
The Office of the High Commissioner for Human Rights
Workshop on “Indigenous peoples, private sector natural resource,
energy and mining companies and human rights”
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SUBMISSION BY
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KAKADU, AUSTRALIA

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1 Executive summary

- 1.1 The Mirrar are the traditional owners of the land subject to the Ranger and Jabiluka uranium mine leases in Kakadu National Park in northern Australia. In 1978, the Australian Government imposed uranium mining on the Mirrar and other Aboriginal people of Kakadu against their express wishes – an extinguishment of the Mirrar peoples’ land rights at Australian law. Mining has impinged on the human rights of the Mirrar people and others traditional owners in Kakadu.
- 1.2 The imposition of mining undermined the concurrent enactment of legislation for Aboriginal rights to land and self-determination and has become a primary barrier to the Mirrar people’s ability to exercise or enjoy their rights as traditional owners.
- 1.3 The barriers to the exercise of Mirrar rights are a result of jurisdictional inequality entrenched by the decisions of government agencies. This has been perpetuated through the determination of agreements by other agencies on behalf of the Mirrar with regard to economic activity within their estate. A devolution of social responsibility has occurred from government to the private sector, a consequence which has reduced the access of Mirrar and other Aboriginal people of the Kakadu region to equity of citizenship entitlements.
- 1.4 The Mirrar believe that their rights have been impinged as a result of inadequate processes of informed consent, deceit and unconscionability on the part of government and industry. This has contributed to the fundamental social and cultural breakdown experienced by the Mirrar and other Aboriginal people in Kakadu.
- 1.5 The Mirrar are not able to access negotiating processes as a distinct legal entity and are disadvantaged because their decisions are misrepresented and they are denied natural justice. They have been subjected to government criticism and vilification for their decision to oppose mining and believe that they have been penalised by authorities for articulating and seeking support for their decision in relation to their land. The Mirrar believe that the Australian Government and mining interests have unfairly placed

pressure on other Aboriginal people in the region in relation to the position taken by the Mirrar to oppose the mine.

- 1.6 Tangible and intangible benefits from mining have not eventuated for the traditional owners. The mining agreement negotiated on behalf of the Mirrar by the Northern Land Council in relation to the mining of uranium at the Ranger lease in 1978 was recognised as a poor economic outcome for the Mirrar at the time of negotiation. Aboriginal interests receive 4.25 per cent of the profit from mining activity, with Aboriginal people of the region receiving 30 per cent of that amount. The traditional owners receive a portion of those monies subsequent to decisions allocating funds to social and economic programs. All social indicators show that conditions for Aboriginal people in Kakadu are no better than those for Aboriginal people elsewhere in Australia.
- 1.7 The Mirrar have undertaken a public campaign to prevent the expansion of mining on their estate. During this campaign the Mirrar have highlighted the deficiencies of decision-making processes, the lack of access to resources to gain independent expert advice and the statutory marginalisation they have experienced. The Mirrar have participated in the examination of the social impacts of the Ranger Uranium Mine, approached the World Heritage Committee and received the broad support of the Australian mainstream community.
- 1.8 The Australian Government has adopted a confrontational approach to reform of decision-making processes related to Indigenous rights to land and entrenched the marginalisation of the Mirrar. This has resulted in the internationalisation of Indigenous cultural heritage issues which has been observed acutely during the deliberations of the World Heritage Committee.
- 1.9 The Mirrar have expressed considerable distrust of the motives of government and industry with regard to future negotiations. With regard to cultural heritage protection this again indicates a critical situation. Mirrar have called for cultural heritage protection, it has been recommended by the World Heritage Committee however, the Australian government has devolved cultural heritage responsibilities to the mining company in terms of cultural heritage management, framed in the terms of the mine

proceeding. The Mirrar have requested the support of the World Heritage Committee, however, Australia refuses to accept offers of professional international support to resolve this matter.

