chief negotiator Eric Pratt informed local Aboriginal people that the NLC had ‘nothing to object to in the draft of the agreement’ – that is, forty minutes after people had raised concerns about a sacred site. He then asked whether the ‘inside group’ of people were ready to decide whether mining should proceed.

The Aboriginal interpreter arrived for the first time that day. Half an hour later, at 11.52 a.m., local Aboriginal people told negotiators that they were not ready to decide. They requested more information about what the mine would look like. Nine minutes later, after Aboriginal people had advised the NLC that they were not ready to decide, Eric Pratt advised the mining company that negotiations were concluded. At 12.39 p.m., half an hour later, after receiving a brief explanation of what the mine would look like from the road, Yvonne’s father said that he was tired and that he was not going to object to the mine going ahead.³⁰

5.42 Mr Fagan concluded that:

That is an excerpt from a very critical stage, but it gives you an idea of the way these negotiations proceeded. Key issues which should be triggers in any negotiator’s mind negotiating on behalf of traditional owners – like issues about a sacred site or what the mine looks like – are pushed to one side in the haste to see the agreement signed by a certain date – maybe the impending election.³¹

5.43 It is clear to the Committee that negotiations conducted under such conditions of pressure, haste, and callous disregard for Aboriginal concerns, cannot be seen as either fair or reasonable.

29 Gundjehmi Aboriginal Corporation, “*We are not talking about mining*”: *The History of Duress and the Jabiluka Project*, July 1997.

30 *Proof Committee Hansard*, Jabiru, 15 June 1999, p 23.

31 *Proof Committee Hansard*, Jabiru, 15 June 1999, p 23.

5.44 The Gundjehmi Corporation argues that a major factor in the agreement of Aboriginals to the mine was the relentless pressure of meetings, with one participant quoted as saying that: ‘A lot of meetings amount to pressure, out and out. It’s a long process – a blitzkrieg towards the end. The old blokes have just been worn down.’ Records of the final meeting showed Yvonne Margarula’s father saying, just prior to signing, that: ‘Eric, David, Phil, I myself am tired, everybody is tired, and everybody agrees we can go ahead.’³²

5.45 The Committee acknowledges the view put to it by the Northern Land Council that ‘informed consent’ was given by Traditional Owners in 1982. The NLC stated that it wished ‘to put on the record the strongest possible denial by the NLC or any of its officers of any impropriety’.³³ In response to the specific claims of the Gundjehmi Aboriginal Corporation, the NLC stated that at the meeting at Djarr-Djarr on 26-27 January 1982, NLC officials gave an undertaking that ‘there would be no agreement to mining without consent’.³⁴

5.46 The NLC also stated that an extensive pattern of meetings should not be interpreted as ‘duress’, and that the Fraser Government’s approval of uranium sales negotiations prior to the Agreement being signed, along with amendments to the Aboriginal Land Rights Act on 18 March 1982, lent ‘little credence to any conspiracy or duress theory which involves the NLC’.³⁵ The NLC told the Committee that:

despite the existence of the Agreement, the NLC has continued to assist the traditional Aboriginal owners in any way it can within the legal constraints which the Agreement creates.³⁶

5.47 The Committee acknowledges and commends the strong efforts of the NLC since 1996 to represent faithfully the views of the Traditional Owners of the Jabiluka lease. It also acknowledges that there is considerable dispute over the interpretation of events leading up to the signing of the 1982 Jabiluka Agreement. However, the Committee also acknowledges that the Mirrar provided evidence, in the form of records of the consultation process, that the Northern Land Council failed in its obligations to Traditional Owners under section 23(3) of the Aboriginal Land Rights Act.

32 Gundjehmi Aboriginal Corporation, *“We are not talking about mining”: The History of Duress and the Jabiluka Project*, July 1997.

33 Northern Land Council, Submission 45A, Attachment D, Letter from the Chief Executive Officer to Senator Lyn Allison, Committee Chair, p 1.

34 Northern Land Council, Submission 45A, Attachment D, ‘Northern Land Council Response to the Gundjehmi Corporation’s paper on the history of duress and the Jabiluka project’, pp 1-2.

35 Northern Land Council, Submission 45A, Attachment D, ‘Northern Land Council Response to the Gundjehmi Corporation’s paper on the history of duress and the Jabiluka project’, pp 4-5

36 Northern Land Council, Submission 45A, Attachment D, ‘Northern Land Council Response to the Gundjehmi Corporation’s paper on the history of duress and the Jabiluka project’, p 5.

5.48 While the formal pattern of meetings and consultations create an appearance of probity, the records suggest that at crucial points NLC officials failed to inform Aborigines adequately of the nature and implications of Pancontinental's proposals, that they failed to follow the instructions provided by Traditional Owners, and that they failed to create an atmosphere free of pressure in which Traditional Owners could provide informed consent. Clause 48D(3) of the Land Rights Act means that these arguments may never be tested in court. However the Committee feels that available evidence creates a prima facie argument for a review of the 1982 Agreement.

Recommendation 11

The Committee believes that the circumstances surrounding the negotiation of the 1982 Jabiluka Agreement, the changes made to the proposal following its original negotiation, and the clear opposition of the Traditional Owners to the project were extraordinary and unfair. The Committee therefore recommends that ERA seek a new mining agreement from the Northern Land Council and the Mirrar-Gundjehmi under Section 46 of the *Aboriginal Land Rights (Northern Territory) Act 1976* before further construction or operation of the Jabiluka mine occurs.

The 1991 Deed of Transfer

5.49 Both the Government and Energy Resources of Australia have claimed the NLC's agreement to a Deed of Transfer in 1991 – of the mining agreement from Pancontinental to ERA – as further evidence of freely given consent by Traditional Owners to the Jabiluka Agreement.³⁷

5.50 However, in its second submission to the UNESCO World Heritage Committee, the Gundjehmi Corporation pointed out that Clause 27.1 of the 1982 Jabiluka Agreement provided that Pancontinental should seek the consent of the NLC to any transfer but that 'consent shall not be unreasonably withheld'.³⁸ It is clear to the Committee that this is an extremely misleading claim by the Australian Government: Traditional Owners were in no way able to veto the transfer and thus could not freely consent to it.

5.51 The Committee also received evidence that ERA sought to evade obligations it had committed to under the Deed of Transfer, that is, to seek the consent of Traditional Owners to the milling of Jabiluka ore at Ranger. The NLC's submission to the EIS stated that:

37 See *Australia's Kakadu: Protecting World Heritage*, April 1999, pp 21, 73.

38 *Submission from the Mirrar people to the UNESCO World Heritage Committee ICCROM and ICOMOS in relation to the Australian Government's Report, 'Australia's Kakadu'*, p 36.

by the deed made on 24 December 1991 between the NLC and Energy Resources of Australia, the latter acknowledged and agreed that for the preferred option [the Ranger Mill Alternative] to be implemented the consent of the NLC, to be given in accordance with the direction of the traditional Aboriginal owners of the Ranger project area, was required and such consent may be given with conditions.

Energy Resources of Australia has consistently, and again within this EIS, failed to acknowledge that it is bound by the deed ... to obtain the consent of the NLC to the milling of Jabiluka ore at Ranger.³⁹

The 1997 'change in scope' Application

5.52 Some bitterness was also evident to the Committee regarding the process followed in the consultation of Traditional Owners after ERA altered the 'scope' of the project from that which was the subject of the 1982 Agreement with Pancontinental. Clause 3.2(a) of the 1982 Agreement provides that if the leaseholder proposes a change in scope in concept of design or operation of the mine, it should deliver a detailed submission to both the NLC and the Northern Territory Minister for Mines and Energy outlining the change in concept and its likely impact on the environment and the Aboriginals affected.⁴⁰

5.53 The 1982 Agreement provided for the NLC to consider the submission and respond within 42 days. However, if the NLC's consent to the changes could not be obtained, the Agreement, under Clause 3.2(h), provided for the formation of a committee to determine the outcome. This committee's decision would be binding on the NLC and the leaseholder.⁴¹

5.54 In August 1997 ERA lodged an application for a change of scope with the NLC, which included detail about both the RMA and JMA options. After consulting with traditional landowners the NLC rejected the change, and the issue was referred to a 3.2(h) Committee for resolution. In evidence to the Committee the NLC stated it refused consent because:

We were then talking about an agreement which was 14 or 15 years old. I think that, on any reasonable assessment, it needed to be reviewed – not just the agreement but also the Commonwealth's environmental requirements. The so-called 3.2 process under the Jabiluka Agreement provided a very

39 *Comments on the Environmental Impact Statement (EIS) for the Jabiluka Uranium Mine Proposal: Submission by the Northern Land Council*, July 1997, p 2.

40 Environment Australia, *Environment Assessment Report: The Jabiluka Mill Alternative at the Jabiluka No 2 Uranium Mine*, July 1998, p 14.

41 Environment Australia, *Environment Assessment Report: The Jabiluka Mill Alternative at the Jabiluka No 2 Uranium Mine*, July 1998, p 14.

good opportunity to do all of those things. The Commonwealth, other government officials and ERA decided not to take that opportunity.⁴²

5.55 This somewhat dry final comment referred to the forced referral of the change in scope to the 3.2(h) Committee. The Committee agreed by a majority to approve the change in scope, subject to ERA entering into a Deed Poll with the NLC which incorporated offers such as additional housing, funding of alcohol programs and a social impact monitoring program for the life of the project.⁴³

5.56 The Committee's membership included representatives of the Supervising Scientist, Energy Resources of Australia, the Northern Territory Minister for Resource Development, the Commonwealth Minister for Aboriginal and Torres Strait Islander Affairs, the Commonwealth Environment Minister, the Northern Land Council, and the Bininj Working Committee.⁴⁴ Each stakeholder held a single vote. The non-Aboriginal majority of five defeated the NLC and Bininj Working Committee representatives, who voted against the change in scope.

The Rights of Traditional Aboriginal Owners: Debate and Conclusions

Should the 1982 Agreement Have Been Reviewed in 1996?

5.57 The arguments of the Northern Land Council for a review of the 1982 Agreement in 1997, on the basis that it was by then 14 or 15 years old, have been cited above. This was also the view of other submitters. The Gundjehmi Corporation pointed to the inconsistency between the automatic triggering of a new environmental impact assessment process without a corresponding review of the views of Traditional Owners. Ms Jacqui Katona told the Committee that:

The lasting concern that Traditional Owners have is that, although a process of assessment of environmental impacts was triggered, there was no process whereby Traditional Owners had an opportunity to provide their input into the development – no legal opportunity, and no opportunity in any formal process, for their views to be taken on board either by the mining company or by the Federal Government.

They made those concerns known very clearly to Senator Hill. In fact, Yvonne Margarula travelled to Canberra to meet with Senator Hill and discuss with him the reasons we felt the Land Rights Act particularly should be triggered, because of the lapse of time between the negotiations which took place in 1982 and the new proposal being put by Energy Resources of

42 Brett Midena, *Proof Committee Hansard*, Darwin, 16 June 1999, p 142.

43 Environment Australia, *Environment Assessment Report: The Jabiluka Mill Alternative at the Jabiluka No 2 Uranium Mine*, July 1998, p 14.

44 Environment Australia, *Environment Assessment Report: The Jabiluka Mill Alternative at the Jabiluka No 2 Uranium Mine*, July 1998, p 14.

Australia was 15 years, and because of the fact that it was a new proposal as well.⁴⁵

5.58 Ms Katona indicated this had enforced the marginalisation of Traditional Owners from the Jabiluka process:

Every opportunity the Traditional Owners have taken they have been forced to take outside the process, when they are legitimate titleholders. They are not merely stakeholders in the process. The question for Traditional Owners and the Northern Territory Aboriginal Community is: what refuge do Aboriginal people have in the Aboriginal Land Rights Act when we are seeing an environmental process construed to be superior to that of title.⁴⁶

5.59 The Committee believes that not merely this question, but the whole of the evidence placed before it regarding the rights of Traditional Owners in this case, raises serious concerns about the legal framework provided by the *Aboriginal Land Rights (Northern Territory) Act 1976* and the Government's exercise of its discretion since 1996. It is clear to this Committee that the Mirrar have been callously and systematically marginalised and their fundamental rights ignored in the negotiation and development of the Jabiluka project. At the very least, the revival of the project in 1996 should have been the occasion for new consultations with Traditional Owners which recognised their authority to make decisions about their land. The Committee supports the view of Ms Katona that:

At a minimum Aboriginal people must have the opportunity, under the Aboriginal Land Rights Act, to provide some input as to their consent or otherwise for the project to go ahead if there is such a length of time between the different processes.⁴⁷

Can the 1982 Agreement Be Challenged?

5.60 The Australian Government has defended the integrity of the 1982 Jabiluka Agreement by arguing that it has never been subject to legal challenge. The Secretary of the Department of the Environment and Heritage, Mr Roger Beale, told the Committee during Estimates hearings that:

this agreement has never been contested as to its statutory validity or its conscionability by anyone who has standing in relation to the matter, and the Northern Land Council has never resiled from the applicability of the Agreement.⁴⁸

45 *Proof Committee Hansard*, Jabiru, 15 June 1999, p 1.

46 *Proof Committee Hansard*, Jabiru, 15 June 1999, p 2.

47 *Proof Committee Hansard*, Jabiru, 15 June 1999, p 7.

48 Senate Environment, Communications, Information Technology and the Arts Legislation Committee, Consideration of Additional Estimates, 5 May 1999, *Proof Committee Hansard*, p 337.

5.61 The Gundjehmi Corporation told the Committee that the Mirrar had long wished to make a legal challenge to the validity of the 1982 Agreement. They believe that they have a persuasive case, using available records, which proves that the Jabiluka Agreement was negotiated in unconscionable circumstances. It also believes that it has a strong case which proves that the Northern Land Council failed to observe the provisions of Section 23(3) of the *Aboriginal Land Rights (Northern Territory) Act 1976* to ensure that Aboriginal people affected by the Agreement understand and agree to the Land Council's actions, and have been consulted and had an adequate opportunity to express their view.

5.62 The Gundjehmi Corporation told the Committee, however, that the Mirrar are prevented from successfully pursuing an action against the 1982 Agreement for two reasons. The first is that under the principles of equity, Energy Resources of Australia would be protected by having purchased an agreement negotiated by another party. The second is an amendment to the Land Rights Act, Section 48D(3), which in their view negates the obligations incumbent upon land councils under Section 23(3) to properly represent the views of Traditional Owners.⁴⁹ This section states:

Where a Land Council, in entering into an agreement under Subsection (1), fails to comply with subsection 23(3) in respect of Aboriginal land to which the agreement relates, that failure does not invalidate the entry by the land council into the agreement.⁵⁰

5.63 Jacqui Katona argued that the result of this was that:

The Aboriginal Land Rights Act is now structured in such a way that, although there are explicit provisions about discussions being required with traditional owners, and therefore consent being withheld or consent given to the Northern Land Council to allow projects to go ahead, there are other provisions which really negate that happening at all.⁵¹

5.64 The Committee believes that this is an extraordinary situation which gravely undermines the credibility of the *Aboriginal Land Rights (Northern Territory) Act 1976* as a vehicle for the exercise and protection of the rights of Traditional Owners. It believes that this provision undermines not only the obligations of land councils under the Act, but the whole intent, purpose and credibility of the Land Rights Act itself. This provision undermines the force of contracts entered into by land councils on behalf of Traditional Owners, endangers the rights of Traditional Owners when negotiating with developers and introduces unacceptable levels of uncertainty into agreements made with Aboriginal people. This ought to be of concern as much to industry and government as to indigenous people. The Committee recommends that this provision be removed from the Act.

49 *Proof Committee Hansard*, Darwin, 16 June 1999, pp 157-8.

50 *Aboriginal Land Rights (Northern Territory) Act 1976*, Section 48D.

51 *Proof Committee Hansard*, Darwin, 16 June 1999, p 158.

Recommendation 12

The Committee recommends that consideration be given to repealing Section 48D(3) of the *Aboriginal Land Rights (Northern Territory) Act 1976*.

How Binding Should the 1982 Agreement Be?

5.65 Other witnesses to the Committee put the view that to review the 1982 Agreement, as suggested by the World Heritage Committee mission and by the Mirrar, would undermine the principles of contract law. At its hearing in Darwin, the Committee asked the Gundjehmi Corporation why the 1982 Agreement was different to any other contract which was binding on its signatories. Mr Fagan replied:

Because agreements reached under the Land Rights Act are extraordinarily strange agreements. The people who own the land are not parties to the Agreement. That, for a start, is a very strange circumstance in regular contract law.

...

another circumstance of the 1982 Agreement ... was that it was the first agreement reached under Section 43 of the Land Rights Act – the very first one ... it came on top of a very manipulated set of circumstances relating to the Ranger agreement. It is a peculiar situation.⁵²

5.66 The submission of the Aboriginal and Torres Strait Islander Commission (ATSIC) commented that:

[consent] was obtained under unusual circumstances that need further investigation. It appears to have taken less than a year to obtain consent from Aboriginal people who spoke little English, in comparison to other more recent agreements that have taken four times as long.⁵³

5.67 The Australian Government and ERA maintain that the contract is binding and must stand. Their views are cited below.

- Professor Jon Altman and Dr Roy Green, members of the World Heritage Committee mission to Kakadu:

reconsidering the status of the 1982 agreement would overturn the principles of property law in Australia, establishing a precedent that a changing oral consent could over-rule a written contract, thereby privileging the property rights of one group over another, and would jeopardise Aboriginal economic

52 *Proof Committee Hansard*, Darwin, 16 June 1999, p 161.

53 ATSIC, Submission 53, p 1.

opportunities based on mining futures and, possibly, the credibility of Aboriginal land rights law.⁵⁴

- The Australian Government:

To set the agreement aside would risk creating a precedent that would unjustly privilege one set of acquired rights over another, to the extent of allowing one party to unilaterally revoke a contract, which was freely given and accompanied by payments, at a later date.⁵⁵

- Energy Resources of Australia:

it is vital for future associations between Aboriginal groups and major projects that a duly negotiated agreement is adhered to. To do otherwise would undermine a fundamental tenet of our legal system and render any agreement made with Aboriginal people implicitly unreliable.⁵⁶

5.68 The Mirrar-Gundjehmi told the Committee that since 1996, they have refused to accept payments due to them on the start of construction. A sum of \$1 million has been paid to the NLC and remains in an NLC bank account.⁵⁷

5.69 The Committee notes that the substance of the Government and ERA objections is that they believe that to review the agreement would bring uncertainty into contracts negotiated with Aboriginal people, jeopardise the credibility of land rights law, and unjustly privilege one set of acquired property rights over another. In response the Committee makes the following points:

- The ‘acquired rights’ of Aboriginal people derive from an ancient and irrefutable interconnection with the land, a fact which is only imperfectly recognised in Australian law. The provisions of the Land Rights Act, in which Traditional Owners are not parties to contracts negotiated on their behalf, already create scope for those rights to be unfairly alienated within contracts which otherwise appear legal; and
- The ‘national interest’ clauses of the Land Rights Act, along with Section 48D(3), unfairly prejudice in law the rights of Traditional Owners, and could be argued to ‘unjustly privilege’ the ‘property rights of one group over another’ – that is, of developers over Aboriginals. The Mirrar have already seen those rights alienated in the case of the Ranger mine, and the latent threat of the national interest provisions remained present throughout the Jabiluka negotiations. It is these provisions, not demands to review the 1982 Agreement, which undermine both the credibility of the Land Rights Act and of agreements reached with Aboriginal people under that Act.

54 UNESCO World Heritage Committee, *Report on the mission to Kakadu National Park, Australia, 26 October to 1 November 1998*, Annex I, p 2.

55 *Australia’s Kakadu: Protecting World Heritage*, April 1999, pp x, xiii.

56 Energy Resources of Australia, Submission 32, p 1.

57 Mr Matt Fagan, *Proof Committee Hansard*, Jabiru, 15 June 1999, p 17.

5.70 The Committee agrees that certainty in agreements reached with Aboriginal people is an important goal, and that it is important that contract law should evolve to ensure consistency. However, it believes that it is the very framework in which those agreements are reached which undermines those principles. Certainty cannot be guaranteed without fairness.

5.71 The highly prejudicial arrangements of the Land Rights Act, and the sorry history of negotiation and consultation with Aboriginal people in the Jabiluka case, ensured that the historic rights accruing to Traditional Owners under Aboriginal Law and kinship could easily be ignored. This has been compounded by provisions of the 1982 Agreement, such as clause 3.2, which thwarted the opposition of later generations of Traditional Owners after the project was changed.

5.72 The Committee believes that the Land Rights Act should be reformed to ensure that:

- Traditional Owners are fully consulted and informed about developments on their land (in forms they can understand, such as plain English and local language);
- Their agreement to significant changes in scope is also required.

5.73 At the very least, the ‘national interest’ provisions of the Act should be removed, and consideration should also be given to deeper reform which makes the contracts accord more closely with traditional law and authority.

5.74 This might involve the designated party being Traditional Owners themselves rather than the Land Council, although there will be a continuing need to ensure that other Aboriginals affected be consulted. Independent observers, perhaps from the Human Rights and Equal Opportunity Commission, should also be present at all stages of negotiations to monitor their fairness. The Committee believes that such reforms would restore certainty to agreements entered with Aboriginal people and remove any questions about the underlying credibility of the Land Rights Act.

5.75 During the course of its inquiry the Committee became aware of a significant gulf of understanding between the Government and ERA and Kakadu Aboriginals about legitimate lines of authority and ownership. For example, ERA Chief Executive Philip Shirvington told the Committee that:

A group of the Aboriginals affected have indicated that they oppose milling of Jabiluka ore at Ranger. The sole purpose of this group’s opposition is to attempt to frustrate the Jabiluka project. It is ERA’s view that the decision to proceed with that option does not rest with a single clan to the exclusion of other stakeholders, including in particular other Aboriginals affected.⁵⁸

58 *Proof Committee Hansard*, 11 June 1999, p 95.

5.76 Such views misunderstand the rights accruing to Traditional Owners under traditional law. The statement released by the Gundjehmi Corporation, quoted above, and signed by leaders of the Mirrar Gundjehmi, Mirrar Erre, Bunitj and Malikarr clans, stated that:

We recognise and affirm the responsibility of the senior traditional owner, Yvonne Margarula, to decide on the future of Mirrar lands and we support her opposition to mining.⁵⁹

5.77 In evidence to the Committee, the Northern Land Council also affirmed these rights:

Our experience has been that, whilst there may be some different views within the Aboriginal community of Kakadu, if you like, the overriding consideration is support for the Gundjehmi clan's rights over that area and their right to assert their stance on the development.⁶⁰

5.78 In the Committee's view it is important that, if a credible Aboriginal Land Rights regime is to be developed, one that provides for both fairness *and* certainty, the rights of Aborigines under traditional law be more clearly recognised in the legal frameworks which shape the development process. That has yet to occur.

Recommendation 13

The Committee recommends that Section 40(b) of the *Aboriginal Land Rights (Northern Territory) Act 1976* be repealed.

Recommendation 14

The Committee recommends that consideration should be given to further reform of the *Aboriginal Land Rights (Northern Territory) Act 1976* in order to ensure that the rights of Traditional Owners are protected during negotiations, and to ensure that their agreement to substantial changes in the nature and scope of projects be required.