- 1.10 The Mirrar have not been assisted with the resources to prepare for negotiations with the Australian government, nor has the Australian government provided any scope for the commencement of such preparation.
- 1.11 The Australian Government has in the past instituted programs to mediate resource conflicts and achieve ecologically sustainable development within broader social and political contexts. Unfortunately successive Australian Governments have undertaken a steady dismantling of environmental procedures and policy and sought to isolate them from broader social and economic issues.
- 1.12 The Mirrar believe that the governments and mining industry must give effect to the spirit and intent of international standards by incorporating policy and procedures which reflect the aspirations of Indigenous peoples in the enjoyment and exercise of cultural life such as the ICCPR Article 7.
- 1.13 The Mirrar believe that institutionalised racism is a pervasive phenomenon which is intrinsic in the development and implementation of policy by governments and industry and requires that Committees such as this are able to offer constructive advice and assistance to move beyond single issue analyses through the articulation of standards.
- 1.14 The Mirrar also note the resolution of the European Parliament in relation to the Jabiluka proposal, which establishes a framework identifying the threshold issues and proposing a process for independent information as a prerequisite to trade relations between States assists in the deliberations of this Committee.
- 1.15 The Mirrar believe that the incorporation of international standards, through the work of this committee to develop thresholds to assist the protection of cultural heritage and the implementation of human rights embracing the principles of ESD will promote the well-being of the international community with equity.

1.16 International issues have addressed aspects of standards relevant to sustainable development and the Mirrar suggest that these provide a basis for assistance in an examination by the Committee of processes leading up to development incorporating the adoption of precautionary development policy. This approach addresses issues of equity, both intra- and inter- generational; equity in negotiations, which provides adequate resources for the process of informed decision-making and reduces the likelihood of unconscionability; and the opportunity for renegotiation regarding the project according to social and economic generational indicators experienced by the Indigenous community with whom agreements are negotiated.

1.17 The Mirrar offer this submission in the spirit of cooperation. While there remains an impasse in negotiations with the Australian government the cost for our people is high. The Mirrar believe it is our very survival which continues to remain under attack through cultural uncertainty. It is our hope that the insight and positive advice of deliberations such as this can contribute productively to the protection of integrity of our cultural heritage for future generations.

2 Recommendations

The Mirrar respectfully recommend:

Office of the High Commissioner for Human Rights

- 2.1 That the OHCHR invite official participation of the Global Mining Initiative, the Mining Council, the Institute of Sustainable Development and the relevant representative of the current deliberations in relation to the Convention for the Protection of Biodiversity to assist the Workshop on Indigenous peoples, private sector natural resource, energy and mining companies and human rights in the future.
- 2.2 That a threshold issue for development project assessment incorporate ecologically sustainable development principles.
- 2.3 That the OHCHR workshop on “Indigenous peoples, private sector natural resource, energy and mining companies and human rights” consider collation and collection of information relating to agreements negotiated with Indigenous peoples with regard to mining. That this data serve as a basis from which comparative analysis may take place.
- 2.4 That the process to which governments and mining companies commit include principles of ecologically sustainable development cognisant of the rights of Indigenous peoples in analysis and implementation.
- 2.5 That OHCHR express support for the Draft Declaration of the Rights of Indigenous Peoples Article 7. The Mirrar also note the deliberations of the Working Group on Indigenous Peoples and draws the Committee’s attention to Article 7. To give effect, to the Declaration in the Committee’s deliberations would provide a sound foundation to address the current inequities in the negotiation of agreements particularly with respect to the practice and enjoyment of rights.
- 2.6 That OHCHR encourage governments and the mining industry to embrace the process discussed in the resolution of the 1998 European Parliament regarding Jabiluka in

relation to mining on Indigenous land. Mirrar contend this would provide an initial positive framework within which an examination of the impacts of mining and future proposals could be constructively achieved.

- 2.7 That OHCHR develop a “Mining and Indigenous Peoples” policy which establishes standards for assessment and negotiations based on the fundamental right of each generation of Aboriginal Traditional Owners to determine economic development strategies and priorities for their homelands, independent of any external development agenda.
- 2.8 That OHCHR undertake a comprehensive study of environmental impact statements for mining projects with a view to developing standard model processes for the protection of Indigenous Peoples’ cultural, social, economic and environmental rights in a multi-disciplinary context incorporating analyses of the interdependence of social, political, cultural and economic factors to reduce regional inequalities
- 2.9 The OHCHR develop a database of current and proposed mining projects on Indigenous Peoples homelands with a view to monitoring abuses of human and environmental rights.