The Ranger Mill Alternative

5.79 A final, and particularly urgent, concern of the Committee is the indications it has received from Energy Resources of Australia that a new round of pressures are to be placed on the Traditional Owners to obtain their agreement to the Ranger Mill Alternative. In evidence to the Committee, ERA's Chief Executive stated that:

59 Statement from the Gundjehmi Aboriginal Corporation. <http://www.peg.apc.org/%7Eacfen/tostate.htm>

60 Mr Stephen Roeger, *Proof Committee Hansard*, Darwin, 16 June 1999, p 152.

The Ranger Milling Option is ERA's preferred development, and has always been so since we purchased the project from Pancontinental ... ERA has vigorously pursued this preference ... we are now intensifying our focus on finalising outstanding approvals for this option.⁶¹

5.80 In answer to questions from the Committee about how far ERA would go in pursuit of this option, Mr Shirvington stated that ERA hoped to have approval for the Ranger Mill Alternative by 2001, 'but, if it is not, then we will take as much time as is needed.' He further stated that:

Prior to 1992 ... the Northern Land Council took a broad view of the consultation process with traditional owners and consulted them as a group ... that focus by the Northern Land Council since 1992 has since narrowed down to just the Mirrar clan. Our contention is that is not the obligation of the Northern Land Council and we believe that the process should be opened up to the whole of the Aboriginal community in that region.⁶²

5.81 The Committee finds the implications of this statement disturbing. While it does not dispute that there may be other views about mining to those of the Mirrar, the statement appears to hint at the possibility, either that the Mirrar could be swayed by these views, or that the NLC could give consent to the Ranger Mill Alternative against the express wishes of the Mirrar. This would involve the NLC in the contravention of Section 23(3) of the Land Rights Act and could provoke legal action. It would certainly lead to the further embitterment of relations between the Mirrar and the NLC.

5.82 Yvonne Margarula was adamant about the Mirrar's opposition to the Ranger Mill Alternative:

We feel as though we have made our decision quite clear to everybody. With respect to the mill where they want to go and crush the ore at Ranger, we have had meetings about that a number of times. We have clearly said, 'No we don't agree to that proposal,' and still people keep coming back to us and putting pressure on us. [Translator's comment: The term used to 'put pressure' literally means to apply the finger to the nose and push backwards] ... Our feeling is that the mining company wants to divide us into two sides, go down the middle, and entice people with large amounts of money and promises of good things.⁶³

5.83 During its inquiry the Committee was informed of the divisive social effects of such pressures, which also place pressure on the traditional structures of Aboriginal law and culture. In the Committee's view, for ERA to pursue so aggressively a renewed consent to the Ranger Mill Alternative – especially over an extended period

61 *Proof Committee Hansard*, Canberra, 11 June 1999, p 95.

62 *Proof Committee Hansard*, Canberra, 11 June 1999, pp 95-97.

63 *Proof Committee Hansard*, Jabiru, 15 June 1999, p 17.

of time – would be an unwelcome return to the practices of the past that have already caused so much resentment and unhappiness.

5.84 Ms Jacqui Katona told the Committee that this renewed pressure was symptomatic of the saying amongst Aboriginal people in Kakadu, ‘You know white people – they just can’t listen’. She reminded the Committee of the deeper social and cultural issues that were at stake in the recognition of fundamental Aboriginal rights – sentiments the Committee endorses:

The poverty is phenomenal and all the other social and economic symptoms of that – like alcoholism, poor health and domestic violence – are just that: symptoms. The Mirrar firmly believe that, until jurisdictionally they have the ability to exercise the rights which they are fully entitled to – not only in Aboriginal law but in non-Aboriginal law – and the Government accepts that and implements that, there will not be any fundamental change here.⁶⁴

5.85 The Committee believes that it is crucial that the linkages between the continuing dispossession of Aboriginal people, as represented by the 1982 Agreement and its aftermath, and their deep social distress and demoralisation, be understood. These processes are inextricably interlinked. Aboriginal people see their basic rights in relation to land, the protection of sacred cultural heritage, and the survival of their living culture, as parts of a seamless continuum. By disregarding these rights and this interconnection the Jabiluka process has placed the survival of the Mirrar’s culture and tradition, and perhaps of the Mirrar themselves, in grave danger. The Committee believes that until the fundamental human and cultural rights of Aboriginal people are recognised, in law, in political and administrative structures, and in the Jabiluka process, there will not be any fundamental change, and the conditions of Aboriginal people may well deteriorate further.

Recommendation 15

The Committee recommends that in view of the inadequate recognition of Aboriginal rights in Australian law, the Australian Government recognise the fundamental human and cultural rights of Aboriginal people in all laws applying to their lands and cultures.

64 *Proof Committee Hansard*, Jabiru, 15 June 1999, p 9.

CHAPTER 6

WORLD HERITAGE ISSUES

The [World Heritage Committee] mission has noted severe ascertained and potential dangers to the cultural and natural values of Kakadu National Park posed primarily by the proposal for uranium mining and milling at Jabiluka. The mission therefore recommends that the proposal to mine and mill uranium at Jabiluka should not proceed.¹

6.1 This chapter examines the World Heritage issues associated with the Jabiluka uranium mine project, and in particular, a number of the issues raised by the World Heritage Committee on its recent visit to Australia and contained in its report from that visit. The chapter comes to the conclusion that the Jabiluka uranium mine poses a serious threat to the natural and cultural World Heritage values of Kakadu National Park.

6.2 In April 1999 the Commonwealth Government responded to the sixteen recommendations contained in the mission's report. Subsequently other interested parties in Australia and the WHC's own advisory bodies have commented on the Government's response. An extraordinary session of the WHC, to be held in Paris on 12 July 1999, will determine whether Kakadu National Park should be placed on the List of World Heritage in Danger (see 2.1-2.12, above).

Kakadu National Park and World Heritage Listing and Criteria

Background

6.3 The Convention Concerning the Protection of the World Cultural and Natural Heritage (the World Heritage Convention) was adopted by the General Conference of UNESCO in 1972. It came into force on 17 December 1975, when 20 countries, including Australia, became parties to it. Today, 156 countries, known as States Parties, are signatories to the Convention.²

6.4 World Heritage is a term applied to sites of outstanding universal cultural or natural significance, which are included on UNESCO's World Heritage List. 'Cultural heritage' is a monument, group of buildings or site of historical, aesthetic, ethnological or anthropological value, while 'natural heritage' designates outstanding physical, biological and geological features; habitats of threatened plants or animal species; and areas of value on scientific or aesthetic grounds or from the point of view of conservation.

1 UNESCO World Heritage Committee, *Report on the mission to Kakadu National Park, Australia, 26 October to 1 November 1998*, p v.

2 World Heritage internet site, The World Heritage Convention:
http://www.unesco.org/whc/world_he.htm#debut

6.5 As at June 1999 there were 582 properties on the World Heritage List, including 445 cultural sites, 117 natural sites and 20 mixed sites in 114 countries. Thirteen world heritage properties are located in Australia. Kakadu was one of the first three Australian properties inscribed on the World Heritage List in 1981, along with the Great Barrier Reef and Willandra Lakes. It is also one of the 20 mixed World Heritage sites.³

6.6 In order to qualify for inclusion on the World Heritage List, a nominated area must meet specific criteria which are contained in the Convention. A World Heritage site can be placed on the List of World Heritage in Danger if it is threatened by serious and specific dangers, such as development projects, the outbreak of armed conflict or natural disasters. Properties are deleted from the World Heritage List if they are seen to have lost the values for which they were listed.

6.7 The World Heritage List is administered under the World Heritage Convention by the World Heritage Committee on behalf of UNESCO. The World Heritage Committee consists of 21 States Parties elected for six year terms during a General Assembly of UNESCO. Australia is currently a member of the World Heritage Committee.

6.8 Although the Commonwealth Government, as the State Party to the Convention for Australia, is the only government which can submit nominations for Australian World Heritage properties, it implements its national obligations under the Convention in conjunction with the State and Territory Governments, through the Inter-Governmental Agreement on the Environment (IGAE). Under the IGAE, the States and Territories recognise the Commonwealth's international obligations to protect World Heritage properties, and the Commonwealth agrees to consult with the relevant State or Territory concerning possible nominations.

6.9 Australia's World Heritage areas comprise a wide variety of land tenures including freehold, perpetual lease, pastoral lease, town reserve, State forest, national park, nature reserve, Aboriginal reserve and recreational reserve. Ownership rights of areas are not changed after World Heritage listing takes place. The management arrangements vary from area to area.

6.10 Approximately fifty per cent of the 19,804 square kilometres of Kakadu National Park is Aboriginal land, leased to the Director of National Parks and Wildlife under the *National Parks and Wildlife Conservation Act 1975*. The remainder of the Park is under claim by relevant Aboriginal groups. The Park is jointly managed by the Aboriginal Traditional Owners of the Park and Parks Australia, with a Board of Management, including a majority of Aboriginal representation, setting the policy. In its submission to the UNESCO World Heritage mission to Kakadu National Park, the Commonwealth Government stated that:

3 World Heritage internet site, The World Heritage List: <http://www.unesco.org/whc/heritage.htm>

[Kakadu National] Park is one of the best resourced and arguably the best managed in Australia. ... Aboriginal traditional owners are actively involved in all aspects of the management of the Park.⁴

World Heritage Listing and the Criteria

6.11 Kakadu National Park was inscribed on the World Heritage List in three stages – Stage I in 1981 (6,144 square kilometres), Stage II in 1987 (an additional 6,929 square kilometres), and Stage III, in 1992 (bringing the total size to 19,804 square kilometres). As the inclusion of Stage III increased the size of the World Heritage site by a third and substantially modified the original nomination of 1981, the World Heritage Bureau regarded the Stage III nomination as a renomination of the entire Park. Following the Stage III inscription, the boundaries of the World Heritage property became the same as those of Kakadu National Park.

6.12 Kakadu National Park is listed under the following criteria for natural heritage and cultural heritage values:

Natural Heritage

- Criterion (ii): Outstanding examples representing significant ongoing geological processes, biological evolution and man's interaction with his natural environment.
- Criterion (iii): Unique, rare or superlative natural phenomena, formations or features or areas of exceptional natural beauty.
- Criterion (iv): The most important and significant habitats where threatened species of plants and animals of outstanding universal value from the point of view of science and conservation still survive.

Cultural Heritage

- Criterion (i): Represent a unique artistic achievement, a masterpiece of the creative genius.
- Criterion (vi): Be directly or tangibly associated with events or with ideas or beliefs of outstanding universal significance.⁵

6.13 In its publication, *Australia's Kakadu: Protecting World Heritage*, the Commonwealth Government describes the cultural and natural values of the Park in the following ways:

4 Submission by the Government of Australia to the UNESCO World Heritage Mission to Kakadu National Park, October-November 1998, p 9.

5 Environment Australia, *Australia's Kakadu: Protecting World Heritage*, Response by the Government of Australia to the UNESCO World Heritage Committee regarding Kakadu National Park, April 1999, p 4.

The specific attributes that make up [the] World Heritage values of the Kakadu National Park are many and varied. These attributes range from specific sites and features to Kakadu's expansive landscapes and stories of evolution, and include the less tangible features such as the cultural and spiritual associations and interactions between the landscape and a living culture.

...

Kakadu National Park is a landscape of cultural, religious and social significance to local Aboriginal people. Special places in the landscape include ceremonial sites, sites of religious significance, archaeological and rock art sites and other areas that have special meaning to Aboriginal people. These sites both reflect the long history of Aboriginal occupation of the landscape and remain central to Aboriginal culture in the region.

...

The diversity of landscapes, habitats and species of Kakadu National Park, combined with its vast size, are attributes of significant conservation value and provide an excellent environment for the continuation of ecological processes.

...

In comparison with the rest of the Australian continent, the environments of north Australia have been little affected by European settlement.

...

Kakadu National Park is a special Australian place. The World Heritage natural and cultural values and attributes for which Kakadu National Park has been inscribed are recognised, protected and promoted. Australia can show that these values and attributes are protected while responding constructively to suggestions for improvement. Australia recognises that it holds and cares for the values of Kakadu National Park for all Australians and for the world.⁶

Should Kakadu National Park be Inscribed on the Most Recent Criteria?

6.14 In their submission to the World Heritage Committee mission to Australia in October 1998, the Traditional Owners of the Jabiluka mineral lease, the Mirrar-Gundjehmi people, discussed the need for Australia to update the inscription of Kakadu National Park on the World Heritage List to reflect more properly recent modifications to World Heritage criteria. In particular, they argued, the cultural criteria have changed to reflect the importance of 'living tradition'.

[Cultural Heritage] (vi) now reads:

Criterion (vi): Be directly or tangibly associated with events or living traditions, with ideas, or with beliefs, with artistic and literary works of outstanding universal significance.

6 Environment Australia, *Australia's Kakadu: Protecting World Heritage*, April 1999, pp 4-11.

[Cultural Heritage] (iii) now reads:

Criterion (iii): Bear a unique or at least exceptional testimony to a cultural tradition or to a civilisation which is living or has disappeared.⁷

6.15 At the time of Kakadu National Park's inscription on the World Heritage List in 1992, cultural criterion (iii) had read, 'bear a unique or at least exceptional testimony to a civilisation which has disappeared'. This was considered inappropriate in relation to Kakadu National Park because of the ongoing living tradition of the Aboriginal civilisation in Kakadu. The Mirrar now contend, however, that the new wording of criteria (iii) and (vi) are highly relevant to Kakadu National Park and that the Park's World Heritage inscription should reflect these changes.

6.16 The Mirrar people also contend in the same submission to the WHC that:

In addition, the World Heritage Committee has developed the concept of 'cultural landscape' as a further category for inclusion on the World Heritage List. Cultural landscapes represent the 'combined works of nature and man' designated in Article 1 of the Convention. The development of the cultural landscape concept is yet another recognition of the cultural significance of living traditions.⁸

6.17 In 1995 the Kakadu Board of Management formally requested that the Commonwealth Government seek the inscription of Kakadu National Park as a cultural landscape. The Senior Traditional Owner of the Mirrar people, Ms Yvonne Margarula, signed this written request. The Commonwealth Government has stated that renomination of the Park as a cultural landscape would require the consent and active participation of the majority of Traditional Owners as expressed by the Kakadu Board of Management and the Northern Territory Government.

At this stage, the Kakadu Board of Management has requested such a nomination and the matter will be considered at the next Northern Territory World Heritage Ministerial Council before further consultation with land owners takes place.⁹

6.18 The Mirrar people state that the Jabiluka mine represents a 'specific and proven danger' to the continuance of their living tradition. By contrast, the recent changes to World Heritage nomination criteria, they contend, fully embrace the concept of living tradition and therefore more accurately reflect the cultural attributes for which Kakadu National Park is inscribed on the World Heritage List.

7 *Mirrar Living Tradition in Danger, World Heritage in Danger*, Submission to the World Heritage Committee Mission to Kakadu, October 1998, p 6.

8 *Mirrar Living Tradition in Danger, World Heritage in Danger*, Submission to the World Heritage Committee Mission to Kakadu, October 1998, p 6.

9 Environment Australia, *Australia's Kakadu: Protecting World Heritage*, Response by the Government of Australia to the UNESCO World Heritage Committee regarding Kakadu National Park, April 1999, p 89.

6.19 The Mirrar people conclude by arguing that any specific and imminent danger to the continuance of living tradition in the Kakadu World Heritage Area, such as mining uranium at Jabiluka, ‘is (subject to compliance with the [World Heritage] Operational Guidelines) *prima facie* evidence of Kakadu being a World Heritage Area in Danger’.¹⁰

Recommendation 16

The Committee recommends that the Government seek a new inscription for Kakadu National Park to enable the listing to reflect the living traditions and cultural landscape of the Park more accurately.

Australia’s World Heritage Obligations

The World Heritage Convention

6.20 The principal obligations on States Parties imposed by the World Heritage Convention are described in Articles 4 and 5. They include, in Article 4, a duty to ensure the ‘identification, protection, conservation, presentation and transmission to future generations’ of natural and cultural heritage, as defined by the Convention, which occur in the territory of States Parties.

6.21 Article 5 sets out in more detail several obligations imposed on States Parties to ensure that effective and active measures are taken for the protection, conservation and presentation of the cultural and natural heritage situated in its territory. States Parties are required, among other things, to:

- adopt a general policy to give the cultural and natural heritage ‘a function in the life of the community and to integrate the protection of that heritage into comprehensive planning programmes’;
- establish effective protection services, training and research; and
- take appropriate legal, scientific, technical, administrative and financial measures.

6.22 As a signatory to the World Heritage Convention, Australia must do all that it can and whatever is appropriate to identify, protect and present world heritage within its borders. The legal regime and management arrangements put in place to implement the Convention are, however, matters for Australia itself to determine and can involve a mixture of Commonwealth, State and Territory responsibilities. This is particularly important given the role of the States and Territories as land managers of most inscribed areas.

10 *Mirrar Living Tradition in Danger, World Heritage in Danger*, Submission to the World Heritage Committee Mission to Kakadu, October 1998, p 6.

World Heritage and Kakadu National Park – The Commonwealth Government’s View

6.23 In its publication *Australia’s Kakadu: Protecting World Heritage*, and its earlier submission to the WHC in October 1998, the Commonwealth Government set out the legal and administrative requirements and initiatives it has implemented to manage World Heritage properties in Australia in general, and Kakadu National Park in particular. It argues that in relation to Kakadu National Park it has stringently met its World Heritage obligations and that the processes it has established in relation to the Jabiluka mineral lease ensure that the values and attributes of the Park are protected.

Australia is the only signatory to the World Heritage Convention to have created national legislation specifically aimed at protecting World Heritage values of the properties. The Australian Government has on numerous occasions used this legislation to protect World Heritage values which it considered to be under threat.¹¹

6.24 Commonwealth environment and heritage legislation relevant to World Heritage properties in Australia includes:

- *Environment Protection (Impact of Proposals) Act 1974* (the EPIP Act) – the object of the Act is to ensure that, to the greatest extent practicable, matters affecting the environment to a significant extent are fully examined and taken into account in relation to actions by the Commonwealth Government.
- *National Parks and Wildlife Conservation Act 1975* (the NPWC Act) – provides for the establishment of parks and reserves in Commonwealth areas, in accordance with a plan of management.
- *Australian Heritage Commission Act 1975* (the AHC Act) – established the Australian Heritage Commission to keep the Register of the National Estate and advise the Commonwealth Government in relation to the national estate.
- *World Heritage Properties Conservation Act 1983* (the WHPC Act) – provides for the protection and conservation of properties in Australia that are of outstanding universal natural or cultural value. The Act enables the Commonwealth to take action where a World Heritage property is likely to be damaged or destroyed.
- Environment Protection and Biodiversity Conservation Bill 1998. This Bill was passed by the Senate on 23 June 1999. When proclaimed it will replace the EPIP Act, NPWC Act, WHPC Act and other Acts. The degree and manner of protection of World Heritage properties under the new legislation is not agreed by all parties to this report.

11 Submission by the Government of Australia to the UNESCO World Heritage Mission to Kakadu National Park, October-November 1998, p 9.

6.25 In relation to Kakadu National Park and the proposed uranium mine at Jabiluka, the Commonwealth Government claims that it has abided by Commonwealth legislation. Under the EPIP Act, it instigated an EIS for the mine's Ranger Milling Alternative proposal and a PER for the Jabiluka Mill Alternative proposal. Under the NPWC Act, the Kakadu Board of Management has a majority of Aboriginal members to ensure that the interests of Traditional Aboriginal Owners of land in Kakadu are respected. Under the AHC Act, most of the Alligator Rivers Region, which includes most of Kakadu National Park, was included in the National Estate Register in 1980.

6.26 In addition, the Commonwealth contends, the Djawumbu-Madjawarnja site complex, which contains most of the approximately 230 art, archaeological and sacred sites in the Jabiluka mineral lease, is listed on the Register and protected within two designated Australian Heritage Commission exclusion sites. Finally, the Commonwealth claims that it has not found it necessary to use its powers under the WHPC Act in relation to Kakadu National Park because the 'stringent 3 year EIS process specifically addressed the protection of World Heritage values, and laid down conditions which assured this'.¹²

6.27 The Commonwealth Government also contends that it meets its obligations to a number of World Heritage properties, including Kakadu National Park, through its Aboriginal land, sacred sites and native title legislation. Under the *Aboriginal Land Rights (Northern Territory) Act 1976*, for example, land can be granted to, and for the benefit of, traditional Aboriginal people in the Northern Territory. As a result of ownership of land, exploration of minerals cannot be carried out and mining rights cannot be granted in relation to Aboriginal land unless an agreement has been entered into between the intending miner and the relevant Aboriginal Land Council, which represents, and is answerable to, Aboriginal Traditional Owners under the Act. In the case of the Jabiluka mineral lease, the Northern Land Council entered into such an agreement on behalf of the Mirrar Traditional Owners in 1982. The validity of this agreement is now in dispute (see Chapter 5, above).

6.28 The Commonwealth Government also argues that it meets its World Heritage obligations to Kakadu National Park through its policy and legislative framework in relation to uranium mining. In particular it cites the conclusion of the Ranger Uranium Environmental Inquiry, established under the *Environment Protection (Impact of Proposals) Act 1974*, to support its view that the environmental impacts of uranium mining in the mining lease areas inside Kakadu National Park would be minimal:

The hazards of mining and milling uranium, if those activities are properly regulated and controlled, are not such as to justify a decision not to develop Australian uranium mines.¹³

12 Environment Australia, *Australia's Kakadu: Protecting World Heritage*, April 1999, p 36.

13 Environment Australia, *Australia's Kakadu: Protecting World Heritage*, April 1999, p 39.

6.29 The Ranger Inquiry also recommended the establishment of the Kakadu National Park and the creation of the Supervising Scientist for the Alligator Rivers Region. The position of Supervising Scientist was established by the *Environment Protection (Alligator Rivers Region) Act 1978* to coordinate and supervise the implementation of requirements, under any prescribed instrument, associated with environmental aspects of uranium mining and to devise, develop and coordinate the environmental effects of uranium mining.

6.30 The Commonwealth Government concludes the chapter in its April 1999 report to the World Heritage Committee on its obligations to protecting World Heritage properties, and Kakadu National Park in particular, by stating that:

In relation to the Jabiluka mine proposal, Australia has applied its environment protection, heritage protection and Aboriginal land rights legislation methodically and in an open and transparent manner. The Australian Government has met every obligation required under its own legislation and can guarantee to the World Heritage Committee that the values and attributes of Kakadu National Park have been protected and will continue to be protected.¹⁴

World Heritage and Kakadu National Park – Other Views

6.31 In submissions and in evidence given to the Committee at public hearings, a number of interested parties agreed that the Commonwealth Government had failed to meet Australia's World Heritage obligations both in relation to the natural and cultural values and attributes of Kakadu National Park because of its continuing support for uranium mining at Jabiluka.

6.32 In their evidence to the Committee at its public hearing in Canberra, and in their written submission to the Committee, Professor Robert Wasson, Professor Ian White, Dr B. Mackey, and Mr Mick Fleming argued that as mining in the midst of a World Heritage area was not normal, it was absolutely essential that the highest standards of assessment should have been applied to all stages of the project's approval process, and, in particular, the initial EIS stage. This, they claimed, did not occur. Instead, the same standards of protection and process applied to any other site were applied to a mine in a very sensitive World Heritage area. This failed to take into account 'the very high values that are attributed to a World Heritage property by the international community'¹⁵.

The basis of our submission to UNESCO was that, for a project surrounded by a World Heritage property, the highest possible environmental protection is mandatory. Therefore, the best possible EIS is essential in such circumstances. The Jabiluka project is not like other mine developments in this country; it is surrounded by and could impact on a World Heritage

14 Environment Australia, *Australia's Kakadu: Protecting World Heritage*, April 1999, p 41.

15 Professor Robert Wasson, ANU, Professor Ian White, ANU and Mr P. M. Fleming, Consulting Ecohydrologist, *Proof Committee Hansard*, Canberra, 11 June 1999, p 25.

Property. This position has been vindicated by the [Supervising Scientist's] Assessment of the Jabiluka Project. As we note in our Comments on that Assessment, "In every case where we raised a question about the accuracy and quality in the EIS and PER, the Supervising Scientist's Report has agreed that the issue is of substance and concern". The Supervising Scientist's Report argues that many of the issues that we raised in our Submission to UNESCO would have been dealt with at the detailed design stage of the project. This in our view is not an appropriate procedure for a project that could impact on a World Heritage Property.¹⁶

6.33 Professor Wasson and his colleagues remain concerned that the conservation values of the likely impacted areas downstream of the Jabiluka project have not yet been properly assessed in a Kakadu-wide context. They place the blame for this serious omission squarely at the feet of Environment Australia:

As an organisation expert in conservation matters, one might have imagined that Environment Australia would have picked this up fairly early.¹⁷

6.34 Summing up his colleagues' concerns about the possible effects of the Jabiluka Project on the World Heritage values of Kakadu National Park, Professor Wasson stated:

We repeat that damage to an ecosystem of high value (e.g. near Jabiluka) will have effects on the conservation values of the entire Park ... We continue to maintain that the conservation values of the whole Park could be affected by Jabiluka, and that this needs to be assessed.

...

Therefore, we remain concerned about the risk of damage to the World Heritage values of Kakadu National Park largely because of the failure to completely assess the impact on those values of the project.¹⁸

and:

the entire Jabiluka project has been piecemeal and very difficult for non-specialists to understand. I think this is a dreadful outcome for such an important area – and from the perspective of many – an important project. We remain concerned, therefore, that possible damage to Kakadu is a reality because a complete risk assessment has not yet been completed ...¹⁹

16 Professor Robert Wasson, ANU, Professor Ian White, ANU, Dr B. Mackey, ANU and Mr P. M. Fleming, Consulting Ecohydrologist, Submission 50, p 1.

17 Professor Robert Wasson, ANU, Professor Ian White, ANU and Mr P. M. Fleming, Consulting Ecohydrologist, *Proof Committee Hansard*, Canberra, 11 June 1999, p 25.

18 Professor Robert Wasson, ANU, Professor Ian White, ANU, Dr B. Mackey, ANU and Mr P. M. Fleming, Consulting Ecohydrologist, Submission 50, pp 2-3.

19 Professor Robert Wasson, ANU, Professor Ian White, ANU and Mr P. M. Fleming, Consulting Ecohydrologist, *Proof Committee Hansard*, Canberra, 11 June 1999, p 25.

6.35 In their submission to the UNESCO World Heritage Committee, and in evidence to the Committee, Australian non-government conservation organisations were also critical of what they saw as the Commonwealth Government's failure to meet its obligations to protect and preserve Kakadu National Park from uranium mining:

The very existence of uranium mines within the external boundaries of Kakadu World Heritage Area, upstream of its "internationally significant wetlands" and within the World Heritage cultural precinct represents a threat to the World Heritage values and integrity of Kakadu World Heritage Area.

... Australian Government approval to commence development of the Jabiluka uranium mine

- despite the objections of the traditional owners of the Aboriginal land held as Mining Lease;
- prior to completion of formal assessment of critical aspects of the mine;
- prior to actioning 73 preconditions (albeit inadequate);
- despite 'last minute' changes being made to critical aspects of uranium ore tailings disposal without proper assessment and public review;
- before the resolution of outstanding legal issues in the Federal Court

is totally pre-emptive and falls far short of world's best practice expected of development control and management within the external boundaries of a World Heritage Area. These are the serious deficiencies which are now contributing to the damage, risks and threats to the World Heritage values of the listed property and associated enclaves.²⁰

6.36 One of the principal arguments of the Australian NGOs is their contention that despite the fact that the three mining leases inside the boundaries of Kakadu National Park – Ranger, Jabiluka and Koongarra – are legally excised enclaves, it can be readily demonstrated that these areas are an integral part of the natural and cultural heritage of the Park. In the case of the Jabiluka mining lease, they argue that as the lease area includes part of the Magela wetland, which is no different from the remainder of the Magela wetland in the World Heritage Area of Kakadu National Park, then the lease area itself 'is a part of the World Heritage'.²¹ They go on to state that:

20 Submission to the World Heritage Committee of UNESCO by Australian Conservation NGO's, *Kakadu: World Heritage in Danger*, October 1998, attachment to Submission 15, p 4.

21 Submission to the World Heritage Committee of UNESCO by Australian Conservation NGO's, *Kakadu: World Heritage in Danger*, October 1998, attachment to Submission 15, p 21.

The natural heritage and natural landscape within the Jabiluka and Koongarra Mining Leases is an integral part of the natural heritage of Kakadu World Heritage Area and as such is World Heritage.²²

6.37 These views are supported by the submission of the Australia International Council on Monuments and Sites (ICOMOS) to the World Heritage Committee:

Australia ICOMOS reasons that the [values] of outstanding significance for which Kakadu National Park is inscribed in the World Heritage List extend across the Jabiluka excision. Indeed, it is concluded that there is a continuous representation of the world heritage values across the landscapes within the boundaries of Kakadu National Park, the World Heritage Area, and in adjacent areas, including the excised mining leases such as Jabiluka, and the National Estate within the Jabiluka mining lease. Such boundaries are artificially imposed on a landscape, or 'country', with links that cannot be separated and that are socially, culturally and ecologically coterminous, with an extent that is the same in space, time and meaning.²³

6.38 The Committee shares the view of Australia ICOMOS that the Commonwealth Government has consistently understated the natural and cultural values of the Jabiluka mineral lease, in part by repeatedly stating its relatively small size in relation to the whole of Kakadu National Park. It also shares the view of the Australian NGOs that 'the [Jabiluka] lease is fully surrounded by World Heritage park, and is ecologically and culturally contiguous with it'.²⁴

6.39 In evidence to the Committee, and in his written submission, Professor John Mulvaney argued that the Commonwealth Government had failed to meet its World Heritage obligations by unduly neglecting the cultural values of the Jabiluka mineral lease area when deliberating on whether to give approval for the uranium mine to proceed.

6.40 Professor Mulvaney, a former Australian Heritage Commissioner, chief Australian delegate to the 1977 World Heritage Bureau meeting which framed the criteria for listing World Heritage properties, one of Australia's most eminent historical archaeologists and a scholar of international reputation, described the cultural significance of the Jabiluka lease area in the following ways:

Jabiluka is set in a major cultural landscape adjacent to several dreaming places – not just one. It has more than one dreaming track running through that area.²⁵

22 Submission to the World Heritage Committee of UNESCO by Australian Conservation NGO's, *Kakadu: World Heritage in Danger*, October 1998, attachment to Submission 15, p 22.

23 Australia ICOMOS submission to UNESCO World Heritage Mission to Australia and Kakadu, October 1998, p 4.

24 Friends of the Earth and The Wilderness Society, Media Release, 19 May 1999.

25 Professor John Mulvaney, *Proof Committee Hansard*, Canberra, 11 June 1999, p 59.

...

[Jabiluka] is a major cultural landscape; it is a much more significant landscape than the Ranger mine.²⁶

and:

The Jabiluka region consists of an intermeshed cultural landscape, continuous with the areas outside the arbitrary base boundaries. Aboriginal landscapes combine as a single entity those two European concepts of natural and cultural environments, best envisaged as a spiritual environment in Aboriginal society. All features of such landscapes are named and have meaning for past events and present belief systems.²⁷

6.41 Significantly, Professor Mulvaney also stated that:

In my opinion ... there is a real possibility that there are sites of significance in the Jabiluka mineral lease areas which have not been recorded or detected.²⁸

6.42 According to Professor Mulvaney, both ERA and the Commonwealth Government have ignored the 'spiritual environment in Aboriginal society' and examined only those sites already known for their archaeological and rock art values. He attributes this shortcoming to a failure to consult Aboriginal Traditional Owners at an early stage of the Jabiluka project and in a very detailed manner.

6.43 The Committee believes that Professor Mulvaney's concerns are endorsed and given greater authority by the Aboriginal Traditional Owners themselves. The Mirrar people argue convincingly that the Commonwealth Government has failed to meet its World Heritage obligations by dismissing their views in relation to the significance of the Jabiluka mineral lease, and diminishing the rights and interests which are an integral part of Mirrar law and custom.

6.44 The Mirrar believe that they have an obligation and a responsibility to look after their country and people. Looking after their country includes preventing both the destruction of the country and the desecration of sacred sites. It is also:

the recognition, assertion and promotion of cultural rights and the carrying out of living tradition on country.²⁹

6.45 The Mirrar are unable to look after the excised Jabiluka mineral lease country even though they are the Traditional Owners of the land which encompasses Jabiluka.

26 Professor John Mulvaney, *Proof Committee Hansard*, Canberra, 11 June 1999, p 66.

27 Professor John Mulvaney, Submission 30, p 2.

28 Professor John Mulvaney, Affidavit to Supreme Court (NT) in case of Yvonne Margarula, attachment to Submission 30, p 4.

29 *Mirrar Living Tradition in Danger, World Heritage in Danger*, Submission to the World Heritage Committee Mission to Kakadu, October 1998, p 8.

They contend that there are dreaming tracks which cross both the Jabiluka and Ranger mineral leases and the World Heritage area and that there are many sacred sites, a number of which have not been identified by Aborigines for a range of cultural reasons, 'all over country', including the Boiwek-Almudj site which is very close to the Jabiluka mine itself.

These sacred sites exist within the Jabiluka and Ranger Mineral Leases and are interconnected with the spiritual and cultural significance of the entire Mirrar estate and other bininj [Aboriginal] country, including the World Heritage Area.³⁰

6.46 Some of these sites, the Mirrar argue, are at present being directly and severely impacted by the Jabiluka uranium mine. The Mirrar go on to say that:

It would simply be a nonsense to suggest that the Mirrar living tradition, which helps comprise the World Heritage values of Kakadu National Park, is intrinsically less significant within the comparatively recent borders of the Jabiluka Mineral Lease than it is in the World Heritage Area.

It would also equally be a nonsense to suggest that impacts associated with activities on the Jabiluka Mineral Lease (or anywhere else for that matter) which affect the Mirrar living tradition do not impact on the cultural qualities for which Kakadu has been inscribed as a World Heritage Area.³¹

6.47 The Northern Land Council support the Mirrar people's claims in relation to the cultural significance of the Jabiluka mineral lease.

The cultural values for which the areas surrounding the lease were nominated and recognised as World Heritage in no way cease to be present once the Jabiluka Mineral Lease area is entered. ... the lease area itself is as rich in Aboriginal artistic achievement and traditional significance as any other areas within Kakadu ... traditional land use patterns, ceremonial beliefs, dreaming tracks and sites all inextricably link the land within the lease boundary to that within the surrounding World Heritage Area.³²

6.48 The Mirrar argue that the Commonwealth Government has failed to meet its World Heritage obligations by both failing to understand and dismissing the nature of living tradition associated with World Heritage cultural values. Both the EIS and PER approvals processes for the Jabiluka uranium mine failed to address adequately issues related to living tradition. Further, the Mirrar state, the Commonwealth Government has not:

30 *Mirrar Living Tradition in Danger, World Heritage in Danger*, Submission to the World Heritage Committee Mission to Kakadu, October 1998, p 8.

31 *Mirrar Living Tradition in Danger, World Heritage in Danger*, Submission to the World Heritage Committee Mission to Kakadu, October 1998, p 9.

32 *Kakadu National Park World Heritage*, Submission by the Northern Land Council to the UNESCO World Heritage Mission to Kakadu National Park, October 1998, p 6.

- established or proposed a method to safeguard cultural values;
- consulted Aboriginal people in relation to the management of cultural values for which Kakadu National Park has received World Heritage listing; and
- attempted to make itself aware of the concerns of the Traditional Owners in relation to cultural values.³³

There is no evidence that the Australian Government is in any way motivated to assess the threat to, and measures required for ongoing protection and management of, living tradition outside an aggressive industrial agenda. The Australian government refuses to require ERA to undertake a moratorium on any further development until these issues can be resolved (or worked through) and does not seek independent Aboriginal advice. The Mirrar believe that the Australian government supports mining at the expense of their very existence.³⁴

6.49 Professor Mulvaney described an incident which the Committee believes starkly illustrates the lack of respect that is being shown for Aboriginal living culture by the proponent of the Jabiluka project. The incident took place during the WHC mission's visit to the Jabiluka mineral lease and mine site with the Traditional Owners. Professor Mulvaney accompanied the group as a representative of Australia ICOMOS.

The mining company was tunnelling, and the Aboriginal people took the World Heritage Committee to the site and showed them, and then they took them along this track way. They were looking towards the main site where the dreaming creature is, and then there was a loud siren and explosions, and ERA continued, even in the presence of the Aboriginal Owners and the World Heritage Committee, to tunnel and blast. That certainly upset the Aboriginal people very much.³⁵

6.50 In their submission to the Committee, the Aboriginal and Torres Strait Islander Commission also warned that the Commonwealth Government must ensure that the Traditional Owners are fully involved in decisions which affect their living culture.

The issue of protection of a living culture is a very important and sensitive issue. It requires the full involvement of the people concerned, any discussions that seek to determine how they see their survival will be sustained. Therefore, it is essential that the traditional owners who requested that there be an additional layer of protection for their land and culture with

33 *Mirrar Living Tradition in Danger, World Heritage in Danger*, Submission to the World Heritage Committee Mission to Kakadu, October 1998, p 29.

34 *Mirrar Living Tradition in Danger, World Heritage in Danger*, Submission to the World Heritage Committee Mission to Kakadu, October 1998, p 31.

35 Professor John Mulvaney, *Proof Committee Hansard*, Canberra, 11 June 1999, p 61.

a World Heritage inscription, should be intimately involved in ensuring that Australia fulfils its international obligations. To do otherwise would make a mockery of the original listing and the genuine concerns of the traditional owners.³⁶

6.51 The Committee believes that the Jabiluka uranium mine is irreconcilable with the outstanding natural and cultural values of Kakadu National Park and should not proceed.

The Government's Response to the World Heritage Committee Mission's Report

Introduction

6.52 In the report on its mission to Kakadu National Park in December 1998, the World Heritage Committee concluded that a number of serious ascertained and potential threats were posed to the Park as a result of uranium mining in the Jabiluka mineral lease. It went on to recommend that a number of 'corrective measures' were necessary to ensure that the serious threats and dangers to Kakadu National Park were overcome. These corrective measures were presented in the report in the form of sixteen recommendations. The executive summary and list of recommendations for the WHC report are included as Appendix 4 to this report.

6.53 The WHC's major finding was contained in its first recommendation.

Recommendation 1: The mission has noted severe ascertained and potential dangers to the cultural and natural values of Kakadu National Park posed primarily by the proposal for uranium mining and milling at Jabiluka. The mission therefore recommends that the proposal to mine and mill uranium at Jabiluka should not proceed.³⁷

6.54 This recommendation and most of the other substantive findings and recommendations in the WHC report have been rejected by the Commonwealth Government and the proponent of the mine. Two documents, submitted to the WHC in April 1999, *Australia's Kakadu: Protecting World Heritage*, and the Supervising Scientist's *Assessment of the Jabiluka Project: Report of the Supervising Scientist to the World Heritage Committee*, contain the Commonwealth Government's detailed response to the WHC report.

6.55 Supporters of the WHC report, including Australian conservation groups, Aboriginal groups, leading Australian scientists and the WHC's own advisory bodies, the IUCN, the International Council on Monuments and Sites (ICOMOS) and the International Council for Science (ICSU) have subsequently commented on the documents provided to the WHC by the Commonwealth Government.

36 Aboriginal and Torres Strait Islander Commission, Submission 53, pp 19-20.

37 UNESCO World Heritage Committee, *Report on the mission to Kakadu National Park, Australia, 26 October to 1 November 1998*, p v.

6.56 The WHC is currently examining all the submitted documentation and will decide at an extraordinary session of the WHC, to be held in Paris in July 1999, whether to place Kakadu National Park on the List of World Heritage in Danger.

Scientific Uncertainties and the Precautionary Principle (WHC recommendation 2)

6.57 In response to the mission's call for the precautionary principle to be applied to the Jabiluka project because of what it saw as 'the unacceptably high degree of scientific uncertainties relating to the Jabiluka mine design, tailings disposal and possible impacts on catchment ecosystems', the Commonwealth Government requested the Office of Supervising Scientist to subject these scientific uncertainties to further independent scientific review and analysis, and, if necessary, make further modifications to the project design. The general conclusion of the Supervising Scientist's subsequent report was that 'the natural values of Kakadu National Park are not threatened by the development of the Jabiluka uranium mine and the degree of scientific certainty that applies to this assessment is very high'.³⁸

6.58 While the Committee accepts that the report of the Supervising Scientist to the World Heritage Committee provided additional important and useful scientific data in relation to the proposed mine including hydrological modelling, long-term storage of mine tailings, and so on, it is not an entirely adequate response and does not therefore ameliorate the need for applying the precautionary principle to the Jabiluka project.

6.59 The Supervising Scientist's report admits that 'there were a number of weaknesses in the hydrological modelling presented by ERA in the EIS and the PER' and that the Supervising Scientist has made 'a number of recommendations for improvement of the model'. Similarly, in analysing the effect of climate change in relation to hydrological modelling, the Supervising Scientist's report concludes that 'there could be a significant increase in the magnitude of Probable Maximum Precipitation (PMP) events' which should be taken into account in the final design stage.³⁹

6.60 Professor Wasson and his colleagues, in evidence to the Committee, argued that it was precisely these kinds of scientific uncertainties created by the EIS and PER which has led them to doubt the desirability of the Jabiluka project:

We have argued – contrary to the point that was put to you by Dr Johnston [the Supervising Scientist] – that for a project with potential to impact on a World Heritage property the highest possible standards of assessment should be applicable at the EIS stage, not just in the detailed design stage.⁴⁰

38 Supervising Scientist, *Assessment of the Jabiluka Project: Report of the Supervising Scientist to the World Heritage Committee*, April 1999, p 14.

39 Supervising Scientist, *Assessment of the Jabiluka Project*, Report of the Supervising Scientist to the World Heritage Committee, April 1999, pp 5-6.

40 Professor Robert Wasson, ANU, Professor Ian White, ANU and Mr P. M. Fleming, Consulting Ecohydrologist, *Proof Committee Hansard*, Canberra, 11 June 1999, pp 24-25.

...

we believe that very much closer attention should have been paid to some of these issues that are now on the Office of the Supervising Scientist report at the EIS stage. Personally I find it worrying that the mine has continued to be developed while the very important data on rainfall, flooding, the design of the tailings disposals and all of these issues to do with stability are still going on. We are expected to believe an awful lot in good faith. A lot of the processes we have seen thus far do not give us huge confidence. It is almost as if the cheque is in the mail. Frankly, in our view, that is not good enough in a World Heritage Area.⁴¹

6.61 The Australian Wilderness Society and other Australian conservation groups have argued that the Commonwealth Government's response to the WHC's second recommendation, in relation to scientific uncertainties, vindicates the concerns of independent scientists and the mission by acknowledging that there were 'serious errors in the [Jabiluka] project design but that these will be incorporated through the necessary modifications to the project design! Trust us!!'.⁴² The Wilderness Society agrees with Professor Wasson and his colleagues that the mine should not have been allowed to continue while the levels of uncertainty remain:

It is absolutely critical that mining be stopped until there is a full and transparent report on hydrological modelling for the mine, full details of severe weather events, proposed methods for storage of uranium ore on the surface and the long term storage of uranium and the impacts of these issues on the area. ... Until this occurs, and while mining continues, the Property must be placed on the List of World Heritage in Danger.⁴³

6.62 The Northern Land Council's reply to the Australian Government response to this recommendation also casts serious doubt on the integrity of the mine design and the adequacy of the environmental assessment process. It points out that:

The fact that no steps were taken to stop construction of the mine supports the view that the Commonwealth did not intend to seriously test any of the concerns expressed by the UNESCO mission.

Leaving water and tails management aspects of the project up in the air until the detailed design phase and then arranging that those details should be determined by the Supervising Authority (currently the Northern Territory

41 Professor Robert Wasson, ANU, Professor Ian White, ANU and Mr P. M. Fleming, Consulting Ecohydrologist, *Proof Committee Hansard*, Canberra, 11 June 1999, p 29.

42 The Wilderness Society, *An NGO assessment of Australia's response to the 16 recommendations of the World Heritage Committee's mission to Kakadu*, June 1999, p 2.

43 The Wilderness Society, *An NGO assessment of Australia's response to the 16 recommendations of the World Heritage Committee's mission to Kakadu*, June 1999, p 2.

Government) is unacceptable when considering a project of this magnitude adjacent to World Heritage and on Aboriginal land.⁴⁴

Visual Encroachment (WHC recommendations 3 & 14)

6.63 In response to the WHC's recommendation that further visual encroachment of the integrity of Kakadu National Park through both uranium mining and the expansion of the town of Jabiru should be prevented, the Commonwealth Government argued that both the Jabiluka mine and the township of Jabiru do not pose a threat to the aesthetic value of the Kakadu World Heritage property. The project, it maintains, is only visible from the air and any expansion of the urban and infrastructure development in Jabiru will be minimal.⁴⁵

6.64 Contrary to the Commonwealth Government's viewpoint, the Northern Land Council stressed to the WHC mission that the Jabiluka mine project would have a significant impact of the visual encroachment of Kakadu National Park.

The excision of the Jabiluka and Ranger areas from the Kakadu National Park to facilitate mining at those areas is a highly artificial action and has a deep visual impact on the Park. The compounding of the damage that presently exists due to Ranger with the additional Jabiluka Mine and Mill or with an intrusive Haulage Road between Ranger and Jabiluka will further erode the world heritage value of Kakadu.⁴⁶

6.65 The Wilderness Society made a similar claim:

It is simply not true to state that "... the project at Jabiluka is not visible from the World Heritage Property, except from the air." This statement is made frequently through the Australian report yet is not true. The mine site and operations are visible from many sites along the perimeter of the Jabiluka mineral lease and within the Property.

6.66 The World Conservation Union (IUCN) argued that the Commonwealth Government has not been able to refute the mission's findings that 'the visual impact of Jabiluka, 22 kilometres north of Ranger and Jabiru, is a distinct and significant additional impact' and concluded that the visual impact of the mine constitutes 'an ascertained danger for the natural World Heritage values of Kakadu in that it constitutes a deterioration of the natural beauty or scientific value of the property'. Therefore, it argued, these concerns were still valid.⁴⁷

44 Northern Land Council, *Reply to the Australian Government Response to the UNESCO Mission Report*, April 1999, pp 9-10.

45 Environment Australia, *Australia's Kakadu: Protecting World Heritage*, April 1999, p 79.

46 Northern Land Council, *Reply to the Australian Government Response to the UNESCO Mission Report*, April 1999, p 11.

47 IUCN, *IUCN Expert Opinion Concerning the Mitigation of Threats Posed by Ascertained and Potential Dangers to Kakadu National Park by the Jabiluka Mine*, May 1999, p 4.

6.67 In their response to the Commonwealth Government's claims that the expansion of the urban and infrastructure development in Jabiru will be minimal, the Mirrar people drew the WHC's attention to what it claims are the Northern Territory Government and ERA's future development strategy for Jabiru. This strategy, they believe, is articulated in a 1995 Jabiru Town Development Authority (JTDA) document entitled 'Development Strategy for the Normalisation of Jabiru', which makes various statements of intent about the future development of the town aimed at relaxing development controls, land usage and even the size of the town itself. The JTDA is comprised of appointees from the Northern Territory Government, ERA and a representative from the Jabiru Town Council and has no Aboriginal representation. The Mirrar go on to argue that:

The Australian Government fails to disclose to UNESCO this stated policy position of the Northern Territory Government and ERA to massively expand the size and kind of development in Jabiru. The development of Jabiluka will see ERA dominate the jurisdictional arrangements in Jabiru and will help ensure that the 'normalisation' process as outlined above is instituted.