Mining sector

- 2.10 That the mining sector recognise and support the independence of cultural institutions derived from Indigenous communities to administer income derived from mining operations. That the expenditure of income from mining operations does not conditionally guarantee access to citizenship entitlements nor to government programs of assistance.
- 2.11 That mining companies and governments ensure that the perceptions and concerns of Indigenous owners of land affected by mining operations be given equal recognition (weighting) as a factor in any Best Practicable Technology matrix.

- 2.12 That fundamental issues of human rights protections should be incorporated into agreements negotiated with Indigenous peoples in respect of mining in a threshold sense.
- 2.13 That informed consent and equity is a requirement of negotiations between mining companies, governments and Indigenous peoples.
- 2.14 That strategies for monitoring and corrective action are mandatory with provision to renegotiate agreements according to thresholds established through the ecologically sustainable development analysis.

Government

- 2.15 Mining royalty income must not be used as a substitute for basic service delivery and community infrastructure that governments are obliged to provide, and would otherwise be expected to provide.
- 2.16 Environmental impact assessment studies, as a prerequisite to proposed mining development and legislative approval process, must include the direct participation of Indigenous peoples in the spirit of Article 1 of the ICCPR, ICESCR, Article 3 of the draft Declaration on the Rights of Indigenous Peoples within the framework of Ecologically Sustainable Development principles.
- 2.17 Mining companies and government ensure that the cultural beliefs, perceptions and concerns of Indigenous owners of land affected by mining operations be given due recognition (weighting) as a factor in any Best Practicable Technology matrix.
- 2.18 That Indigenous consent for mining developments on traditional Indigenous lands and waters be negotiated in a transparent process with the assistance of international peer review according to principles established through the work of the Committee.
- 2.19 That Indigenous consent for mining developments on traditional Indigenous lands and waters be assessed to ensure consent was informed and free of duress and that this assessment be carried out by an independent judiciary and not an executive or its

agencies.

- 2.20 That Governments establish and use impartial mechanisms, including international mechanisms, to oversee and facilitate fair and equitable resolutions of Indigenous land and resource claims and the implementation of land agreements.
- 2.21 That Governments undertake the development of long term strategic policy rather than ad hoc application of political imperatives in the implementation of assessment. That this also include regulatory mechanisms for implementation of resource development issues.
- 2.22 That Governments recognise the necessity of undertaking evaluation of Indigenous social and economic imperatives in the review of agreements and support renegotiation of projects where detriment threatens sustainability.
- 2.23 That independent funding be made available to Indigenous peoples to undertake social and environmental impact assessment, corrective measures, and programs to achieve cultural security.

3 Introduction

- 3.1 This submission outlines the human rights experiences of Mirrar Aboriginal people of Australia in regard to mining activities on their traditional land.
- 3.2 The submission focuses on the role played by government in mining negotiations in the recent past and present. Equal emphasis is placed upon the obligations and responsibility of industry to safeguard the human rights of Indigenous peoples where traditional lands are exploited for natural resources.
- 3.3 The Mirrar Aboriginal people are the traditional owners of country within the borders of the World Heritage listed Kakadu National Park in the Australian province of the Northern Territory. The natural and cultural values for which Kakadu is inscribed as a World Heritage Area are intrinsically linked to the living tradition of the Mirrar, who are the custodians of this land.
- 3.4 Mirrar country encompasses the Ranger and Jabiluka Mineral Leases, the mining town of Jabiru and parts of Kakadu National Park. The mineral leases are surrounded by the external boundaries of the national park and are thus mining enclaves totally surrounded by the national park.
- 3.5 The Mirrar exercise their rights as Traditional Owners under two Aboriginal Land Trusts and benefit from *fee simple* title to most of their estate. The town of Jabiru and surrounds were excluded from the Kakadu Aboriginal Land Trust and are currently subject to a native title claim lodged in the Federal Court by the Mirrar.
- 3.6 Yvonne Margarula is identified by the Northern Land Council (NLC) and by the local Aboriginal community as Senior Traditional Owner, pursuant to the *Aboriginal Land Rights (Northern Territory) Act 1976* (Federal legislation), of the land currently subject to the Ranger and Jabiluka uranium mineral leases. Ms Margarula's position as Senior Traditional Owner is the result of the succession of this primary care responsibility from her father, Toby Gangali.