If the *Environment Protection and Biodiversity Conservation Bill (No 2)* 1998 is enacted the future expansion of Jabiru could occur regardless of the [Kakadu] Plan of Management or the opposition of the [Kakadu] Board of Management.⁴⁸

Recommendation 17

The Committee recommends that the Government ensure that the future expansion of Jabiru takes place in accordance with the Kakadu Plan of Management and the full endorsement of the Kakadu Board of Management.

6.68 The Committee agrees with the WHC that further visual encroachment on the integrity of Kakadu National Park through both uranium mining and the expansion of the town of Jabiru should be prevented. It is also not convinced that the Commonwealth Government has been able to allay these concerns in its response to the WHC.

Threats to Cultural Values (WHC recommendations 4, 5, 6, 8 & 11)

6.69 Four of the most important WHC report recommendations encompassing cultural values cover:

- the completion of an international best practice cultural heritage management plan;

48 Submission from the Mirrar People to the UNESCO World Heritage Committee ICCROM & ICOMOS in relation to the Australian Government's Report "Australia's Kakadu: Protecting World Heritage", May 1999, pp 14-15.

- an exhaustive cultural mapping of the Jabiluka mineral lease and the Boiwek site and its boundaries;
- the immediate and effective implementation of the Kakadu Regional Social Impact Study (KRSIS) recommendations; and
- the need to repair the breakdown in trust and communication between Aboriginal people and the Commonwealth Government in relation to the Jabiluka project.

(i) Cultural Heritage Management Plan

6.70 The Commonwealth Government stated in its response to the WHC report that it had invited participation in the further development of the Interim Cultural Heritage Management Plan (CHMP) from the organisations identified in the mission, albeit despite the non-involvement of the Traditional Owners. In addition, every effort had been made to ensure the compilation of an accurate cultural inventory for the conservation of the cultural sites located within the Jabiluka mineral lease.

6.71 The Northern Land Council (NLC) was strongly critical of the Commonwealth Government's approach to the CHMP. Despite the Government's requirement in response to the EIS that a cultural heritage management plan be in place prior to the commencement of the construction of the mine, 'construction was allowed to commence without any form of cultural heritage management plan in place'.⁴⁹

The Interim Cultural Heritage Management Plan was eventually supplied to the NLC some six months after construction had commenced. In formulating the Interim Plan there was no consultation with the NLC or Traditional Owners and in an attempt to bypass the appropriate avenues of consultation, an approach was made to Djabulukgu Association to formulate the Interim Cultural Heritage Management Plan. Djabulukgu Association perceived the approach as divisive and inappropriate and refused to participate.

It was not until April 1999, some 12 months after construction at Jabiluka commenced, that the Government wrote to the NLC seeking input into the CHMP and other studies concerning the impacts of dust and vibration from the project on cultural heritage values surrounding Jabiluka. This attempt to reconcile cultural heritage issues at Jabiluka has been made far too late to make any accurate baseline research involving Traditional Owners possible. Given their views that construction represents a real threat to their sites and therefore their physical and spiritual safety, it is not surprising that the owners of the cultural heritage in question are not willing to participate in the process.⁵⁰

49 Northern Land Council, *Reply to the Australian Government Response to the UNESCO Mission Report*, April 1999, p 11.

50 Northern Land Council, *Reply to the Australian Government Response to the UNESCO Mission Report*, April 1999, p 12.

6.72 The Committee is highly critical of the Commonwealth Government's failure to consult properly with Aboriginal stakeholders on the CHMP and many other aspects of the Jabiluka project. Furthermore, the Committee is disappointed that the Government consistently emphasises a 'consultation' approach rather than a more appropriate and useful broader participatory approach.

Recommendation 18

The Committee recommends that the Government develop a broader, more appropriate and more effective participatory approach to the development of a cultural heritage management plan with Aboriginal stakeholders.

(ii) Cultural mapping

6.73 In response to the mission's call for an exhaustive cultural mapping of the Jabiluka mineral lease and the Boiwek site and its boundaries, the Commonwealth Government argued that the Aboriginal Areas Protection Authority of the Northern Territory (AAPA) had reviewed the status and location of Boiwek over the last twenty years but had declined to register the site due to disagreements amongst custodians over the significance of the site and its boundaries. (See Chapter 4, above, for a more detailed discussion of the Boiwek site.)

6.74 According to the Traditional Owners, the Mirrar people, the Boiwek-Almudj Sacred Site is a sacred site complex and not one site as the Commonwealth Government contends.

There are various sites and tracks along a journey in which Boyweg-Almudj made Mine Valley and other landforms, including a soak on the western side of Mine Valley called Boyweg-Bagaloi. It appears that [the Commonwealth Government], while acknowledging the existence of the Boyweg-Almudj journey, seeks to isolate the Boyweg-Bagaloi soak as the only sacred site.

... Unfortunately it seems that the Australian Government is seeking to deliberately obscure the fact that a significant part of Boyweg-Almudj's journey rather inconveniently traverses the Jabiluka Ore body No. 2.⁵¹

6.75 In 1998 the NLC and ERA entered into an agreement which included recognition of the Boiwek-Almudj Sacred Site Complex, and restrictions were placed on ERA's surface activities in the area of the mine valley. The Mirrar people did not understand why the restrictions were limited to the surface as this was contrary to the

51 Submission from the Mirrar People to the UNESCO World Heritage Committee ICCROM & ICOMOS in relation to the Australian Government's Report "Australia's Kakadu: Protecting World Heritage", May 1999, pp 21-22.

information they had given to George Chaloupka, an internationally acknowledged rock art expert in 1997.

6.76 In June 1998, the Jabiluka tunnel began with the status of the Boiwek-Almudj Sacred Site Complex unresolved:

Since the World Heritage Committee decision, the Mirrar have written to and visited the Australian Government's Minister for the Environment and Heritage on a number of occasions asking for blasting and drilling to stop at the Jabiluka minesite so that further cultural mapping can take place in the minesite area. The Australian Government has rejected the Mirrar requests.⁵²

6.77 According to the NLC:

The Government's audit of cultural mapping on the [Jabiluka] lease area is shallow and results in simplistic conclusions. The NLC has, subsequent to the UNESCO's Mission's report, undertaken its own investigation of the historical record of non-Aboriginal knowledge in relation to sites in the lease area. The NLC has access to substantial material not available to the Australian Government.⁵³

6.78 The Committee notes that although the Commonwealth Government reported to the World Heritage Committee that the AAPA had decided not to register the Boiwek-Almudj Sacred Site Complex, it failed to acknowledge that the Authority also indicated that its decision not to register the area concerned 'does not necessarily mean that this area is not a sacred site'.⁵⁴

(iii) Implementation of the KRSIS Recommendations

6.79 In response to the mission's call for the immediate and effective implementation of the Kakadu Regional Social Impact Study (KRSIS) recommendations, the Commonwealth Government stated that it had already commenced and accelerated the implementation of the KRSIS outcomes that will ensure that effective structures are in place within twelve months.

6.80 The NLC has indicated to the WHC that:

52 Submission from the Mirrar People to the UNESCO World Heritage Committee ICCROM & ICOMOS in relation to the Australian Government's Report "Australia's Kakadu: Protecting World Heritage", May 1999, p 25.

53 Northern Land Council, *Reply to the Australian Government Response to the UNESCO Mission Report*, April 1999, p 14.

54 Letter from the Aboriginal Areas Protection Authority to the Northern Land Council, 20 July 1998, quoted in: Aboriginal Areas Protection Authority, Submission 52, p 1.

No proposals detailing how and when the KRSIS recommendations might be implemented have yet been submitted by the Government to the NLC and the Aboriginal community.⁵⁵

6.81 The NLC is also very concerned that the Commonwealth Government will, in its eagerness to produce visible results in the region which it can report to the WHC, leave little room for the priorities of local Aboriginal people themselves to be established and acted upon.

6.82 The NLC argues that any attempt to implement the KRSIS recommendations and other programs of regional significance should be undertaken with the support and subject to the reasonable control of Aboriginal people. A hasty approach may mean that the efforts which are being made to reach long term solutions to many complex issues of very great importance to Aboriginal people, touched on in the KRSIS reports, will be wasted. The NLC argues that Aboriginal people in the region must be empowered to reach solutions and set priorities for change themselves.⁵⁶

(iv) Breakdown in trust and communication

6.83 Contrary to the finding of the WHC mission, the Commonwealth Government denied that there had been a general breakdown in communication and trust between Aboriginal people and the Government in relation to the Jabiluka project. Both the NLC and the Mirrar people claim that such a breakdown has occurred.

6.84 The NLC believes that:

There has been no change of any substance to the circumstances prevailing at the time of the Mission's visit, nor has the Commonwealth attempted to redress this situation. This is illustrated by the Commonwealth's failure to provide the NLC and the Aboriginal community with detailed proposals for the implementation of the KRSIS recommendations ... and, instead, to rely on the chair of the implementation committee by way of informal and ad hoc communication.⁵⁷

6.85 The Committee notes with concern that the NLC has not been requested to advise the Commonwealth Government in relation to any consultation process regarding the nomination of cultural landscape criteria. This 'consultation' has been taken over by the Northern Territory World Heritage Properties Ministerial Council.⁵⁸ The Committee believes that as long as action on this issue is driven from this forum

55 Northern Land Council, *Reply to the Australian Government Response to the UNESCO Mission Report*, April 1999, p 17.

56 Northern Land Council, *Reply to the Australian Government Response to the UNESCO Mission Report*, April 1999, p 17.

57 Northern Land Council, *Reply to the Australian Government Response to the UNESCO Mission Report*, April 1999, p 24.

58 IUCN, *IUCN Expert Opinion Concerning the Mitigation of Threats Posed by Ascertained and Potential Dangers to Kakadu National Park by the Jabiluka Mine*, May 1999, p 13.

it is unlikely that Traditional Owners of either Kakadu or other Aboriginal lands will have an interest in pursuing such an agenda.

6.86 The Mirrar people believe that the Commonwealth Government is clearly not interested in building trust and communication with them or any other Aboriginal people who support the Mirrar people's right to protect their country and culture. In particular the Mirrar claim that the Government does not consider an In Danger listing for Kakadu National Park is justified because, they argue, it cannot be shown that 'an irretrievable loss of or serious damage to World Heritage values' has occurred.⁵⁹

The Mirrar are appalled that the Australian Government does not consider the potential loss of a distinct language, culture, spirituality and society as an "irretrievable loss" or "serious damage".⁶⁰

6.87 As has been noted in Chapters 4 and 5 of this report, the development of the Jabiluka uranium mine has placed enormous social and cultural pressures on the Aboriginal community:

Possible social impacts ... can include the psychological and health effects of suffering fear, reduced use of the area concerned and of species normally hunted from it. Over a very long period there is a risk of gradual attrition of knowledge of these areas if they become less frequented and children are taken there less often for socialisation into traditional ecological knowledge.⁶¹

6.88 The Committee believes that the Jabiluka project threatens the living culture of the Aboriginal population. It therefore threatens the integrity of the cultural values of Kakadu National Park and their interaction with the natural values for which Kakadu is justifiably recognised internationally.

6.89 The Committee is of the view that in proceeding with the Jabiluka mine without the effective involvement of the most relevant people, the Traditional Owners, the Commonwealth Government is taking an approach which is clearly at odds with the cultural values of Kakadu National Park as a World Heritage site.

59 Environment Australia, *Australia's Kakadu: Protecting World Heritage*, April 1999, p 122.

60 Submission from the Mirrar People to the UNESCO World Heritage Committee ICCROM & ICOMOS in relation to the Australian Government's Report "Australia's Kakadu: Protecting World Heritage", May 1999, p 41.

61 Environment Australia, *Environment Assessment Report: Proposal to Extract, Process and Export Uranium from Jabiluka Orebody No 2*, August 1997, pp 113-4.

Recommendation 19

The Committee recommends that the Government take appropriate steps immediately to implement the recommendations of the UNESCO World Heritage Committee's report on Kakadu National Park. The Committee does not believe that the Government has adequately addressed the major findings and recommendations in that report.

Should Kakadu National Park Be Given an 'In Danger' Listing?

Introduction

6.90 In its mission report the WHC states that:

In accordance with paragraph 77 of the *Operational Guidelines* "a World Heritage property – as defined in Articles 1 and 2 of the Convention – can be entered on the List of World Heritage in Danger by the Committee when it finds that the property corresponds to at least one of the criteria" set out in paragraph 78 concerning the case of cultural properties and paragraph 79 concerning the case of natural properties.⁶²

The specific cultural and natural ascertained and potential danger criteria are included in Appendix 4 to this report.

6.91 Article 11.4 of the Convention Concerning the Protection of the World Cultural and Natural Heritage establishes a prescribed List of World Heritage in Danger. For a property to be added to the List of World Heritage in Danger it must be threatened by:

serious and specific dangers, such as the threat of disappearance caused by accelerated deterioration, large-scale public or private projects or rapid urban or tourist development projects; destruction caused by changes in the use or ownership of the land; major alterations due to unknown causes; abandonment for any reason whatsoever; the outbreak or the threat of an armed conflict; calamities and cataclysms; serious fires, earthquakes, landslides; volcanic eruptions; changes in water level, floods and tidal waves.⁶³

6.92 Contrary to the findings in the WHC mission report, the Commonwealth Government does not believe that Kakadu National Park should be placed on the WHC's List of World Heritage in Danger. It argues that:

62 UNESCO World Heritage Committee, *Report on the mission to Kakadu National Park, Australia, 26 October to 1 November 1998*, p 7.

63 World Heritage internet site, *Convention Concerning the Protection of the World Cultural and Natural Heritage*, http://www.unesco.org/whc/world_he.htm

there is no basis, in terms of either ascertained or potential dangers, or inadequate legal and administrative protection, for placing Kakadu National Park on the List of World Heritage in Danger.⁶⁴

6.93 Subsequent to receiving and analysing the Commonwealth Government's two major responses to the WHC mission report, *Australia's Kakadu: Protecting World Heritage*, and the Supervising Scientist's *Assessment of the Jabiluka Project: Report of the Supervising Scientist to the World Heritage Committee*, the World Conservation Union is still of the view that Kakadu National Park should be placed on the List of World Heritage Sites in Danger:

IUCN recognises that the Australian Government has put considerable resources into addressing the issues raised by the Unesco Mission in October 1998. However our assessment of the analyses provided is that many of the concerns identified by the Mission remain valid. In the opinion of IUCN, continuing uncertainties over the final design of the mine site and the weaknesses of previous design as recognised by the Supervising Scientist's report, argue for application of the Precautionary Principle as recommended by the Mission. Jabiluka will constitute a significant additional impact on the visual integrity of the sweeping landscapes for which the Park is rightly recognised internationally. And there is strong evidence that Jabiluka is dividing the Aboriginal community and threatening the integrity of the cultural values of the Park. For these reasons IUCN believes that the conditions still exist for inscribing Kakadu National Park on the List of World Heritage Sites in Danger.⁶⁵

6.94 On the balance of the varied and detailed evidence it has examined over the course of this inquiry, the Committee supports the view held by the IUCN, namely, that if the proposed Jabiluka uranium mine were to proceed, there would be strong natural and cultural heritage grounds for inscribing Kakadu National Park on the List of World Heritage in Danger.

6.95 The Committee deplors the view repeatedly expressed by the Minister for the Environment and Heritage that the Commonwealth Government will not halt the proposed Jabiluka uranium mine if the WHC inscribes Kakadu National Park on the List of World Heritage in Danger. The Committee believes that such action, were it to occur, would place Australia in direct conflict with its international obligations.

6.96 The Committee believes that the Jabiluka uranium mine threatens the natural and cultural values of Kakadu National Park. The Committee therefore urges the World Heritage Committee to place Kakadu National Park on its List of World Heritage in Danger at the extraordinary session of the WHC in July 1999.

64 Environment Australia, *Australia's Kakadu: Protecting World Heritage*, April 1999, p 124.

65 IUCN, *IUCN Expert Opinion Concerning the Mitigation of Threats Posing Ascertained and Potential Dangers to Kakadu National Park by the Jabiluka Mine*, May 1999, p 5.

Recommendation 20

The Committee recommends that the UNESCO World Heritage Committee place Kakadu National Park on its List of World Heritage in Danger.

Consequences of an ‘In Danger’ Listing

6.97 The Commonwealth Government insists in its response to the WHC mission report that one of the main consequences of Kakadu National Park being inscribed on the List of World Heritage in Danger is that some of the fundamental principles that underpin the Convention Concerning the Protection of the World Cultural and Natural Heritage would be put at risk:

In particular, the principles of respect for the sovereignty of the State Party, the safeguarding of the property rights provided for in its national legislation, and the primacy of the role of the State Party in the protection of the natural and cultural heritage. Such action would also, in Australia’s view, be at odds with the terms of both the Convention and those relevant parts of the Operational Guidelines which are consistent with the Convention. It would represent a significant change to the basis upon which states took the serious step of becoming a party to the Convention and may deter other States from taking that step in the future.⁶⁶

6.98 The Committee notes, however, that the Commonwealth Government admits later in the same report that an In Danger listing is possible without State Party consent where there is ‘an irretrievable loss of or serious damage to World Heritage values or in the integrity of the World Heritage property’.⁶⁷ The Committee is of the view that an In Danger listing of Kakadu National Park without State Party consent, as a result of uranium mining proceeding at Jabiluka, would be justified as the mine represents a serious threat to the Park’s World Heritage values.

Recommendation 21

The Committee recommends that the UNESCO World Heritage Committee proceed to place Kakadu National Park on its List of World Heritage in Danger without State Party consent.

6.99 The Commonwealth Government also claims that an In Danger listing will lower the esteem in which the World Heritage Convention is held in Australia. The Committee believes, however, that such an action by the WHC, if necessary, would demonstrate to the Australian population that the World Heritage Committee and

66 Environment Australia, *Australia’s Kakadu: Protecting World Heritage*, April 1999, p 49.

67 Environment Australia, *Australia’s Kakadu: Protecting World Heritage*, April 1999, p 124.

Bureau are credible organisations which take their responsibilities seriously. It would also demonstrate that a State Party must not evade its obligations under the Convention.

6.100 Contrary to the views of the Commonwealth Government, the Committee believes that the main consequence of an In Danger listing of Kakadu National Park would be the damage to Australia's international reputation on conservation and indigenous issues. As this report has noted, Australia has been a leader in World Heritage protection, with thirteen World Heritage properties and high standards of management, community involvement and protection. Australia remains the only signatory to the World Heritage Convention to have created national legislation specifically aimed at protecting the World Heritage values of its properties.

6.101 This well deserved reputation is now being jeopardised unnecessarily by the Commonwealth Government's intransigence in relation to a proposed uranium mine at Jabiluka. The Committee does not believe that the economic benefits claimed for the mine can in any way offset the damage to Australia's international reputation in relation to cultural and natural heritage.

6.102 The Committee also regrets the damage to Australia's international reputation in relation to the human rights of indigenous peoples. This inquiry has revealed an alarming lack of respect by the Commonwealth Government for the legitimate participation of indigenous people in an issue which directly affects their daily lives and their living culture.

Recommendation 22

The Committee recommends that the Government note the damage to Australia's reputation in relation to the human rights of indigenous peoples as a result of its lack of respect for the legitimate participation of indigenous people in issues affecting their daily lives and living culture.

6.103 In addition, the Committee notes the possible damage to Australian tourism resulting from the proposal to open a second uranium mine within the boundaries of Kakadu National Park.

Recommendation 23

The Committee recommends that the Government examine the possible impact on the Australian tourism industry of an In Danger listing of Kakadu National Park.

Conclusion

6.104 The Committee reiterates its view that the Jabiluka uranium mine threatens the natural and cultural values of Kakadu National Park, and therefore urges the World Heritage Committee to place Kakadu National Park on its List of World Heritage in Danger at the extraordinary session of the WHC in July 1999.

6.105 As one group of witnesses expressed so eloquently at the Canberra public hearing:

Let us be clear: mining in the midst of a World Heritage area is not normal. That is why we have World Heritage areas. Therefore, to apply to a mine in the midst of a World Heritage area the same standards of protection and process as we do to any other site seems to miss the point of the very high values that are attributed to a World Heritage property by the international community. Kakadu is a very special place.⁶⁸

6.106 It is precisely because Kakadu is a very special place, not only for those Australians who are fortunate enough to visit it, but for all Australians, including the Aboriginal people who own it, that every effort must be made to ensure that its natural and cultural values are protected. The Jabiluka mine threatens those natural and cultural values and therefore should be not be allowed to proceed.

Recommendation 24

The Committee recommends that the Jabiluka uranium mine should not proceed because it is irreconcilable with the outstanding natural and cultural values of Kakadu National Park. Every effort must be made to ensure that these values are protected.

Senator Lyn Allison
Chair

The Greens (WA) endorse and support the majority report of the Australian Democrats and the Australian Labor Party.

Senator Dee Margetts
The Greens (WA)

68 Professor Robert Wasson, ANU, Professor Ian White, ANU and Mr P. M. Fleming, Consulting Ecohydrologist, *Proof Committee Hansard*, Canberra, 11 June 1999, p 25.

APPENDIX 1

LIST OF SUBMISSIONS

1	Ms Bon Darlington
2	Mr David Wise
3	Gillespie Economics
4	C & A Drafting
5	<i>confidential</i>
6	Mr Michael Unger
7	Ms Edith Franks
8	Electrical Trades Union of Australia
9	Ms Heather Ellis
10	Public Heath Association of Australia (NT)
11	Ms Karen Hodder
12	Ms Catherine Franks
13	Mr Ronald Wolff
14	Friends of the Earth (Fitzroy)
15	The Wilderness Society
16	Chris Leslie
17	Ms Marnie Kent
18	Dr Una Stephenson
19	Dr Alan Roberts
20	Ms Marlene Hodder
21	Ms Dianne Koser
22	Mr Bert King
23	Mark Sonter Consulting Pty Ltd
24	Mr Basil Cameron
25	Professor Ben Selinger
26	Environment Centre – Armidale
27	Ms Sharon Baxter
28	Mr Quentin Kidd
29	Ms Julie Mason
30	Professor John Mulvaney
31	Ms R Bekker
32	Energy Resources of Australia Ltd
32A	Energy Resources of Australia Ltd
33	Ms Cherry Prior
34	Australian Conservation Foundation
35	Ms Bernadette Kennedy

36	Ms Carole MacDonald
37	Mr Charles Ling
38	Environment Centre of NT
39	Mr Lawrence Toogood
40	Mr Peter Schnelbogl
41	The Big Scrub Environment Centre
42	ENUFF Lismore
43	Friends of the Earth (Sydney)
44	Australians for Native Title & Reconciliation
45	Northern Land Council
45A	Northern Land Council
46	Jabiluka Action Group (QLD)
47 & 47A	The Wilderness Society (Sydney)
48	Gundjehmi Aboriginal Corporation
49	Government of the Northern Territory
50	Professor Robert Wasson
51	Ms Maree Diaye
52	Aboriginal Areas Protection Authority
53	ATSIC
54	Ms Alison Green
55	Ms Marit Hegge
56	Mr David Perry
57	Ms Carolyn Quon
58	Ms Jude McCulloch
59	Ms Claire Sullivan
60	Mr P.R. Canagaratna
61	Ms Ellen Mac Lennon
62	Ms Lynda Ruth
63	Ms Margaret Brady
64	Ms Eva Haarbuger
65	Ms Tina Kitchener
66	Ms Jacki Wirth
67	Ms Angela Harvey
68	Mr Alistair Orchard
69	Mr Nicholas Bunney
70	Ms J Davis
71	Ms Blanche Moerz
72	Ms Valerie Woodward
73	Mr Peter McCallum
74	Ms Kelly Young

75	Ms Elitza Metherall
76	Mr Adam Rimington
77	M/s J Cornish
78	Mr Peter Feathers
79	Dr Dougald McLean
80	Mr Paul Kuhlmann
81	Mr Kenny Brownell
82	M/s R McLennan
83	M/s J Latham
84	M/s M Lange
85	Ms Anne Tao
86	Ms C Halligan
87	Ms Rikki Coulston
88	Mr Rob Williams
89	Ms Nichola Hungerford
90	Ms Karen Kaye
91	Mr Bill Crawford
92	Ms Claire Kelly
93	Mr Wayne Palmer
94	Ms Claire Carey
95	Ms Karen Woodward
96	Mr Luke Chamberlain
97	Mr Lloyd Percia
98	Ms Sylvia Henderson
99	Mr Craig Exton
100	Ms Tania Ruddick
101	Ms Natalie O'Connor
102	Mr Paul Dowling
103	Ms Kirsty Seymour
104	Ms Serena Hansen
105	Ms Lisa Loulier
106	Mr Daniel Ward
107	Ms Jessica Henderson
108	Ms Lisa Newman
109	Ms Kalinda Vary
110	Ms Tonya Flower
111	Ms Sophie Burke
112	Mr David Ogilvie
113	Ms Marion Giles
114	Ms Amanda Roff

115	Ms Elisha McMurray
116	Ms S Traies
117	Ms Sara Beasley
118	Ms Mel Williamson
119	Ms Sara Tarapi
120	Ms Rita Camillerie
121	Ms Florence Wathen
122	Mr Vincent Dalfonso
123	Mr Bradley Clarke
124	Ms Fiona Hallam
125	Ms Lauren Dwyer
126	Mr Ian Butterworth
127	Ms Tara Campbell
128	Ms Leonie Sevona
129	Ms Alfreida Booth
130	Ms Dorothy Bevy
131	Ms Kelly Hunt
132	Mr Spencer Dimtscheff
133	Mr Tim Roberts
134	Ms Chris Turnbull
135	Mr Jay Styles
136	Mr Michael Powell
137	Ms Cheryl Kaulfuss
138	Mr Keith Kaulfuss
139	Mr Mark Cain
140	Ms Mandy McPherson
141	Mr Justin Kaulfuss
142	Mr Justin Tutty
143	Mr Russ Lund
144	Ms Lyn Cassar
145	Mr Luke Battersby
146	Ms Lenore Bull
147	Mr Alan Bull
148	Ms Susan Tippett
149	Mr Dieter Michel
150	Ms Linda Odgers
151	Mr Barry Sheffield
152	Mr Benn Sheffield
153	Ms Korin Kraus
154	Mr Stephen Valentine

155	Mr Scott Gordon
156	Ms Kelly Sheffield
157	Ms Jill Sheffield
158	Ms Judith Kellett
159	Ms Kim Hauselberger
160	Ms Jane Dermer
161	Ms Shannon-Kate Archer
162	Mr Denis Kalos
163	Ms Charlotte Henry
164	Mr Bruce Thompson
165	Mr Brett Dickson
166	Mr Christopher Green
167	Ms Anna Whitelaw
168	Mr Marc Alperstein
169	Ms Bronwyn Alleyn
170	Ms Rosalind Byass
171	Ms Jill Sparrow
172	Ms Caithleen Storr
173	Mr Benjamin Rumble
174	Ms Rebecca Boreham
175	Ms Hilary Ross
176	Mr Sven Howorth
177	Ms Vyvan Cayley
178	Ms Elaine Mival
179	Mr Liam Thomas
180	Ms Angela McFeeters
181	Ms Larissa Felley
182	Ms Sally Jape
183	Ms Tammy Gourvelos
184	Ms Debra Herrmann
185	Ms Helen McKenna
186	Ms Kathy Owens
187	Mr Jared Robinson
188	Mr John Wickham
189	Mr Anthony Nicholas
190	Mr Robert Paxton
191	Ms Alexandra Nogy
192	Ms Jen Thompson
193	Mr Philip Armit
194	Ms Annita Seilbert

195	Mr Sam Walker
196	Ms Katrina Mimmo
197	Ms Anny Beresford
198	Ms Nicole Bienovich
199	Ms Grace McQuilter
200	M/s M Pels
201	Ms Julie McBride
202	Ms Yolanda Cress
203	Mr Adam Binns
204	Ms Juliana Kemp
205	Ms Klaus Lange
206	Mr Dean Serroni
207	Mr Edward DeRooij
208	M/s G Sell
209	M/s M Gibbs
210	M/s R MacMarel
211	M/s Benno Engels
212	M/s M McLean
213	M/s J Buckland
214	Mr Andrew Saunders
215	Mrs D Poulton
216	Mr Peter Rice
217	M/s S Wallis
218	Ms Kelly Adams
219	Ms Linda Holland
220	Mr Michael Palmer
221	Mr Darryl Thomas
222	Ms Tracey Rose
223	Mr Alan Storey
224	Mr Paul McMahan
225	Ms Ana Whitehouse
226	Ms Natalie Maher
227	Ms Melissa McClelland
228	Mr Michael Duffin
229	Father Tony Stace
230	M/s Jos Van Boheemen
231	M/s A Fail
232	Mr Zac Wright
233	Ms Erin Davis
234	Mr John Ball

235	Mr Taryn Stringfellow
236	Ms Zette Phillips
237	Ms Louise Ludlo
238	Mr Michael Del Monaco
239	Ms Peggy Carlton
240	Ms Jodi Bellchambers
241	Ms Belinda Glass
242	Ms Meredith Butler
243	Ms Fleur Taylor
244	Ms Jess Booth
245	Mr Rebecca Conning
246	Ms Judith Pierce
247	Ms Samantha Putter
248	Ms Melinda Sullivan
249	Ms Fiona Connan
250	M/s M Celuzzi
251	Mr John Goodall
252	Ms Nicola Mercer
253	Ms Fay Spear
254	Ms Claire Smiddy
255	Mr Oliver Stoll
256	Ms Marianna Van Loon
257	Ms Angela Clemens
258	Mrs Margaret Gabbedy
259	Mr Daniel Glikson
260	Mr Noah Erlich
261	Ms Di James
262	Ms Zoe Goss
263	Ms Mel Cattlin
264	Ms Frances Gleeson
265	Ms Lindsey Morris
266	Mr C O'Reilly
267	Ms Ema Hall
268	Ms Elizabeth Fairlie
269	Mr Luke Kinnear
270	Ms Alison Edwards
271	Ms Rita Leuggy
272	Ms Natalie Davenport
273	Mr Ian Sutton
274	M/s J Hansel

275	Mr Blake Pitman
276	M/s J Campbell
277	Ms Cordelia Hewitt
278	Mr David Lancaster
279	M/s J Couper
280	Mr William Barry
281	Mr Paul Dubowski
282	Ms Patricia Wilson
283	Ms Margaret Borden
284	Mr Martin Frank
285	Ms Loma Cannon
286	Ms Kathryn Vernon
287	Ms Shae Toogood
288	Ms Susan Moran
289	Mr M Mansbridge
290	Ms Shay Frank
291	Ms Elke Kerr
292	Mr John Clark
293	Mr V Macarow
294	Ms B Brown
295	Ms Michelle Buckley
296	Ms Rachel Gilson
297	Ms Maria Sola
298	Mr P Darruch
299	Ms J Walker
300	Ms Helen Tripp
301	Ms Anna Clark
302	Ms Tania Smith
303	Mr Marlo Killingsworth
304	M/s E Porter
305	Mr Bob Rothols
306	M/s Dal Ellis
307	Ms Jean Leiese
308	Mr Richard Thomas
309	Ms Amie Peeler
310	M/s G Stokes
311	Ms Karen Mackay
312	Mr Leo Prestia
313	Ms Beverley Clarke
314	Mr Jacob Hazzard

315	Mr Martin Cosier
316	Ms Farina Khar
317	Ms Rachel Fletcher
318	Mr Bruce Dunn
319	Ms Mandy DeVivo
320	Ms Ursula Blake
321	Ms Carol McConville
322	Ms Fran Martin
323	Ms Natalie Tomlinson
324	Ms Brigid Avid
325	M/s C H Tomlinson
326	Ms Patricia Goldie
327	Mr Patrick Murray
328	Mr Ben Schuster
329	Ms Mary Heinemann
330	Ms Laura Pagotto
331	Ms Amy Carson
332	Mr Samuel Toogood
333	Ms Emily Toogood
334	Ms Shelley Frank
335	Ms Julie Siebentritt
336	Mr Oliver Toogood
337	Ms Johanna Malone
338	Mrs M Rand
339	Ms Margaret Davey
340	M/s P McPhan
341	Ms Katherine Myers
342	Ms Kim Bosnich
343	Ms Monique Cook
344	Mr Marcus Cook
345	Ms Maryke Cook
346	M/s Kim Cook
347	Ms Shanelle Cook
348	Ms Sohpie Rudolph
349	Mr John Rudolph
350	Ms Laura Binks
351	Ms Karen Wilson
352	Ms Jill Toovey
353	Ms Ellen Donaldson
354	Ms Wendy Haylock

355	Ms Kylie Moritz
356	Mr Daniel Grieve
357	Ms Janet Simpson
358	Ms Alison Buck
359	Ms Natasha Kearslake
360	Ms Charmain Boiz
361	Ms Lauren Jeffs
362	Ms Linda Kosmer
363	Ms Vanessa Calvert
364	Mr Matthew Kelly
365	Ms Angela Wolfenden
366	M/s D Salisbury
367	Ms Suzi Sharp
368	Ms Tessa Toumbourou
369	Ms Barbara Woodward
370	Mr John Howland
371	Mr Danica Baker
372	Mr Andrew Brophy
373	Ms Carolyn Burley

Submissions 54-373 were in the form of a standard letter. Thirty-nine additional letters were received but illegible names and/or addresses prevent the Committee from acknowledging them.

**INDIVIDUALS WHO APPEARED BEFORE THE COMMITTEE AT
PUBLIC HEARINGS**

Friday, 11 June 1999, Canberra

Office of the Supervising Scientist

Dr Arthur Johnston, Supervising Scientist
Mr Stewart Needham, Assistant Secretary, Uranium Mining, Audit & Review
Mr Alex Zapantis, Director, State of the Environment Section

Professor Robert Wasson (Submission 50)
Professor Ian White
Mr Mick Fleming

Department of the Environment and Heritage

Mr Roger Beale, Secretary
Mr Gerry Morvell, Assistant Secretary, Environment Assessment Branch
Mr Tim Kahn, Manager, Mining and Industrial Section

Department of Industry Science and Resources

Mr Malcolm Farrow, Head of Division, Coal and Mineral Industries Division
Mr Robin Bryant, General Manager, Energy Minerals Branch

Professor John Mulvaney (Submission 30)

Professor Ben Selinger (Submission 25)

Friends of the Earth (Submission 43)

Mr John Hallam, Nuclear Campaigner

The Wilderness Society (Submissions 47 & 47A)

Mr Chris Doran, Jabiluka Campaign Coordinator

Australian Conservation Foundation (Submission 34)

Mr Dave Sweeney, Uranium Campaigner

Energy Resources of Australia (Submissions 32 & 32A)

Mr Philip Shirvington, Chief Executive
Mr Robert Cleary, Deputy Chief Executive
Mr Andrew Jackson, Manager, Environment, Safety and Health

Wednesday, 16 June 1999, Darwin

Northern Territory Government (Submission 49)

Department of Mines and Energy

Mr Tony McGill, Director of Mines

Mr Malcolm Wedd, Uranium Adviser

Department of Lands, Planning and Environment

Mr Randall Scott, Environmental Scientist

Northern Land Council (Submission 45 & 45A)

Mr Norman Fry, Chief Executive Officer

Mr Brett Midena, Principal Legal Adviser

Mr Steve Roeger, Senior Project Officer

Mr John Roberts, Senior Policy Adviser

Mr Jeff Stead, Manager, Anthropology Branch

Gundjehmi Corporation (Submission 48)

Ms Jacqui Katona, Executive Officer

Mr Matt Fagan, Legal and Policy Officer

Aboriginal Areas Protection Authority (Submission 52)

Dr David Ritchie, Chief Executive Officer

Environment Centre NT (Submission 38)

Mr Mark Wakeham, Coordinator

Australian Conservation Foundation (Submission 34)

Mr Richard Ledger

BIBLIOGRAPHY AND REFERENCES

General

Chaloupka G, *Djawumbu-Madjawarnja Site Complex*, October 1978

Environment Australia, *Guidelines for a Public Environment Report on the Proposed Development of the Jabiluka Mill Alternative at the Jabiluka No 2 Uranium Mine*, June 1998:
<http://www.environment.gov.au/portfolio/epg/eianet/notifications/MIJ.html>

Grey, Tony, *Jabiluka: The Battle to Mine Australia's Uranium*, 1994

Kakadu National Park Plan of Management, Australian National Parks and Wildlife Service, Kakadu National Park Board of Management, 1991

Kakadu National Park Plan of Management, Kakadu Board of Management and Parks Australia, June 1998

Kakadu Natural and Cultural Heritage and Management, edited by Press T, Lea D, Webb A & Graham A, Australian Nature Conservation Agency, North Australia Research Unit, The Australian National University, Darwin, 1995

Kakadu Region Social Impact Study, *Report of the Aboriginal Project Committee*, June 1997

Kakadu Region Social Impact Study, *Report of the Study Advisory Group*, July 1997

Keen I, *Sites of Significance in the vicinity of the proposed Arnhem highway extension: A report to the Northern Land Council*, ANU, 22 August 1978

Ranger Uranium Environmental Inquiry, Second Report, Australian Government Publishing Service, Canberra 1977

Wasson RJ, White I, Mackey B, and Fleming M, *The Jabiluka Project: Environmental Issues that Threaten Kakadu National Park*, October 1998

Report of the World Heritage Committee Mission to Australia

UNESCO World Heritage Committee, *Report on the mission to Kakadu National Park, Australia, 26 October to 1 November 1998*:
<http://www.biodiversity.environment.gov.au/kakadu/pdfs/inf18e.pdf>

Australia ICOMOS, Submission to UNESCO World Heritage Mission to Australia and Kakadu, October 1998

Government of Australia, Submission to the UNESCO World Heritage Mission to Kakadu National Park, October-November 1998

Kakadu National Park World Heritage, Submission by the Northern Land Council to the UNESCO World Heritage Mission to Kakadu National Park, October 1998

Mirrar Living Tradition in Danger, World Heritage in Danger, Submission to the World Heritage Committee Mission to Kakadu, October 1998:
http://www.mirrar.net/index_main.htm

Responses to the World Heritage Committee Mission Report

Environment Australia, *Australia's Kakadu: Protecting World Heritage*, Response by the Government of Australia to the UNESCO World Heritage Committee regarding Kakadu National Park, April 1999:
http://www.biodiversity.environment.gov.au/kakadu/jabiluka/response_aust.html

Gundjehmi Aboriginal Corporation, *Submission from the Mirrar People to the UNESCO World Heritage Committee ICCROM & ICOMOS in relation to the Australian Government's report "Australia's Kakadu: Protecting World Heritage"*, May 1999:
http://www.mirrar.net/index_main.htm

International Council for Science, *Review of an Independent Scientific Panel of the scientific issues associated with the proposed mining of uranium at Jabiluka in relation to the state of conservation of Kakadu National Park*, May 1999

IUCN, *IUCN Expert Opinion Concerning the Mitigation of Threats Posing Ascertained and Potential Dangers to Kakadu National Park by the Jabiluka Mine*, May 1999

Supervising Scientist Group, *Assessment of the Jabiluka Project: Report to the World Heritage Committee*: <http://www.environment.gov.au/science/whc>

The Ranger Mill Alternative

Environment Protection Agency and NT Department of Lands, Planning and Environment, *Jabiluka: Draft Guidelines for an Environmental Impact Statement on the proposed development of Jabiluka No 2 uranium mine*, June 1996

Environment Australia, *Environment Assessment Report: Proposal to Extract, Process and Export Uranium from Jabiluka Orebody No 2*, August 1997

Kinhill and Energy Resources of Australia, *The Jabiluka Project Draft Environmental Impact Statement*, October 1996

Kinhill and Energy Resources of Australia, *The Jabiluka Project EIS Supplement*, June 1997

Northern Territory Department of Lands, Planning and Environment, *Assessment Report 22: Jabiluka Number 2 Uranium Mine Proposal*, August 1997:
<http://www.lpe.nt.gov.au/dlpe/enviro/EIAREG/Jabiluka/Jabiluka.htm>

The Jabiluka Mill Alternative

Energy Resources of Australia, *Jabiluka Mill Alternative: Synopsis of Key Issues and Processes*, August 1998

Environment Australia Environment Assessment Branch, *Environment Assessment Report: The Jabiluka Mill Alternative at the Jabiluka No 2 Uranium Mine*, July 1998

Kinhill and Energy Resources of Australia, *The Jabiluka Mill Alternative Public Environment Report*, June 1998

Northern Territory Department of Lands, Planning and Environment, *Assessment Report 26: Jabiluka Milling Alternative*, July 1998:
<http://www.lpe.nt.gov.au/dlpe/enviro/EIAREG/jabmilalt/default.htm>

Waite T D, Dudgeon C and Fell R, *Review of Jabiluka Mine Alternative Tailings Management Proposal*, Unisearch Ltd, 19 August 1998

Aboriginal Land Rights

Reeves, J, QC, *Building on Land Rights for the Next Generation*, Report of the Review of the *Aboriginal Land Rights (Northern Territory) Act 1976*, August 1998:
<http://www.atsic.gov.au/nextgeneration/index.htm>

Gundjehmi Aboriginal Corporation, “*We are not talking about mining*”: *The History of Duress and the Jabiluka Project*, July 1997: http://www.mirrar.net/index_main.htm

Court Transcripts

Federal Court of Australia, *Margarula v Minister for Environment, Minister for Resources and Energy and Energy Resources of Australia*, 1 June 1999

Federal Court of Australia, *Yvonne Margarula v Minister for Resources and Energy, Commonwealth of Australia, Energy Resources of Australia Ltd and Northern Territory of Australia*, NG 186 of 1998, 14 August 1998

High Court of Australia, *Yvonne Margarula v Minister for Resources and Energy, Commonwealth of Australia, Energy Resources of Australia Ltd and Northern Territory of Australia*, application for special leave to appeal, 20 November 1998

Supreme Court of the Northern Territory, *Yvonne Margarula v Hon Eric Poole, Minister for Resource Development and Energy Resources of Australia Ltd*, 16 October 1998

WORLD HERITAGE COMMITTEE REPORT ON THE MISSION TO KAKADU NATIONAL PARK, 26 OCTOBER TO 1 NOVEMBER 1998

Executive Summary and Recommendations

The mission notes the obligations of States Parties to the *World Heritage Convention* to identify, protect, conserve and transmit to future generations cultural and natural heritage of outstanding universal value.

After assessing the information made available to the mission in the background documents and stakeholder submissions, and through site visits and overflights, the mission has concluded that Kakadu National Park is exposed to a number of serious threats which are placing it under both ascertained and potential danger.

The recommendations made below, which are indicative of the main findings of the mission, have been formulated with the view to overcoming the serious threats to Kakadu National Park.

Recommendation 1: The mission has noted severe ascertained and potential dangers to the cultural and natural values of Kakadu National Park posed primarily by the proposal for uranium mining and milling at Jabiluka. The mission therefore recommends that the proposal to mine and mill uranium at Jabiluka should not proceed.

Recommendation 2: The mission noted the serious concerns and preoccupations expressed by some of Australia's most eminent scientists as to the unacceptably high degree of scientific uncertainties relating to the Jabiluka mine design, tailings disposal and possible impacts on catchment ecosystems. The mission shares these concerns and therefore recommends application of the Precautionary Principle which requires that mining operations at Jabiluka be ceased.

Recommendation 3: Further visual encroachment on the integrity of Kakadu National Park through uranium mining and the associated incremental expansion of urban and infrastructure development in and associated with the town of Jabiru, located within the World Heritage property, should be prevented.

Recommendation 4: The mission recommends that the Jabiluka Cultural Heritage Management Plan should be as thorough as possible. It should be prepared according to international best practice in cultural heritage management. This should be achieved in consultation and with the participation of Australia ICOMOS, the Australian Academy of the Humanities, the Australian Heritage Commission and the Northern Territory's Aboriginal Areas Protection Authority (AAPA). The Mission recommends that every effort is made to ensure thorough participation, negotiation and communication with traditional owners, custodians and managers to ensure the compilation of an accurate cultural inventory that will ensure the conservation of the cultural sites located within the Jabiluka Mineral Lease. It is the Mission's view that the Australian Academy of the Humanities should be approached to nominate world-class Australian or international expertise to undertake the review of the Cultural Heritage Management Plan announced by the Australian government during the mission.

Recommendation 5: The Mission recommends, as an utmost priority, exhaustive cultural mapping of the Jabiluka Mineral Lease and the Boyweg site and its boundaries to ensure protection of these integral elements of the outstanding cultural landscape of Kakadu. This survey and cultural mapping work should be undertaken by senior anthropologists working with Aboriginal custodians. The mission recommends that the Northern Territory's Aboriginal Areas Protection Authority (AAPA) undertake and document a full site identification survey that maps site boundaries. The anthropologists should report to a committee with representation from the Northern Territory's Aboriginal Areas Protection Authority (AAPA), the Australian Heritage Commission and the Gundjehmi Aboriginal Corporation and their work should be submitted to independent expert scrutiny via objective and impartial peer review.

Recommendation 6: The mission recommends that the Australian Government take a leading and decisive role in overseeing the immediate and effective implementation of the KRSIS recommendations. Implementation of the KRSIS recommendations should ensure that structures are in place within 12 months to begin to ameliorate the negative regional socio-cultural impacts of development on Aboriginal people that are a potential danger to the cultural values recognised when Kakadu National Park was inscribed on the World Heritage List according to cultural heritage criterion vi.

Recommendation 7: The mission notes the existence of the mining rights of Energy Resources Australia Ltd (ERA) in relation to the Jabiluka Mineral Lease. The mission also recognises the customary rights (and responsibilities) of the senior traditional owner, Ms Yvonne Margarula, to oppose a development that she believes will irretrievably damage her country and her people. The mission is of the view that it is incumbent on the Australian Government to recognise the special relationship of the Mirrar to their land and their rights to participate in decisions affecting them. Therefore the mission is of the opinion that the Australian Government, along with the other signatories, should reconsider the status of the 1982 agreement and the 1991 transfer of ownership to ensure maintenance of the fundamental rights of the traditional owners.

Recommendation 8: The mission is of the opinion that the full extent of the outstanding cultural landscape of Kakadu should be recognised and protected. The mission recommends that the State Party be asked to propose to the World Heritage Committee further recognition of the outstanding living cultural traditions of the traditional owners of Kakadu through application of cultural heritage criterion (iii) and the World Heritage cultural landscape categories. The mission is of the opinion that the living traditions of the traditional owners and custodians of Kakadu, and their spiritual ties to the land form the basis of the integrity of the cultural landscape.

Recommendation 9: The mission recommends that the Australian government should examine the feasibility of extending the boundary of Kakadu National Park and World Heritage property to ensure increased protection of more of the catchment of the East Alligator River. The mission recognized that this may be a lengthy procedure. It should involve the full engagement of the traditional owners whose consent would need to be gained, particularly if the expansion was to include land held under inalienable Aboriginal freehold title. The mission is of the opinion that work towards the recommended expansion of the Park should not detract from efforts to address the more immediate and urgent issues identified in this report.