3.7 Gundjehmi Aboriginal Corporation is an organisation established, managed and controlled by the Mirrar independent of any agenda influenced by mining. The establishment of Gundjehmi Aboriginal Corporation in July 1995 occurred due to the Mirrar peoples' dissatisfaction with jurisdictional and institutional arrangements on their land, including their ability to exercise their land rights under land rights legislation.

3.8 Kakadu National Park has been described as containing:

.....an especially rich collection of places, including sacred sites, that have significance to Aboriginal people today. Traditional beliefs and practices remain very important to daily life and rites and ceremonies continue to be practised. According to tradition, the Aboriginal relationship with the land is an amalgam of spiritual, economic and physical bonds. These bonds are inextricably interwoven and originate from a time that Aboriginal people refer to as the creation era. This is a belief system that perceives the past, present and future as interacting in an eternally dynamic relationship, affecting the affairs of men and women in their everyday lives...¹

3.9 This living cultural tradition was one of the criterion upon which Kakadu was inscribed on the World Heritage list. That is:

ii) outstanding examples representing significant on-going geological processes; biological evolution and man's interaction with his natural environment;

3.10 The central issues arising from the imposition of uranium mining on Mirrar country relate to consent, duress, misrepresentation and conflicts of interest amongst parties with respect to the exploitation of resources within their lands.

3.11 The Mirrar have sought cultural heritage protection of sacred sites within their estate and therefore seek recognition of their human rights within the framework of Australia's national interest. The Mirrar seek to participate in a framework of analysis which embraces cultural rights and social and economic rights equally. The Mirrar have

¹ Australian Government submission to UNESCO World Heritage Committee on re-nomination of Kakadu on World Heritage list, 1991.

sought to encourage industry to undertake an open, transparent implementation and monitoring process which prioritises the involvement of the Mirrar as landowners in a meaningful and genuine dialogue. The Mirrar desire negotiations and assessment processes which are conducted in a fair, open and transparent manner. For the purposes of developing best practice, Mirrar propose that their symbiotic relationship with the land be recognised.

- 3.12 As a direct result of uranium mining on their land, Mirrar experience a whole range of social, economic and environmental problems including poverty, disadvantage, distress, dispossession, and as a people are culturally threatened due to these significant social impacts on their lives.
- 3.13 Mirrar want to ensure that they have a full and proper opportunity to provide input (and possess a 'right of veto' in certain circumstances) into decisions in relation to any development on their land.
- 3.14 The major concern of the Mirrar has been to protect and maintain their culture. The granting of land rights without power to prevent development in the region is only token recognition of self-determination.² It has been the experience of the Mirrar, as with many Indigenous peoples, that they are denied effective exercise of their right to self-determination.
- 3.15 Mirrar assert their status as a distinct people Indigenous to their land, and seek to exercise the full gamut of their fundamental rights and freedoms that derive from this unique status, including their rights to land and their right to self-determination.
- 3.16 By the time the Ranger (uranium mining) Agreement was signed in 1978 Australia had ratified the International Covenant on Civil and Political Rights, and the International Covenant on Economic, Social and Cultural Rights - both in 1976. The International Convention Against All Forms of Racial Discrimination was ratified in 1975, and the International Convention for the Protection of the World Cultural and Natural Heritage in 1974 that came into force in 1975.

² Cousins, D. & Nieuwenhuysen J., *Aboriginals and the Mining Industry*, Allen & Unwin, 1984, p.116.