Recommendation 10: The mission recommends that the Australian Government undertake considerable additional negotiation before requiring an immediate place for a Northern Territory Government representative on the Kakadu Board of Management. The mission further recommends that the Australian Government ensure that if a Northern Territory Government representative is placed on the Kakadu Board of Management, that two additional Aboriginal members be appointed (as offered by Minister Hill in a meeting with the mission team) to maintain a clear two-thirds majority for Aboriginal membership of the Board. The Mission also recommends that the proposed changes to the status of the Director of National Parks be reconsidered.

Recommendation 11: The mission considers that it is imperative that the breakdown in trust and communication that was perceived by, and articulated to, the mission be repaired. The mission is of the opinion that in accordance with the Aboriginal Land Rights Act, proper consultation with traditional owners must continue to be a requirement when considering any issues relating to the management of their lands. Furthermore the mission urges all indigenous and non-indigenous stakeholders with an interest in the Kakadu region to engage in a cross-cultural dialogue to ensure conservation of the outstanding heritage values of Kakadu for future generations.

Recommendation 12: With reference to the need to develop stronger community trust of, and communication with, the Supervising Scientist's Group, the mission recommends that the presence of ERISS be maintained in Jabiru and that the question of membership of the Advisory Committee should be reconsidered.

Recommendation 13: The mission is of the opinion that the Australian Government should discuss rescinding the 1981 Koongarra Project Area Act (which proposes amendment of the boundaries of Kakadu National Park to accommodate a mine at Koongarra) with the traditional owners and seek their consent to include the Koongarra Mineral Lease in the Park and therefore preclude mining.

Recommendation 14: In noting that the mining and tourism town of Jabiru is located within the World Heritage property, the mission questioned the compatibility of the incremental development and expansion of Jabiru with World Heritage conservation. The mission is of the view that urban and infrastructure development at Jabiru should be strictly controlled and recommends that Parks Australia North and the Board of Management play a greater role in the present management of, and future planning for, the town of Jabiru in cooperation with the traditional owners. The World Heritage Committee may wish to be appraised of the future of Jabiru and therefore may wish to ask for submission of a plan that describes the future of the town in line with objectives to protect the World Heritage values of the Park.

Recommendation 15: The mission recommends that for both *Mimosa pigra* and *Salvinia molesta*, adequate funds (separate from general management funds) should be identified and guaranteed, but not to the budgetary detriment of other Park management and protection priorities.

Recommendation 16: The mission recommends that additional necessary funds and resources be provided to research the potential threat of cane toads to Kakadu National Park and to develop measures to prevent such a threat.

The mission is of the opinion that recommendations and actions for the future conservation of Kakadu National Park once approved by the twenty-second session of the World Heritage Committee in Kyoto, Japan (30 November - 5 December 1998), should be implemented in a spirit of full transparency and public consultation in Australia. The mission advises that high level professional mediation between stakeholders be the starting point for such implementation.

ARTICLE 11(4) OF THE WORLD HERITAGE CONVENTION WORLD HERITAGE IN DANGER

Article 11(4) of the World Heritage Convention states that:

The Committee shall establish, keep up to date and publish, whenever circumstances shall so require, under the title of List of World Heritage in Danger, a list of the property appearing in the World Heritage List for the conservation of which major operations are necessary and for which assistance has been requested under this Convention. This list shall contain an estimate of the cost of such operations. The list may include only such property forming part of the cultural and natural heritage as is threatened by serious and specific dangers, such as the threat of disappearance caused by accelerated deterioration, large-scale public or private projects or rapid urban or tourist development projects; destruction caused by changes in the use or ownership of the land; major alterations due to unknown causes; abandonment for any reason whatsoever; the outbreak or the threat of an armed conflict; calamities and cataclysms; serious fires, earthquakes, landslides; volcanic eruptions; changes in water level, floods and tidal waves. The Committee may at any time, in case of urgent need, make a new entry in the List of World Heritage in Danger and publicise such entry immediately.

GOVERNMENT SENATORS' REPORT

BY SENATORS TIERNEY, PAYNE AND EGGLESTON

Introduction

Government Members of the Committee reject the findings of the majority report. They believe that the Jabiluka uranium mine has been subject to the most rigorous level of assessment over a very considerable period, and that at every stage it has been demonstrated that the mine will have no adverse impact on the environment of Kakadu National Park and on its World Heritage values.

The Government has provided a comprehensive analysis of the relevant issues in its response to the World Heritage Committee, *Australia's Kakadu: Protecting World Heritage*,¹ and in the Supervising Scientist's report to the World Heritage Committee.² Excerpts from key sections of those reports are provided as appendices to this report.

Government Members of the Committee saw no need for the inquiry, given the exhaustive nature of previous assessments of the Jabiluka project. They share the view of the Minister for the Environment that the current debate in relation to the project is occurring in 'very difficult circumstances ... highly unusual circumstances. You do not usually have the Opposition working with non-government organisations to lobby international bodies to find against Australia.'³

The inquiry has demonstrated, however, that the Government's position is widely supported in the general community and also within the scientific community. In the course of this inquiry the Committee was provided with evidence from a range of organisations and individuals who fully supported the views expressed by the Minister in relation to the Jabiluka project.

The conclusion reached by Government Senators on the Committee is that the Jabiluka project poses no threat to the environment or to the World Heritage values of Kakadu National Park, and that all appropriate processes, in relation both to environmental assessment and to consultation with Traditional Aboriginal Owners and their representatives have been strictly adhered to.

-
- 1 Environment Australia, *Australia's Kakadu: Protecting World Heritage*, Response by the Australian Government to the World Heritage Committee Regarding Kakadu National Park, April 1999: http://www.biodiversity.environment.gov.au/kakadu/jabiluka/response_aust.html
 - 2 Supervising Scientist, *Assessment of the Jabiluka Project, Report of the Supervising Scientist to the World Heritage Committee*, April 1999: <http://www.biodiversity.environment.gov.au/kakadu/jabiluka/scientist.html>
 - 3 Senator the Hon Robert Hill, Senate Environment, Communications, Information Technology and the Arts Legislation Committee, Consideration of Additional Estimates, 5 May 1999, *Proof Committee Hansard*, p 313.

The Approvals Process

It is my belief that it is the most watched and studied mine that I have ever seen, and I have seen a few.⁴

There is no doubt that Energy Resources of Australia (ERA) has followed established processes for the assessment and approval of major projects under Commonwealth and Northern Territory legislation and regulations. The legal processes used for the approval of the Jabiluka mine project were under constant scrutiny by both governments. The approval of the project followed extensive review and investigation over a period of more than two and a half years, based on information gathered from the region over a period of thirty years. All attempts to challenge the process and approvals through legal means have failed.

Despite the existence of a full Environmental Impact Statement (EIS) under the *Environment Protection (Impact of Proposals) Act 1974* for Pancontinental's earlier Jabiluka proposal, and the fact that ERA's option significantly reduced the physical and visual impact of the mine compared with the Pancontinental proposal, the Minister for the Environment directed that a full EIS be undertaken to ensure the application of current knowledge and best practice to ERA's 1996 proposal. Mr Roger Beale, Secretary of the Department of the Environment and Heritage, told the Committee that: 'We believe that assessment to have been equivalent to the best practice in the world.'⁵

As a result of the assessment the Minister for the Environment advised the Minister for Resources and Energy in August 1997 that the project was environmentally acceptable subject to 77 conditions being met. The Minister for Resources and Energy accepted that advice and applied a range of conditions that would need to be met before an export permit would be issued to the company.

Because the Traditional Owners indicated that they would not consent to the milling of Jabiluka ore at Ranger, ERA sought approval for the Jabiluka Mill Alternative. Taking into account previous assessments, the Minister directed that a Public Environment Report (PER) be prepared. Given that a comprehensive EIS had been carried out for the Ranger Mill Alternative, which covered all aspects of the mine, a PER was an adequate assessment for the more restricted issue of the mill being sited at Jabiluka.

Following the completion of the PER, and advice from his department concerning remaining scientific uncertainties associated with the company's proposal for the storage of tailings on the surface, and in order to ensure the very highest standard of assessment, the Minister sought further technical advice from Professors Waite,

4 Professor Ben Selinger, *Proof Committee Hansard*, Canberra, 11 June 1999, p 69 (speaking about the Ranger uranium mine).

5 Mr Roger Beale, Department of the Environment and Heritage, *Proof Committee Hansard*, Canberra, 11 June 1999, p 35.

Dudgeon and Fell at Unisearch, a research arm of the University of New South Wales, in relation to hydro-geological and chemical issues associated with the surface storage of tailings. That advice confirmed that there were uncertainties associated with the proposed method of storage.

The PER and the advice from the University of NSW scientists led to the Minister's advice to the Minister for Resources and Energy of 25 August 1998 that a further 17 conditions, including the disposal of 100 per cent of tailings underground, would need to be imposed on the proponent.

Any argument that the assessment and approval process has been anything but rigorous and objective, or that the Minister has not exercised his responsibilities in an energetic and independent way, simply cannot be sustained. Advice to the Minister from the Supervising Scientist, and the Minister's decision to require further clarification of issues not fully explored in the PER, clearly indicate that the Government's approach to the assessment process has been genuine and credible.

The Minister required that before the final project could proceed and a mill be constructed there had to be a further, detailed report on the relevant issues. The Minister has recorded publicly that the Supervising Scientist's recommendation:

was that the decision [to approve the project] should be deferred until further information was obtained. We exercised caution at that stage and we specifically referred to the issue of tailings, and [said] that further information would be needed before the approval was given. The caution that we exercised in our recommendations to the Minister was reflected in the Minister's decision.⁶

Significantly, when the Senior Traditional Owner sought a review under the *Administrative Decisions (Judicial Review) Act 1997* of the Environment Minister's decisions in relation to the PER and the Unisearch advice, the Federal Court found on 1 June 1999 against the plaintiffs and ordered costs in favour of the Minister.

Clearly, no pre-operational assessment can provide a definitive answer to all the questions associated with a project. As the Northern Territory Government stated:

The major difficulty and deficiency of the pre-mining environmental impact assessment process is that it attempts to predict future impacts from limited data ... It is always possible to say that more needs to be done or known and that measurements need to be improved.⁷

Equally clearly, any fresh assessment of a proposal may reveal areas where further improvement is possible, particularly when a closer scrutiny of specific matters is undertaken. At each stage of the Jabiluka process the Government has taken the

6 Dr Arthur Johnston, Supervising Scientist, *Proof Committee Hansard*, Canberra, 11 June 1999, p 4.

7 Northern Territory Government, Submission 49, p 5.

necessary steps to ensure that even more stringent conditions are met by the proponent, with the result that the mine is subject to an unparalleled level of environmental safeguards and oversight.

It might be claimed that still more needs to be known; such a claim can always be made. However, the unparalleled degree of scrutiny associated with the Jabiluka project has meant that the assessment has extended to matters of technical detail not usually examined until the detailed design stage of a project. This has meant that there is a greater degree of certainty in relation to many issues than is usually the case prior to development.

Additionally, because of the Supervising Scientist's twenty year study of the Ranger mine and its impact on the environment, there is a great volume of technical data on a wide range of issues relevant to the mining of uranium in the region, which is not usually available for the development of new projects. This data, and the experience at Ranger, means that there is a great deal more certainty and predictability in relation to issues associated with Jabiluka than is usually the case for the assessment of new projects.⁸

Among the conclusions of the *Report of the Supervising Scientist to the World Heritage Committee* was the statement that:

the environmental protection regime that the Australian Government implemented for the mining of uranium at Ranger has been completely consistent with the principles of Sustainable Development and it has been demonstrated, through an extensive chemical, biological and radiological monitoring program, that no impact of significance under those principles has occurred, on either people or ecosystems of Kakadu National Park, throughout the operation of the Ranger mine.

The same regulatory regime, but strengthened in some particular cases, would apply to the mining of uranium at Jabiluka.⁹

Significantly, *all* of the predictions made by the Ranger Uranium Environmental Inquiry in 1977 overstated the likely impact of the mine, and in every case the environmental impact has been less severe than what was predicted by that inquiry.¹⁰

In the case of Jabiluka, the Supervising Scientist told the Committee that:

while in some cases there were issues of detail that would need to be pursued by the Supervising Scientist and the NT regulatory authorities at the detailed design stage, there was adequate evidence that an appropriate final

8 Dr Arthur Johnston, Supervising Scientist, *Proof Committee Hansard*, Canberra, 11 June 1999, p 9.

9 Supervising Scientist, *Assessment of the Jabiluka Project, Report of the Supervising Scientist to the World Heritage Committee*, April 1999, p 91.

10 Northern Territory Government, Submission 49, p 5.

design was achievable that would ensure the protection of the World Heritage values of Kakadu National Park.¹¹

Professor Wasson, one of the major critics of the assessment process, has conceded that 'it is not usual to have a detailed design available' at the stage of an EIS.¹² However, although considering them issues for the detailed design stage of the project, at the request of the World Heritage Committee the Supervising Scientist analysed a number of issues in relation to the protection of the natural World Heritage values of Kakadu National Park. The conclusion of that analysis was that the project posed no threat to the natural values of the Park and that the degree of scientific certainty that applied to this assessment was very high.¹³ (See Appendix 1 to the Government Senators' Report, below.)

The report to the World Heritage Committee has been reviewed by the International Council for Science (ICSU) which has agreed that there is now a high degree of scientific certainty in relation to predicting the impact of Jabiluka and Ranger on Kakadu. According to the ICSU:

The Supervising Scientist's report and supporting documentation contains new information and analyses that enable a scientific assessment to be made of the impact of the Jabiluka mine on the World Heritage values of Kakadu with a much greater degree of certainty than formerly.¹⁴

Once the mine is operational, oversight is provided by the Minesite Technical Committee, which includes officials from the NT Department of Mines and Energy, staff of the Office of the Supervising Scientist, staff of the Northern Land Council and of the mining company. Every approval or authorisation given for the operation of the Ranger mine or the future operation of the Jabiluka mine goes through a detailed assessment by that committee.

More generally, over the life of the mine, information will be gathered, technology improved and reviews undertaken by that committee, all of which will combine to improve the performance of the mine. The Supervising Scientist gave an example to the Committee of the way in which the water management system at Ranger was improved through just such a review.¹⁵

11 Dr Arthur Johnston, Supervising Scientist, *Proof Committee Hansard*, Canberra, 11 June 1999, p 2.

12 Professor Robert Wasson, *Proof Committee Hansard*, Canberra, 11 June 1999, p 29.

13 Supervising Scientist, *Assessment of the Jabiluka Project, Report of the Supervising Scientist to the World Heritage Committee*, April 1999, p 99.

14 International Council of Scientific Unions, *Review of an Independent Scientific Panel of the scientific issues associated with the proposed mining of uranium at Jabiluka in relation to the state of conservation of Kakadu National Park*, May 1999, p 4.

15 Dr Arthur Johnston, Supervising Scientist, *Proof Committee Hansard*, Canberra, 11 June 1999, pp 8-9.

The Supervising Scientist

A number of opponents of the Jabiluka project have criticised the Office of the Supervising Scientist (OSS), suggesting that its staff are not genuinely independent and that the OSS is too reliant on, and uncritical of, data supplied by the company. It was also suggested that the Supervising Scientist and his staff were subject to political direction from the Minister.

The independence of the Supervising Scientist is enshrined in the *Environment Protection (Alligator Rivers Region) Act 1978*. The Supervising Scientist reports to the Minister for the Environment and is subject to the direction of the Minister, but any directions by the Minister must be reported by the Supervising Scientist in his annual report, which is tabled in Parliament. In the 21 years since the Office of the Supervising Scientist was established only two such directions have been given.¹⁶

In the case of Jabiluka, the *Report of the Supervising Scientist to the World Heritage Committee* was finalised without being seen by the Minister or his staff, no directions were given by the Minister and no requests to see the report were received from the Minister's office prior to its being submitted to the WHC.¹⁷

Professor Wasson stated that: 'we would like to have it on the public record that the OSS report is of a high quality,' and that he and his colleagues had only two remaining concerns.¹⁸ The Supervising Scientist, Dr Arthur Johnston, addressed both of those concerns in his evidence to the Committee.

Government Senators have the highest confidence in the expertise and the independence of both the Supervising Scientist and the scientists associated with reviews of the various assessment reports and of the Supervising Scientist's own report to the World Heritage Committee. It is the nature of scientists to scrutinise evidence rigorously and to reach verifiable conclusions. As the former Supervising Scientist, Dr Peter Bridgewater, said in relation to the Jabiluka proposal:

Scientists do not normally persuade each other, other than through the veracity of their work.¹⁹

Environmental Issues

Government Senators recognise and accept the outstanding significance and value of the environment of Kakadu National Park, and that it is essential that that environment be fully protected and appropriately managed. Given the importance of the region to

16 Dr Arthur Johnston, Supervising Scientist, *Proof Committee Hansard*, Canberra, 11 June 1999, pp 1-2.

17 Dr Arthur Johnston, Supervising Scientist, *Proof Committee Hansard*, Canberra, 11 June 1999, pp 2, 15.

18 Professor Robert Wasson, *Proof Committee Hansard*, Canberra, 11 June 1999, p 25.

19 Dr Peter Bridgewater, Senate Environment, Communications, Information Technology and the Arts Legislation Committee, Consideration of Additional Estimates, 5 May 1999, *Proof Committee Hansard*, p 323.

Australians, and also internationally, the idea that the Government would not take the utmost precautions to ensure its preservation is unthinkable. To allow the values of the Park to be degraded would be to ignore the responsibilities that the Government has to protect those values. It is in this context that the Government has approached the environmental assessments of the Jabiluka mine project.

Kakadu is a place of climatic extremes. It experiences the highest thunderstorm activity of any place on the planet and is subject to extreme flooding, sometimes over 2,200 mm per year. Early in the wet season the surface water is quite acid, possibly from dissolved aluminium, and acidic water takes with it uranium ore naturally exposed at the surface.

The ecology of Kakadu has thus evolved in the context of naturally occurring uranium. Approximately 170 kilograms of uranium is washed from natural sources into the Magela floodplain each year and eventually out to sea. The Magela floodplains cover six hundred square kilometres and the enormous volume of the catchment provides a very high dilution factor.²⁰ The issues considered below need to be seen in the context of this natural occurrence.

Tailings

The first of Professor Wasson's concerns related to the likelihood of above ground storage of tailings, an option which was not approved by the Minister for Resources and Energy and which is therefore no longer an issue. Professor Wasson stated that:

If we accept the current strategy for returning the tailings to the void, then most of our issues to do with tailings management vanish – as long as the groundwater issues can be coped with, and our current understanding is that that is highly likely.²¹

Dr Johnston told the Committee that even with best practice engineering tailings stored on the surface would eventually disperse over thousands of years and that it was better that they be stored underground, provided that one could be confident that there was no risk associated with transported groundwater. In that case they could be contained for millions of years.²²

In relation to the underground storage of tailings, the permeability of the sandstone in which the tailings will be stored at Jabiluka is relatively low, and it is expected that the uranium will move a maximum of forty to fifty metres in a period of a thousand years. With the decline now complete very little water has appeared in the excavated area of the mine, confirming scientific estimates of very low permeabilities.²³ As

20 Professor Ben Selinger, Submission 25, p 4.

21 Professor Robert Wasson, *Proof Committee Hansard*, Canberra, 11 June 1999, p 26.

22 Dr Arthur Johnston, Supervising Scientist, *Proof Committee Hansard*, Canberra, 11 June 1999, p 14.

23 Dr Arthur Johnston, Supervising Scientist, *Proof Committee Hansard*, Canberra, 11 June 1999, p 10.

Professor Ian White told the Committee, 'that is actually a nice test of the hydrology of the area.'²⁴

It is worth noting that even stored above ground the tailings material would not pose a serious risk:

We are not dealing with a dangerous, highly radioactive material. It is above background but it is not much above background.

...

[But] Because you are allaying fears you go beyond what a technical person would say is necessary ... If there is a technology that is not too expensive which takes you further, then why not use it.

...

Let me put the tailings in perspective. If someone were to sit on the Ranger tailings, which are basically the same, for a year, unprotected, just sitting on them, the dose they would get would be roughly the same as what an airline hostess gets from the cosmic rays during a year's work.²⁵

The cement paste technology proposed for the underground storage of tailings will offer significantly increased physical stability of the tailings mass, will neutralise any acid-producing potential of the tailings mass, which does exist at Jabiluka, and will precipitate and fix in place a number of metals. The potential risk of movement of contaminants from the tailings will be substantially reduced by the application of this technology.²⁶

In relation to the key concern associated with the tailings, Dr Johnston stated that:

The issue that we are dealing with here is the question of how likely it is that there will be constituents move out from that tailings mass and have an impact on the surface waters of Kakadu. We are very, very confident that that will not happen.²⁷

Similarly, the ICSU review of the Supervising Scientist's report to the World Heritage Committee, compiled by an international panel of eminent, independent experts, stated that modelling showed that:

transport of uranium and radium away from the repository is very limited, even after 1,000 years and that the concentrations are very low. This would

24 Professor Ian White, *Proof Committee Hansard*, Canberra, 11 June 1999, p 30.

25 Professor Ben Selinger, *Proof Committee Hansard*, Canberra, 11 June 1999, pp 70-71.

26 Mr Stewart Needham, Office of the Supervising Scientist, *Proof Committee Hansard*, Canberra, 11 June 1999, p 19.

27 Dr Arthur Johnston, Supervising Scientist, *Proof Committee Hansard*, Canberra, 11 June 1999, p 20.

therefore not appear to present any foreseeable risk to the Kakadu environment.²⁸

Water Management

The second concern raised by Professor Wasson and his colleagues related to the possible impact on unique ecosystems downstream from the mine in the unlikely event of water being released from the mine. The Supervising Scientist indicated that the necessary information was available and that he would be providing it to Professor Wasson and his colleagues.²⁹

All stormwater run-off within the 'Total Containment Zone' surrounding key facilities at the site will be contained by an 8.5 hectare retention pond designed to withstand a 1 in 10,000 year rainfall event and lined to prevent seepage to groundwater. Water thus contained will be disposed of through evaporation and recycling.³⁰

Concerns have been raised, however, about storage and evaporation ponds and the impact of extreme weather events on water management at the mine. Calculations show that wet seasons that might occur once in 1,000 or once in 10,000 years would not result in the release of any water from the mine site into the surrounding environment. Nor would a single extreme flood event, such as the one that occurred at Katherine in 1998.

However, a combination of those two events, an extreme flood event following an extremely unusual wet season, would result in the escape of water from the mine site to the downstream environment. In those circumstances, the probability of which is extremely low, the Supervising Scientist expects that there would be limited effect in Swift Creek and no significant impact in the floodplain itself.³¹

The Supervising Scientist reported to the World Heritage Committee that his review of scientific issues raised by the mission to Kakadu National Park had demonstrated that there were certain weaknesses in the hydrological modelling presented by ERA in the EIS and the PER, and that accordingly, a number of recommendations had been made which should be implemented in completing the detailed design of the Jabiluka project.

However, he also reported that even if ERA's water management plan, as proposed in the PER, had been implemented, the risk to the wetlands of Kakadu National Park, and the risk of radiation exposure to people of the region, would have been extremely

28 International Council of Scientific Unions, *Review of an Independent Scientific Panel of the scientific issues associated with the proposed mining of uranium at Jabiluka in relation to the state of conservation of Kakadu National Park*, May 1999, p 21.

29 Dr Arthur Johnston, Supervising Scientist, *Proof Committee Hansard*, Canberra, 11 June 1999, pp 2-3.

30 Energy Resources of Australia, Submission 32, p 4.

31 Dr Arthur Johnston, Supervising Scientist, *Proof Committee Hansard*, Canberra, 11 June 1999, pp 16-17.

low, even in extreme circumstances leading to the complete failure of the structure of the water retention pond at Jabiluka:

The lay reader will, no doubt, find this conclusion surprising. Its origin, however, lies in the fact that uranium is not a particularly toxic substance for aquatic animals. It has been well established that the toxicity of uranium is much lower than that of many many more common substances such as copper, cadmium and lead. It is the perception of the public that uranium is a very dangerous substance, and the failure of the scientific community to persuade the public otherwise, that has led to adoption of extreme measures to ensure that no amount of uranium should leave the site of a uranium mine.

...

Thus, on scientific grounds, there is no reason why water collected at Jabiluka could not be discharged into the surface waters of the Magela floodplain under a suitably designed control regime that would protect both people and ecosystems. The proposal by ERA that these waters should be totally contained at the mine site was made in response to social concerns and perceptions, not scientific evidence.³²

There is thus little or no threat posed to the environment and the World Heritage values of Kakadu National Park in the unlikely event of water being released from the mine.

Professor Ben Selinger also argued that the possible release of water from the mine site was not a significant issue, when he told the Committee that:

Taking a fairly cynical view of the modelling, the hydrology and so on, I ask myself the following question: let us say that these projections are wrong and the tailings water does actually get into the environment, what big difference will it make? Given the size of the flood plain, 600 square kilometres ... if there should be an enormous flood at some stage in the next 10,000 years, the chances of its making a measurable difference, except for the very short term, is quite small.³³

As noted above, the leaching of uranium into the floodplain is a naturally occurring process; there is a considerable amount of uranium at the surface and it is relatively soluble, so that 'every time it rains you get uranium naturally flowing into the Magela floodplains – about 160 kilograms per year – and it ends up in the sediment and finally washes out to sea.' If there were a disastrous flood and mine site water was released into the local environment, it would be 'more concentrated and for a short period you

32 Supervising Scientist, *Assessment of the Jabiluka Project, Report of the Supervising Scientist to the World Heritage Committee*, April 1999, p 99.

33 Professor Ben Selinger, *Proof Committee Hansard*, Canberra, 11 June 1999, p 69.

will get a spike that is higher, [but] given that sort of big flood, it would flood out fairly quickly.’³⁴

In the case of day to day mining operations at Ranger, regular stringent testing has revealed that flora and fauna downstream of Ranger have not been adversely affected by mining operations. The Supervising Scientist has stated that:

The natural values of Kakadu National Park are not threatened by the development of the Jabiluka uranium mine and the degree of scientific certainty that applies to this assessment is very high. There would appear, therefore, to be no justification for a decision by the World Heritage Committee that the natural World Heritage values of Kakadu National Park are in danger as a result of the proposal to mine uranium at Jabiluka.³⁵

Government Senators are confident that the two issues of tailings disposal and water management have been more than adequately addressed in the various stages of the environmental assessment process. In the case of the storage of tailings, there is clear scientific evidence that the use of cement paste technology and underground storage will ensure that the contaminated material, although not inherently dangerous, will remain contained for millions of years.

In the case of water management, it is significant that while the Supervising Scientist’s report to the World Heritage Committee noted some deficiencies in ERA’s proposed water management plan, it states quite clearly that had it been implemented there would have been very little risk to the wetlands of Kakadu National Park or to people in the region. Nevertheless, an improved design will be implemented and there will be an even lower risk of damage to the Park environment.

Radiological Protection

Australia has always been at the forefront in responding to recommendations of the International Commission on Radiological Protection (ICRP) and the International Atomic Energy Agency and in maintaining a good radiological control regime for uranium mining. Australia has applied a higher radiation control standard to the industry than that adopted by the United States and Canada.³⁶

According to the Supervising Scientist:

uranium in its natural state does not pose a particularly severe radiation threat. Exposure to uranium and its radioactive progeny needs to be controlled but the inherent radioactivity of uranium and its progeny is sufficiently low that ensuring that people do not receive exposures that would be harmful is relatively straightforward. It is only when uranium is

34 Professor Ben Selinger, *Proof Committee Hansard*, Canberra, 11 June, p 74.

35 Supervising Scientist, *Assessment of the Jabiluka Project, Report of the Supervising Scientist to the World Heritage Committee*, April 1999, p 14.

36 Mr Mark Sonter, Submission 23, pp 1-2.

used as fuel in a reactor that fission reactions result in a large number of radioactive products which produce high levels of ionising radiation.³⁷

The average yearly radiation dose received by uranium miners in Australia, including those at Ranger, is approximately 5 millisieverts per year, about equal to a CAT scan or to two hip or pelvis x-rays. It is little more than twice what most people are exposed to from naturally occurring background radiation, which in Australia is 2 millisieverts per year. In some areas of Europe and the United States background levels are considerably higher.³⁸ An international flight attendant is estimated to receive an annual dose of three millisieverts per year.³⁹ The standard set by the ICRP (and by the National Health and Medical Research Council) for uranium workers is a maximum average exposure of 20 millisieverts per year.

Mr Mark Sonter, an independent, expert consultant, stated in his submission to the Committee that:

The only way one can support a belief that somehow Australia has failed to fulfil its international and domestic obligations in regard to radiological protection, is to believe the claims of avowed anti-nuclear opponents whilst disbelieving the considered, published, professional opinions over the last twenty years of all relevant State Mines and Health Department officers of the five states involved, the officers of OSS and ARL [Australian Radiation Laboratory], and the governmental assessment reviews of the various EIS documents which have passed muster, and of the various committees of inquiry which have been held over the years, and the professional health physicists working for the companies.⁴⁰

Government Senators, like Mr Sonter, find the notion of a conspiracy of the magnitude that would be required to achieve such consistent conclusions, in a range of jurisdictions over such a time frame, difficult to credit, to say the least.

At Jabiluka, an underground mine, the predicted doses for the most exposed workers will be 11.8 millisieverts per year. This will be achieved by using a once-through ventilation system with approximately double the normal airflow for underground mines. The design includes high airflow velocities and single pass use of fresh air in the ore body.⁴¹ In its assessment of the 1997 EIS, Environment Australia took advice

37 Supervising Scientist, *Assessment of the Jabiluka Project, Report of the Supervising Scientist to the World Heritage Committee*, April 1999, p 99.

38 Professor Ben Selinger, Submission 25, p 3; Mr Mark Sonter, Submission 23, p 2; Energy Resources of Australia, Submission 32, p 5.

39 Professor Ben Selinger, *Canberra Times*, 3 June 1999, p 10.

40 Mr Mark Sonter, Submission 23, p 2.

41 Energy Resources of Australia, Submission 32, p 5.

from the Australian Radiation Laboratory and made specific recommendations, including routine and periodic measurement of a range of factors.⁴²

Australian legislation requires that the public must not be exposed to additional radiation, above natural background radiation, of more than an average of 1 millisievert per year. The potential exposure levels for the public in the vicinity of the Jabiluka mine will be 0.1-0.5 millisieverts per year. Radiation levels will be constantly monitored by detection equipment of the most advanced kind.⁴³

The Supervising Scientist reports that in the entire nineteen year period of mining at Ranger, there has been:

no detectable impact on a range of sensitive indicators of ecological health, including the survival of larval fish, the reproduction of freshwater snails, the migration patterns of fish and the community structure of fish and macro-invertebrates, and that the radiation exposure of people living in the vicinity of the mine, either through consumption of foods collected in downstream waters or through radon dispersed from the mine site, has always been significantly lower than the internationally recommended limit on radiation exposure of members of the public.⁴⁴

Government Senators are confident that the most advanced technology will be used to ensure the minimum exposure possible of workers to radiation in the Jabiluka mine, and that exposure for both mine workers and the general public will fall well within the international standards. They are also confident that there is minimal risk of radiation contamination of the surrounding environment.

Indigenous Issues

The 1982 Agreement

Aboriginal people of the Northern Territory have the right of veto over mining on their land. This is a right not available to non-indigenous Australians through the Northern Aboriginal Land Council. The Traditional Owners of Jabiluka chose, however, to consent to mining on their land.

The development and finalisation of the 1982 Agreement involved a number of years of negotiations with Traditional Owners and included hundreds of meetings with them and with other Aboriginal custodians in the Kakadu region with an interest in the Jabiluka mine. In contrast to recent concerns regarding the Agreement process, none

42 Mr Gerry Morvell, Department of the Environment and Heritage, *Proof Committee Hansard*, Canberra, 11 June 1999, p 47; Environment Australia, *Environment Assessment Report, Proposal to Extract, Process and Export Uranium from Jabiluka Orebody No. 2: The Jabiluka Proposal*, August 1997, pp 90-96.

43 Energy Resources of Australia, Submission 32, pp 5-6.

44 Supervising Scientist, *Assessment of the Jabiluka Project, Report of the Supervising Scientist to the World Heritage Committee*, April 1999, p 91.

of the principals associated with the Agreement in 1982 have disowned it or the process which led to its finalisation.

The Northern Land Council (NLC) has a statutory responsibility under section 23(3) of the *Aboriginal Land Rights (Northern Territory) Act 1976* to ensure that appropriate consultation takes place with the Traditional Owners over development of their land and that it has their informed consent for agreements made in relation to developments. It is clear that the NLC complied with that responsibility in negotiating the 1982 Agreement and the 1991 transfer of the lease from Pancontinental to ERA.

Representatives of the Northern Land Council, appearing before the Committee in Darwin, stated that while recognising the change of views on the part of the current generation of Traditional Owners:

the NLC entered into the agreement in 1982 as a result of extensive consultations with traditional owners. It is of the view that those consultations were done properly and extensively and that informed consent was obtained. Leading from that was a formal, legally binding agreement, which the Land Council stands by.⁴⁵

The consultation leading up to the original 1982 Agreement was not questioned for fifteen years and the Traditional Owners approved the 1991 transfer almost a decade after the 1982 Agreement. At the conclusion of negotiations for the original agreement the senior Traditional Owners stated that they hoped that the Jabiluka project would be a success and affirmed that no pressure had been applied by Pancontinental to reach the decision to consent to the project.⁴⁶

Mr Robin Bryant, General Manager of the Energy Minerals Branch in the Department of Industry, Science and Resources, told the Committee that:

In 1982 there was an agreement under section 43 of the Land Rights Act between the then proponent of this project, Pancontinental, and the Northern Land Council. The Northern Land Council in turn, under its legislation, was obliged to consult with and represent the views of the relevant traditional owners and affected Aboriginals. Included among those, of course, were the Mirrar-Gundjehmi people ...

A very extensive consultation period, by the Northern Land Council and the company, extended over some many months ... prior to the conclusion of that agreement in 1982. In 1991, the rights under the agreement were assigned ... from Pancontinental to ERA. That in turn required the agreement of the Northern Land Council, and the relevant traditional owners would have been consulted or would have had entitlements. With respect to the Northern Land Council, it clearly saw no basis on which it could

45 Mr John Roberts, Northern Land Council, *Proof Committee Hansard*, Darwin, 16 June 1999, pp 141-142.

46 Energy Resources of Australia, Submission 32, p 7.

reasonably refuse to provide that agreement. The Northern Land Council has advised the World Heritage Committee that it stands by the 1982 agreement, as assigned in 1991 to ERA, and that it is satisfied that the consultations in 1982 had led to an informed consent by the relevant traditional owners.⁴⁷

Professor Jon Altman and Dr Roy Green, members of the World Heritage Committee mission to Kakadu, commented that:

reconsidering the status of the 1982 agreement would overturn the principles of property law in Australia, establishing a precedent that a changing oral consent could over-rule a written contract, thereby privileging the property rights of one group over another, and would jeopardise Aboriginal economic opportunities based on mining futures and, possibly, the credibility of Aboriginal land rights law.⁴⁸

The Traditional Owners have made no moves under Australian law to rescind the 1982 Agreement. To set aside the agreement outside the appropriate legal processes would have serious consequences and, as suggested by Professor Altman and Dr Green, set a dangerous precedent.

The consequences of such a precedent would result in large areas of Australia under Aboriginal ownership possibly being regarded as 'out of bounds' for any future negotiated agreements. This would limit Aboriginal people's opportunities to enter into such agreements and thus limit their ability to maximise the returns from their unique property rights in relation to mineral development on their lands.

Government Senators believe that the 1982 Agreement was negotiated in good faith after extensive consultations with the appropriate Traditional Owners and their representatives, and concur with the view expressed in the Government's response to the World Heritage Committee, that to set the 1982 Agreement aside would risk:

- creating a precedent that would unjustly privilege one set of acquired rights over another, to the extent of allowing one party unilaterally to revoke a contract, freely given and accompanied by payments, at a later date;
- extending the ambit of the World Heritage Committee, unilaterally and in a manner that is not consistent with the Convention, into questions of mineral rights, property law and indigenous land ownership when the Convention itself expressly recognises that these are matters for the relevant State Party;

47 Mr Robin Bryant, Department of Industry, Science and Resources, *Proof Committee Hansard*, Canberra, 11 June 1999, p 56.

48 UNESCO World Heritage Committee, *Report on the mission to Kakadu National Park, Australia, 26 October to 1 November 1998*, Annex I, p 2.

- injustice to the Company who have complied with every law, met every requirement, respected every notified Aboriginal site in managing the project; and
- pre-empting any domestic law processes to consider these issues.⁴⁹

Sacred Sites

Opponents of the mine have argued that the sites known as Boiwek (or Boyweg) and Almudj, now referred to as the Boiwek-Almudj complex, are significant sacred sites and that the development of the mine will cause irreparable harm to the sites and to the Aboriginal community as a result.

Government Senators on the Committee accept that there are discrete sites near the mine, of significance to the Aboriginal community, but believe that on the basis of anthropological evidence accumulated over many years, including information supplied by the Traditional Owners themselves, there is no threat to those sites from the proposed development of the mine. Energy Resources of Australia has, in fact, made strenuous efforts to identify and protect sites within the lease area.

The company's task has been made more difficult by the unwillingness of the present group of Traditional Owners to cooperate in a Cultural Heritage Management Plan. However, despite uncertainty about the proposed sacred areas known as Boiwek and Almudj, they will be protected from any potential damage arising from development of the project.

Although the 1982 Agreement between ERA and the Northern Land Council, acting on behalf of the Traditional Owners, states that there are no sacred sites within the operational area of the mine, following more recent representations by the NLC the company has banned entry by mine staff into an area much larger than the soakage or swamp which has previously been recorded as the Boiwek site.

Recent claims that the Boiwek site is larger (covering a wider area), deeper (extending to the ore body) and of greater significance (more ancestors, more dangerous) than previously acknowledged need to be weighed against the historical facts that approvals for any mine project, including exploratory drilling needed to be provided by Traditional Owners before any work could commence. These permissions were given.

There is a very substantial body of anthropological evidence available over many years from work in the region in relation to the site. Several highly regarded anthropologists, working closely with Traditional Owners, including the father of the current Senior Traditional Owner, have defined the site of Boiwek as a small, discrete soakage or swamp on the edge of the wetlands located to the west of the Jabiluka mine

49 Environment Australia, *Australia's Kakadu: Protecting World Heritage*, April 1999, p 89.

valley. It was a sacred, but not necessarily a dangerous, site. There will be no damage or disturbance to this site from the Jabiluka development.

When negotiating agreements for access and mining, the previous and current Senior Traditional Owners consistently indicated to the owners of the Jabiluka mineral lease that the major site was confined to the area of the soak. This is reflected in the 1982 Agreement. It was not until 1997 that claims were made about a possible extended area for Boiwek, possibly covering the whole of Mine Valley. These revisions also upgraded the category of the site from sacred to sacred and dangerous, and involving sub-surface manifestations, perhaps defined by the ore body.

At a meeting between the Minister for Environment and Heritage, on 9 February 1999, and the Traditional Owners of the Jabiluka Mineral Lease, the Senior Traditional Owner made several statements concerning Boiwek. In brief these were that the site is three ancestors, that the site has sub-surface manifestations, and that any disturbance would destroy the community.⁵⁰

These claims are not consistent with anthropological records or with the previous statements and permissions given between 1976 and 1997 by Traditional Owners, including the current Senior Traditional Owner, and spelt out in legal agreements and site permits agreed by the current Senior Traditional Owner as recently as 1992. Those permissions were freely given and the Northern Land Council has confirmed that the consultation process was adequate and effective.

Despite requests, no other evidence has yet been supplied by Traditional Owners to the Australian Government to substantiate the recent claims.

The Aboriginal Areas Protection Authority (AAPA), the body established by Northern Territory legislation specifically to investigate and register sacred sites, was not involved until late 1997, when the Senior Traditional Owner approached the Northern Land Council for assistance in making a submission to the AAPA to have the Boiwek-Almudj site registered as a sacred site under the NT *Northern Territory Aboriginal Sacred Sites Act 1989*.⁵¹

Dr David Ritchie, Chief Executive Officer of the Authority, told the Committee that there was 'considerable disagreement' over the site, and stated that key points about the site were 'fairly heavily contested,' to the extent that the Authority could not enter the site on the register of sacred sites.⁵² Mr Jeff Stead, Manager of the Anthropology Branch of the Northern Land Council, also referred to 'disagreement among

50 Environment Australia, *Australia's Kakadu: Protecting World Heritage*, April 1999, p 70.

51 Aboriginal Areas Protection Authority, Submission 52, p 1; Dr David Ritchie, Aboriginal Areas Protection Authority, *Proof Committee Hansard*, Darwin, 16 June 1999, p 172.

52 *Proof Committee Hansard*, Darwin, 16 June 1999, p 173.

Aboriginal people' about the status of the Boiwek-Almudj site and to the inconclusive and confused nature of the evidence.⁵³

In a letter to the Northern Land Council in July 1998, the AAPA stated that:

The Authority noted that on a number of key issues, including the location and extent of the site and the physical features that constitute the site and the significance of the site according to Aboriginal tradition, there were widely divergent and strongly held positions taken by various custodians. Disagreement on the part of some senior custodians with the proposed registration had the effect of creating substantial doubt from a legal point of view that the area proposed for registration is a sacred site.⁵⁴

Government Senators believe that every effort has been made by Commonwealth and Northern Territory agencies, and by Energy Resources of Australia, to identify and protect sacred sites within the Jabiluka mineral lease. They believe that the mine should proceed in accordance with the extensive provisions applying to the protection of Aboriginal heritage in Commonwealth and Northern Territory law. (See also Appendix 3 to the Government Senators' Report, below.)

Social Issues

The Kakadu Region Social Impact Study (KRSIS) has identified a number of issues which need to be addressed. The Government has acknowledged the need for a positive and comprehensive response to those social impact issues and has accelerated the implementation of agreed KRSIS outcomes. The great majority of Traditional Owners from clans in the region are participating in these initiatives, although the Mirrar-Gundjehmi have not yet agreed to participate.

Energy Resources of Australia co-funded the KRSIS study in order to identify Aboriginal concerns with a view to understanding and responding to Traditional Owner concerns. ERA has entered into a Deed Poll with the Northern Land Council committing to the most important recommendations of the Study, involving funds in excess of \$9 million and significant Aboriginal employment.⁵⁵

The Jabiluka project has already generated \$5.2 million of benefits for Aboriginal people and over the life of the mine is expected to contribute a further \$230 million. It is expected that these funds will be used to complement Government programs and provide benefits in a range of health, education and other community services, cultural and land management programs, business development and financial investment.⁵⁶ The delays associated with the project have prevented many of these benefits

53 *Proof Committee Hansard*, Darwin, 16 June 1999, p 150.

54 Letter from the Aboriginal Areas Protection Authority to the Northern Land Council, 20 July 1998, quoted in: Aboriginal Areas Protection Authority, Submission 52, p 1.

55 Energy Resources of Australia, Submission 32, p 7.

56 Environment Australia, *Australia's Kakadu: Protecting World Heritage*, April 1999, p 21.

associated with the operation of the mine from being delivered to the affected communities.

Mr Tony McGill, Director of Mines for the Northern Territory Government, told the Committee that:

The Jabiluka mine will infuse over \$200 million in royalty benefits directly to the regional community over its 25 year life. There will be a positive social, economic and employment benefit flowing from those royalties and from the mine. Many of the traditional owners of Kakadu National Park strongly support mining as a means of obtaining economic independence.⁵⁷

World Heritage

The majority report has clearly set out the criteria under which Kakadu National Park is justifiably listed by the World Heritage Committee. On both natural and cultural grounds the Park is an outstanding example of World Heritage, of which all Australians have reason to be proud. The Australian Government takes its responsibilities under the World Heritage Convention seriously; Australia is the only country which has put into place domestic legislation to address its obligations under the Convention.

Government Senators believe that the rigour of the environmental assessments required by the Government, the ninety recommendations made by the Environment Minister, the further independent reviews commissioned by the Minister and the transparency of the entire process all reflect the Government's commitment to protecting the World Heritage values of the Park.

There is no basis, in terms of ascertained or potential dangers, on which to place Kakadu National Park on the List of World Heritage in Danger. To do so, in the light of all the evidence presented in a number of reports, would be to undermine the credibility of the World Heritage Convention and the spirit of consensus and common purpose which has been a fundamental feature of the Convention's implementation and administration to date.

Energy Resources of Australia has recognised that operating mining projects adjacent to a World Heritage area demands significant attention and responsibility to manage environmental and cultural issues. ERA's operations at Ranger are the most closely monitored mining activities in Australia's history, and the regulation of the Ranger mine by the Northern Territory Government has ensured that the protection of Kakadu National Park has exceeded that predicted by the Fox inquiry.⁵⁸

57 *Proof Committee Hansard*, Darwin, 16 June 1999, p 112.

58 Northern Territory Government, Submission 49, p 5.

Government Senators have examined above both the environmental and indigenous issues which have been cited as posing a threat to the World Heritage values of the Park. It is clear that in neither case are there any grounds for concern.

In 1987 the World Heritage Committee accepted the nomination of Stage 2 of Kakadu National Park. At that time the Ranger uranium mine had been operating for six years; presumably the proximity of a working uranium mine was not considered to pose a danger to the World Heritage values of the Park.

In relation to natural values, Kakadu National Park is inscribed on the World Heritage list under three criteria. The one most relevant to claims of a threat posed by the mine project is the significance of habitats within the Park where threatened species of plants and animals of outstanding universal value survive. As stated above, all the scientific studies have demonstrated that the mine will pose no threat to those habitats and species.

The other two natural values will not be threatened either: the ongoing geological processes and biological evolution will continue, and the examples of superlative natural phenomena and outstanding natural beauty will remain. The Jabiluka mine, when complete, will have a far smaller impact on the immediate site than the Ranger mine has had and will not be visible from anywhere within the World Heritage area.

In relation to cultural values, the Park is inscribed on the World Heritage list for its direct association with living traditions of outstanding universal significance and for its unique artistic achievements. The Government is committed to protecting these examples of World Heritage through joint management of the park with its Aboriginal owners.

The Government and ERA have made strenuous but unsuccessful efforts to obtain the cooperation of the Traditional Owners of the Jabiluka lease area in the development of a Cultural Heritage Management Plan. Nevertheless, the Government and the company, in cooperation with a range of authorities and on the basis of knowledge accumulated over a long period, have made every attempt to identify and protect significant sites within the lease area. Government Senators are confident that the mine project will not threaten the cultural heritage of the Park.

In summary, Government Senators believe that the Supervising Scientist's comment, made in the conclusions of his report to the World Heritage Committee, is fully justified but that it applies to both natural *and* cultural World Heritage values:

There would appear, therefore, to be no justification for a decision by the World Heritage Committee that the ... World Heritage values of Kakadu National Park are in danger as a result of the proposal to mine uranium at Jabiluka.⁵⁹

59 Supervising Scientist, *Assessment of the Jabiluka Project, Report of the Supervising Scientist to the World Heritage Committee*, April 1999, p 14.