3.17 Under Article 1 of the ICCPR and the ICESCR:

All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

3.18 It has been argued that the self-determination policies introduced by the Whitlam government after 1972 were not designed to enable Aboriginal people to achieve political autonomy. The intention was to encourage participation and involvement in community economic, social and financial affairs, from within the Australian political economy. In reality, Aboriginal people were not granted rights under international law to control their own destiny or to adapt laws and customs that would enable them to identify themselves, politically, as a viable and identifiable people.³

3.19 Of concern is that what has occurred in the past, is with us in the present despite the Australian government's ratification and obligations arising through a raft of international treaties.

3.20 The present federal government of Australia, under John Howard as Prime Minister, does not adequately recognise the right of Aboriginal and Torres Strait Islander peoples to self-determination. Mirrar are seriously concerned at the recent announcement by the re-elected Howard government announcing its ongoing support for the development of a second uranium mine (Jabiluka) on Mirrar country despite on-going resistance by the Mirrar people. The Howard government claims the mine is in the best interests of the Northern Territory, and for Indigenous people generally. Aboriginal people, including the Mirrar, have been relegated to the position of second-rate 'stakeholders', outside decision-making processes. This non-consultative imposition represents the antithesis of the right to self-determination by Aboriginal peoples.

3.21 Like many Indigenous peoples throughout the world, the formal recognition of the right of self-determination of Aboriginal peoples in Australia is politically driven, with

³ Lawrence, D. *Kakadu: the making of a national park*, Melbourne University Press, 2000, p.41.

commitments varying from government to government. Australia presently lacks an overall commitment to a framework of sustainable development recognising the benefits of Indigenous autonomy.

- 3.22 The Global Mining Initiative has attempted to address a social charter to reflect corporate citizenship in multinational mining corporations. Representation of this initiative should be made to future workshops regarding Indigenous peoples. A relatively new, though relevant, expert working group has been formed to advise the World Heritage Committee on Indigenous issues – the World Heritage Indigenous Peoples Council of Experts (WHIPCOE). These should be invited to participate in forums such as OHCHR to ensure inclusiveness of international non-government organisations and inter-governmental agencies and coordination between international instruments. The Mining Council and the Institute of Sustainable Development would also be constructive contributors to workshops addressing aspects of the interrelationship between industry, governments and Indigenous Peoples. It is hoped that this workshop will give practical effect to standards which build a meaningful and genuine framework.

4 Mining agreements on Mirrar land

– History of uranium mining and Aboriginal land rights

- 4.1 The history of the treatment of Indigenous peoples is a story of exploitation and exclusion. Wherever colonial powers have wanted to develop their agricultural, fishing, mining or other business interests, scant regard has been shown for indigenous peoples' lives, let alone their rights.⁴ In 1991 the United Nations Secretary General said:

*The abuse of the rights on indigenous peoples is principally a development issue. Indigenous peoples have been and, in fact, [are the] victims of development policies which deprive them of their economic base – land and resources – and they are almost never the beneficiaries.*⁵

⁴ Rees, S. & Wright, S. (Eds) *Human Rights, Corporate Responsibility*, Pluto Press, 2000, p.17.

⁵ Rees, S. & Wright, S. (Eds) *Human Rights, Corporate Responsibility*, p.17.

- 4.2 Such has been the experience of the Mirrar people who have been either excluded from decision-making with regard to mining on their land by amending legislation to remove the right of veto, or pressured into making decisions without sufficiently clear information or translation.
- 4.3 The development of uranium mines in the Alligator Rivers Region of Kakadu began in 1953, and in 1969 Peko Exploration Ltd (acting on behalf of Peko Wallsend and Electrolytic Zinc, together referred to as Peko-Ez) discovered the Ranger orebody by radiometric and ground surveying .⁶
- 4.4 In 1970 Australian Atomic Energy Commission (AAEC) reported that some 60 companies were set to explore for uranium in the Alligator Rivers region.⁷ Discovery of the Narbarlek, Ranger and Koongarra deposits was announced in 1970 and the massive Jabiluka deposits three years later.⁸
- 4.5 The Ranger and Jabiluka deposits are within the traditional lands of the Mirrar. Sacred sites are situated on and within these lands.
- 4.6 In 1972, the Whitlam Government placed a freeze on the issuing of further uranium exploration licences, and sought to install a government owned and controlled uranium industry. The Minister responsible for the Northern Territory told industry at a meeting on 26 January 1973 that “until issues relating to environmental conditions and appropriate safeguards of Aboriginal interests had been resolved, no licences in the area under consideration for the national park would be renewed.”⁹
- 4.7 In February 1973, Justice A.E. Woodward received his commission from the Governor-General to inquire into, “the appropriate means to recognise and establish the traditional rights and interests of Aborigines in and in relation to land.”¹⁰ The Woodward Commission, which subsequently recommended the *Aboriginal Land (Northern Territory) Act 1976* (the Land Rights Act) and outlined its structure, was the Whitlam