Conclusion

The Jabiluka project was assessed over a period of three years. Not only were the two formal assessment processes scrutinised by the Commonwealth and Northern Territory Environment Ministers, but during that period there were two opportunities for public review of the documentation. The decisions following the two processes contained ninety recommendations, all of which were accepted by the action minister.

Additionally, a further scientific review, examining issues usually left to the detailed design stage, was carried out and that review was itself the subject of independent review by an international panel of experts. It is simply not possible to argue that the environmental assessment process has been anything but comprehensive, scientifically rigorous, transparent and closely scrutinised.

Senator John Tierney (Deputy Chair)

Senator Marise Payne
Senator Alan Eggleston

GOVERNMENT SENATORS' REPORT: APPENDIX 1

CONCLUSIONS OF THE REPORT OF THE SUPERVISING SCIENTIST TO THE WORLD HERITAGE COMMITTEE⁶⁰

This report has been prepared in response to the request of the World Heritage Committee that the Supervising Scientist conduct a full review of scientific issues raised by the Committee's Mission to Kakadu National Park in October–November 1998. Perceived scientific uncertainty with respect to these issues had led to the Mission's conclusion that the natural values of Kakadu are threatened by the Jabiluka project.

It must be emphasised that this report does not purport to be a complete environmental impact assessment of the Jabiluka project. There are many environmental protection issues related to the development of Jabiluka that were not raised in the Mission's report or in the decision of the World Heritage Committee. These broader issues have already been addressed in the environmental impact assessment process to which the Jabiluka project was subjected and are covered by the requirements that the Commonwealth Government imposed in granting its approval for the project to proceed.

This report includes a thorough review of all of the issues raised by the World Heritage Committee and provides a detailed assessment of the risks to the wetlands of Kakadu arising from the storage of uranium ore at the surface at Jabiluka, the management of water and the storage of tailings.

Before summarising the report's conclusions, it is pertinent to provide a brief comment on the environmental impact assessment process in Australia. For a project of environmental significance, any Commonwealth approvals may only be given following environmental assessment under the Commonwealth's *Environment Protection (Impact of Proposals) Act 1974*, the EPIP Act. A similar process is also required under State or Territory legislation and, where both are required, these processes may be carried out jointly under Commonwealth and State or Territory law.

The intent of the EPIP Act, and its State/Territory counterparts, is to ensure that matters affecting the environment to a significant extent are fully examined and taken into account in decisions taken by the Commonwealth and State/Territory governments. The proponent must describe the design of the project in sufficient detail that the likely environmental impact arising from the project can be adequately assessed. However, the detailed design of the project may not have been completed prior to submission of the EIS. The detailed design of the project would normally be completed after approval has been given for the project to proceed under the EPIP Act process so that any environmental conditions can be included within final design parameters. Recognition is given to the fact that each State and Territory has in place a regulatory regime under which detailed aspects of a project are assessed and specific authorisations and approvals are granted.

In the case of uranium mining in the Alligator Rivers Region of the Northern Territory, specific authorisations and approvals are granted by the responsible Northern Territory

60 Supervising Scientist, *Assessment of the Jabiluka Project, Report of the Supervising Scientist to the World Heritage Committee*, April 1999, pp 98-99.
<http://www.environment.gov.au/science/whc/TheMainReport.pdf>

Minister under the *Uranium Mining (Environmental Control) Act 1979*. Under the Working Arrangements agreed between the Commonwealth and Northern Territory Governments, the Supervising Scientist reviews the environmental aspects of all detailed proposals that might be the subject of such authorisations and approvals and provides advice to the Northern Territory on the environmental consequences. It is through this process that the detailed design of the Jabiluka project would be assessed and approved.

Many of the issues that were raised by the report of the Mission of the World Heritage Committee come into the category of detailed design. That is, many of the issues had been identified by the Supervising Scientist and others as being issues that would need to be resolved by the proponent in consultation with officials of the Northern Territory and the Supervising Scientist at the detailed design stage but the conclusion had been reached that there were no insurmountable obstacles that would prevent a design being achieved that would ensure the highest level of environmental protection in Kakadu National Park.

This detailed review has demonstrated that there were a number of weaknesses in the hydrological modelling presented by ERA in the EIS and the PER. Accordingly, a number of recommendations have been made which should be implemented by ERA in completing the detailed design of the Jabiluka project. On the other hand, the review has demonstrated quite clearly that, if the design of the water management system proposed by ERA in the PER *had* been implemented, the risk to the wetlands of Kakadu National Park, and the risk of radiation exposure to people of the region would have been extremely low. This conclusion is valid even in extreme circumstances leading to the complete failure of the structure of the water retention pond at Jabiluka.

The lay reader will, no doubt, find this conclusion surprising. Its origin, however, lies in the fact that uranium is not a particularly toxic substance for aquatic animals. It has been well established that the toxicity of uranium is much lower than that of many many more common substances such as copper, cadmium and lead. It is the perception of the public that uranium is a very dangerous substance, and the failure of the scientific community to persuade the public otherwise, that has led to adoption of extreme measures to ensure that no amount of uranium should leave the site of a uranium mine.

Similarly, uranium in its natural state does not pose a particularly severe radiation threat. Exposure to uranium and its radioactive progeny needs to be controlled but the inherent radioactivity of uranium and its progeny is sufficiently low that ensuring that people do not receive exposures that would be harmful is relatively straightforward. It is only when uranium is used as fuel in a reactor that fission reactions result in a large number of radioactive products which produce high levels of ionising radiation.

Thus, on scientific grounds, there is no reason why water collected at Jabiluka could not be discharged into the surface waters of the Magela floodplain under a suitably designed control regime that would protect both people and ecosystems. The proposal by ERA that these waters should be totally contained at the mine site was made in response to social concerns and perceptions, not scientific evidence.

The long-term threats to the wetlands of Kakadu arising from the storage of uranium mill tailings at Jabiluka have also been assessed. Because the tailings will be stored at a significant depth below the surface of the land, physical dispersion of the tailings will not be possible for millions of years. The whole land mass would need to be eroded away and by that time the wetlands of Kakadu would no longer exist. Even then, the threat to future generations is

insignificant because the residual uranium and its radioactive progeny would be present at low concentrations and would be mixed, when dispersed, with the inert material surrounding the current orebody. Dispersion of radionuclides and other constituents of the tailings in groundwater has been shown to present no threat to the wetlands of Kakadu or the people who live there in either the short-term or the long-term.

The conclusion of this review, therefore, is that, contrary to the views expressed by the Mission, the natural values of Kakadu National Park are not threatened by the development of the Jabiluka uranium mine and the degree of scientific certainty that applies to this assessment is very high. There would appear, therefore, to be no justification for a decision by the World Heritage Committee that the natural World Heritage values of Kakadu National Park are in danger as a result of the proposal to mine uranium at Jabiluka.

GOVERNMENT SENATORS' REPORT: APPENDIX 2

EXCERPTS FROM THE GOVERNMENT'S RESPONSE TO THE WORLD HERITAGE COMMITTEE IN RELATION TO THE 1982 AGREEMENT⁶¹

The *Aboriginal Land Rights (Northern Territory) Act 1976* (the Act) provides indigenous people of the Northern Territory the right of veto over mining on their land. The legislation in Northern Territory is currently the strongest operating in Australia. The right of veto provided by this Act does not apply to land owned by non-Indigenous Australians. Although possessing this power of veto, the traditional owners of Jabiluka instead chose to consent to the mine for the economic benefits and other protections negotiated in the 1982 Agreement.

The 1982 Agreement and the 1991 Transfer of Ownership were statutory agreements undertaken by the Northern Land Council on behalf of the traditional owners under the Act. The Australian Government considers, and all evidence provided indicates, that these agreements were reached through the informed consent and strong support of traditional owners at that time as required under the Act.

The development and finalisation of the 1982 Agreement involved a number of years of negotiations with traditional owners and included hundreds of meetings with these people and the other Aboriginal custodians in the Kakadu region who had an interest in the Jabiluka mine. In contrast to recent concerns regarding the Agreement process, none of the principals associated with the Agreement have disowned the Agreement or the process which led to its finalisation.

In 1982, following the signing of the Agreement, the Chairman of the Northern Land Council, Mr Gerry Blitner, said 'We believe it is a fair agreement for both parties'. Mr Blitner went on to say that 'Because of the fairness of the negotiations and the careful and delicate way in which they have been handled, and the long-lasting benefit to the Aboriginal people, the Northern Land Council is proud to have been a part of them'.

In 1991 Bill Neidjie, one of the traditional owners who was a principal to the 1982 Agreement, referred to the importance of the 1982 Agreement being kept because it was Bininj (Aboriginal) law that since the two old men who had agreed to the mine proceeding were now dead, their word was law and must be followed. Mr Neidjie and his family reiterated their support for the 1982 Agreement in a letter submitted to the 1998 meeting of the World Heritage Committee.

The Government notes that the parties to the 1982 and 1991 agreements have the right to legally challenge them if they consider that the terms of the agreements have not been satisfied or were entered into under duress. There has been no attempt to challenge them in law.

The Northern Land Council, an Aboriginal organisation which has the statutory role to undertake agreements in consultation with the traditional owners, maintains their

61 Environment Australia, *Australia's Kakadu: Protecting World Heritage*, Response by the Government of Australia to the UNESCO World Heritage Committee Regarding Kakadu National Park, April 1999, pp 87-89.
<http://www.biodiversity.environment.gov.au/kakadu/jabiluka/response.html>

commitment to the 1982 Agreement and the 1991 transfer of rights. The 1982 Agreement also has the ongoing support of senior and key members of the Kakadu Aboriginal community who would like to see regional development, including the Jabiluka mine, continue (under appropriate controls) to ensure a strong economic future for Aboriginal people in the region.

This position was further demonstrated during a visit of traditional owners to Canberra in 1991 in which they lobbied the Commonwealth Government in favour of the Jabiluka mine. The present senior traditional owner attended these meetings.

Should the legally binding agreements of 1982 and 1991 be dissolved outside the appropriate legal processes, the capacity of Aboriginal people to enter into future obligations that bind themselves and their successors would be damaged.

The consequences of such a precedent would result in large areas of Australia under Aboriginal ownership as possibly being regarded as “out of bounds” for any future negotiated agreements. This would deny Aboriginal people the right to enter into such agreements and thus limit their ability to maximise the returns from their unique property rights in relation to mineral development on their lands.

To set the 1982 agreement aside would risk:

- creating a precedent that would unjustly privilege one set of acquired rights over another, to the extent of allowing one party unilaterally to revoke a contract, freely given and accompanied by payments, at a later date;
- extending the ambit of the World Heritage Committee, unilaterally and in a manner that is not consistent with the Convention, into questions of mineral rights, property law and indigenous land ownership when the Convention itself expressly recognises that these are matters for the relevant State Party;
- injustice to the Company who have complied with every law, met every requirement, respected every notified Aboriginal site in managing the project; and
- pre-empting any domestic law processes to consider these issues.

Again, the Australian Government will be open and transparent on this issue, notifying the World Heritage Committee of any future potential changes to the status of property rights within the excluded mining lease areas, including notification of any relevant court actions and their outcomes.

GOVERNMENT SENATORS' REPORT: APPENDIX 3

EXCERPTS FROM THE GOVERNMENT'S RESPONSE TO THE WORLD HERITAGE COMMITTEE IN RELATION TO SACRED SITES⁶²

The site of Boiwek has been described in reports by anthropologists on sacred sites in the Jabiluka region since 1975. Boiwek was listed as a 'djang' sacred site involving the ancestral dreaming figures the Knob-tailed Gecko ('Boiwek') and the Rainbow Serpent ('Almudj'). Anthropologists have documented these sites in conjunction with the Aboriginal traditional owners, including the father of the current senior traditional owner. Until 1997 the Australian Government was not aware of any claim that Boiwek was a Djang andjamun place that was especially dangerous or had specific restrictions on access by traditional owners and others.

From 1975 on, the site of Boiwek has been studied, photographed, mapped and protected. Several highly regarded anthropologists, working closely with traditional owners, including the father of the current senior traditional owner, have defined the site of Boiwek as a small, discrete soakage or swamp on the edge of the wetlands located to the west of the Jabiluka mine valley. It was a sacred, but not necessarily a dangerous site. There will be no damage or disturbance to this site. It is protected by conditions of approval.

This site is linked by a dreaming track to another separate site, known as Almudj, also protected and registered. The area between these sites (including the earth beneath this area) is now claimed by the senior traditional owner to be a sacred site. This claim was first made in 1997 and an expanded claim then made in 1999. It is this extended area which, it is claimed, will be threatened or disturbed.

The location and definition of the Boiwek site as a discrete swamp or soak on the edge of the wetlands were discussed and confirmed in:

- The 1977 Fox Inquiry;
- The claim book for the 1982 Alligator Rivers stage two land claim;
- The research necessary for registration on the National Estate for sites on the lease, including
- Boiwek and Almudj; and
- Decisions by traditional owners and the Northern Land Council on site permits for workers in the Jabiluka lease area.

When negotiating agreements for access and mining, the previous and current senior traditional owners consistently indicated to the owners of the Jabiluka Mineral Lease that the major site was confined to the area of the soak. This is reflected in the 1982 Agreement. As a member of the Bininj working committee the current senior traditional owner ratified in 1992 a map showing Boiwek as a small site at the soak. This map identified the parts of the lease where particular conditions would be attached to any permits issued to non-Aboriginal

62 Environment Australia, *Australia's Kakadu: Protecting World Heritage*, Response by the Government of Australia to the UNESCO World Heritage Committee Regarding Kakadu National Park, April 1999, pp 63-73.
<http://www.biodiversity.environment.gov.au/kakadu/jabiluka/response.html>

people. The map was to be attached to any permits so permit holders would not inadvertently enter the area of any sacred sites.

It was not until 1997 that claims were made about a possible extended area for Boiwek, possibly covering the whole of Mine Valley. These revisions also upgraded the category of the site from sacred to sacred and dangerous, and involving sub-surface manifestations, perhaps defined by the ore body. The recent claims are not consistent with anthropological records or the previous statements and permissions given between 1976 and 1997 by traditional owners, including the current senior traditional owner. Those permissions were freely given and the Northern Land Council has confirmed the consultation process was adequate and effective.

Boiwek: Chronology of Site Recording

Phase One: Pre Land Rights

In 1975, George Chaloupka, a respected site recorder and rock art specialist working for the Northern Territory Museum and Dr Ian Keen, an Australian National University anthropologist, mapped the Mirrar Gunjeimbi clan estate with senior owners. With Toby Gangali, Jimmy Madjandi, Nipper Gabarrigi and George Namingum, Chaloupka located 35 places and depicted the routes taken by mythological creator beings.

The 1978 Chaloupka report describes Boiwek as a sacred site as a small, discrete soakage or swamp located to the west of the Jabiluka Mine Valley. The site lies immediately to the west of what is now the Oenpelli road. The report states that Boiwek is connected by a dreaming track to a sacred site to the east of the mine valley named 'Almudj'. The site of Almudj relates to the Rainbow Serpent, a prominent Dreaming figure across large areas of Australia. A map in the report shows the line of the dreaming track. It travels the length of the Mine Valley, connects Boiwek and Almudj, and is confined to the area now covered by the Jabiluka Mineral Lease. The dreaming track has no connection with the World Heritage property.

Phase Two: Alligator Rivers Stage Two Land Claim

In 1980, Justice Toohey heard evidence in the Alligator Rivers Stage Two Land Claim. In 1981, Justice Toohey reported his findings on the Land Claim. While his report gives considerable attention to the proposed Jabiluka project (as it was planned then), including the reproduction of a model showing the effect of the project on the Jabiluka outlier and consideration of changes to the siting of facilities, and to the protection of sacred sites, no concerns over Boywek or Almudj were noted.

Although the [Pancontinental] proposal was much larger than the present initiative, the site does not appear to have been perceived by Justice Toohey, on the basis of evidence before him from traditional owners, to be under any threat.

Phase Three: The Agreement: 1982–1997

In the years leading up to 1982, the Northern Land Council carried out extensive consultation with traditional owners and affected Aboriginal communities over the Jabiluka project. Traditional owners were fully informed about the project by NLC staff and consultant anthropologists and had ample opportunity to express their views on sites that required protection and to have those views reflected in the final agreement.

In 1982, after this exhaustive consultation process, an agreement (the 1982 Agreement) was signed that stated, in part, “It was agreed by NLC on behalf of traditional Aboriginal owners that there are no sacred sites within the fenced area. Traditional Aboriginal owners have instructed NLC that they have no present intention of conferring upon any place the status of a sacred site within the Fenced Area during the term of this deed.” The Agreement defines the extent of the operational area and refers to it as the ‘Fenced Area’.

The 1982 Agreement also set out processes to be followed should sacred site issues arise, including a Bininj Working Committee, formed by traditional owners (including at the time Toby Gangele, Jacob Nayinggul and Big Bill Neidjie) on which the NLC has representation. The Committee was not asked to consider the status or boundaries of Boiwek, or to consider issues arising from the drilling program in Mine Valley (including the new extended site area) by Pancontinental.

After the 1982 Agreement, Pancontinental (and later ERA) sought and received a succession of approvals from the traditional owners through the NLC for drilling works in and around Mine Valley, as well as approval for the construction of the access road to the mine.

In August 1992, the Bininj Working Committee (including Yvonne Margarula, Joseph Bumarda, Mick Alderson, Liam Maher and Jonathan Nadji) discussed a “map to be attached to all permit applications to avoid confusion and to ensure people going into Area A near Boywek and other sacred sites are identified.” The minutes indicated that all agreed to use a map showing Boywek as a small site at the spring and Almudj as a separate site. The Mine Valley was clear of sites.

Phase Four: The Jabiluka campaign 1997–1999

The next available information comes from a supplementary Northern Land Council (NLC) submission (in 1997) on the Draft EIS for the Jabiluka Project. The summary states that Boyweg is not ‘djang’ but is in fact recorded by the NLC as a dangerous sacred site (ie djang andjamun). The submission noted that ‘there is potential for the sacred integrity of this site to be compromised if the [Jabiluka] development proceeds’. No information was provided on why the site was dangerous, the sources of the information, the apparent contradiction of the 1982 Agreement, inconsistencies with the extensive anthropological research, and the findings of Justice Toohey.

During 1997, ERA was presented with a series of maps depicting several boundaries for a new site of several square kilometres described as the Boyweg-Almudj site complex. These maps were understood to be based on anthropological research carried out by the NLC. One map had a kilometre wide corridor in which mining was banned, including an area directly over the mine site, which has been extensively and consistently cleared. Another boundary extends over most of the western lease area. These reports have not been supplied to the Australian Government.

In mid 1997, following the preparation of the Draft EIS for the Jabiluka Project, the traditional owners approached the NLC seeking registration of the site complex Boyweg-Almudj. A comprehensive anthropological investigation was carried out by the NLC which resulted in an enlarged area of influence being listed by the NLC for Boyweg. This area is many times larger than that of the immediate soakage or swamp, which in the past had been recorded as the Boyweg site. Much of the enlarged area extends into the Fenced Area and covers localities planned for the installation of mine facilities (particularly mine vents) by

ERA in the 1996 Draft EIS. The NLC advised ERA of the location of this area of influence and the area is shown in ERA's Public Environment Report. The company bans entry by mine staff into the area.

Recent Actions

At a meeting between the Minister for Environment and Heritage, on 9 February 1999, and the traditional owners of the Jabiluka Mineral Lease, the senior traditional owner made several statements concerning Boiwek. In brief these were:

- the site is three ancestors;
- the site has sub-surface manifestations; and
- any disturbance would destroy the community.

These are inconsistent with previous information provided by traditional owners, researched by anthropologists, and spelt out in legal agreements and site permits agreed by the current senior traditional owner as recently as 1992. Despite requests, no other evidence has yet been supplied by traditional owners to the Australian Government to substantiate the recent claims.

The Australian Government has not previously been provided with the information that the site is related to the two additional dreaming ancestors, that it has sub-surface manifestations and that its disturbance could destroy the community. In 1999, the official Mirarr web site displayed a map showing an even larger location for the boundaries of the site. Independent anthropological assessment requested by the Australian Government has confirmed that this information on boundaries and significance is not consistent with previous descriptions of the site.

The 1982 Agreement between the Northern Land Council (NLC) and Pancontinental states that sacred sites will be protected. The Agreement was signed under the *Aboriginal Land Rights (Northern Territory) Act 1976*, which includes provisions for the protection of sacred sites on Aboriginal Land.

The 1982 Agreement has provisions to protect sacred sites from mine construction. The provisions relate to the protection both of sacred sites known at the time of the 1982 Agreement and those places which may take on that status over time. The provisions relate especially to the protection of sacred sites within the area of the Mineral Lease covered by the operational area of the mine.

ERA states in the Supplement to its Interim Cultural Heritage Management Plan (October 1998) that they have not received complete advice as to the impact of the extended area of Boiwek (ie whether there would be any restrictions on operational or monitoring activity within it), however they have been requested not to carry out any work in the area other than to cross it via the existing track.

Under the 1998 Deed Poll (resulting from arbitration over changes to the Jabiluka development), ERA has agreed to a number of additional measures while awaiting confirmation and complete advice on the site boundary:

- to not, without the prior written approval of the NLC, enter upon or occupy any part of the extended area,
- to realign the Access Road to a route acceptable to the NLC, and

- to comply with the decisions and requirements of the Northern Territory Aboriginal Areas Protection Authority with respect to whether or not the vents which it has proposed to construct on the Boiwek–Almudj complex can be constructed within those sites.

ERA has listed in the Supplement the measures which it has undertaken to comply with each of these agreements, and also the recommendations and requirements set by Australian Ministers.

ERA states in the Supplement that it is very conscious of the importance of the Boiwek area of influence and, both in mine design and environmental practice, has sought to take account of the concerns of the landowners and custodians.

It would therefore seem that the locality covered by what is now the extended area of influence of Boiwek which lies within the Fenced Area (ie most of the extended area) was not of sufficient concern to the NLC at the time to be noted in the 1982 Agreement. This is despite there being an opportunity for such issues to be raised.

Under the recommendations and requirements listed by the Minister for the Environment and the Minister for Resources and Energy, ERA is required to take all reasonable steps to identify potential dewatering effects at the Boyweg site. It is also required to prevent contamination of groundwater and conduct baseline studies to establish the degree of connection between deep and shallow aquifers.

Due to access restrictions imposed by the traditional owners, ERA has relied on desktop modelling to address these requirements. The modelling suggests that there could be little or no connections between the deep and shallow aquifer and thus mine construction could expect to have little or no hydrological impact on the site.

CONCLUSION

The Jabiluka project has been subjected to three years of intensive, exhaustive open and transparent environmental impact assessment. There is an extensive and comprehensive program of environmental monitoring in place. This assessment process specifically included binding measures to ensure no damage to the World Heritage values of the Park, or to sacred sites in the project area.

The sacred and significant site protection measures available to traditional owners include both Commonwealth and Northern Territory legislation through which traditional owners could apply for sites to be protected. For over 20 years the site at Boiwek located at the soakage and Almudj on the outlier have been recognised and protected.

Recent claims that the site is larger, (covering a wider area) deeper, (extending lately to the ore body) and of greater significance (more ancestors, more dangerous) needs to be weighed against the historical facts that approvals for any mine project, including exploratory drilling needed to be provided by traditional owners before any work could commence. These permissions were given. The recent claims are not consistent with anthropological evidence or the previous statements and permissions given between 1976 and 1997 by traditional owners, including the current senior traditional owner. Those permissions were freely given and the Northern Land Council has confirmed that the consultation process was adequate and effective.