⁶ Lawrence, D. *Kakadu: the making of a national park*, p.52.

⁷ Australian Atomic Energy Commission, *Annual Report 1969-70*, Australian Government Publishing Service.

⁸ Cousins, D. & Nieuwenhuysen J., *Aboriginals and the Mining Industry*, 91.

⁹ Grey, T. *Jabiluka: The Battle to Mine Australia's Uranium*, The Text Publishing Company, Melbourne 1994, p.97.

¹⁰ Woodward, A.E. *Aboriginal Land Rights Commission: First Report*, AGPS, Canberra, 1973. p.iii.

government's recognition of the validity of Aboriginal claims to land in the Northern Territory province.

- 4.8 The Land Rights Act commenced operation on 26 January 1977 and has since been amended on a number of occasions.
- 4.9 The Act was historic because it gave Indigenous people in the Northern Territory the right to claim vacant Crown land, and then to determine activities on those lands. It determined the procedures that were to be carried out to allow claims to be made for traditional lands, and procedures for consultation with indigenous people by developers proposing to develop those lands.¹¹
- 4.10 It has been argued that one of the main motivations behind the passage of the *Aboriginal Land Rights (Northern Territory) Act* in the form it took was the discovery of vast uranium riches in the Kakadu region, in particular the negotiations regarding Ranger Uranium Mine.
- 4.11 The main features of the Land Rights Act include:
- immediate transfer of ownership of all reserves (approximately 15% of the NT) as inalienable freehold to Aboriginal people;
 - the requirement that development cannot proceed (or interests be granted) in respect of Aboriginal land (or land under claim) without the consent of traditional Aboriginal owners (Aboriginal objections to mining may be overruled by the Commonwealth in cases of national interest, although this has never occurred) - this provision is often described as a power of 'veto';
 - the provision of funds for traditional owners and community projects derived from royalties generated from mining on Aboriginal land;
 - the provision of comprehensive functions and a representative structure to land councils to provide representation and administrative support to Aboriginal people regarding land issues; and,
 - appropriate and stable funding for land councils derived from mining on Aboriginal land.

- 4.12 A key intention of the original Act was to ensure that traditional owners are fully informed and consulted about any proposed development on Aboriginal land, and to enable them to refuse development if they did not wish it to take place on their traditional lands. Mining companies are able to further propose development after a period of five years from the refusal by traditional owners.
- 4.13 Minerals on Aboriginal land remain the property of the Crown, but Aboriginal consent is normally required before exploration and mining can begin under s.23(3) of the *Aboriginal Land Rights (Northern Territory) Act*. The *Atomic Energy Act 1953* is the legislative basis for mining and the processing of uranium (as a prescribed substance) on the Ranger Project Area.
- 4.14 Under the *Aboriginal Land Rights (Northern Territory) Act* traditional owners are not allowed to negotiate with mining companies directly for consent to use tracts of Aboriginal land for exploration for minerals. Following amendments in 1987, the grant of consent for mineral exploration removes any right of veto over actual mining development.
- 4.15 The Minister has to be satisfied that a proper and full process of consultation and negotiation has taken place between traditional owners and other Aboriginals affected. The Minister is required to be satisfied that informed consent was given by the traditional owners, without duress, before he or she can give consent to any agreement or mining development proposals on Aboriginal land.¹²
- 4.16 The Northern Land Council was created to act as a third party between consulting the traditional owners about a development, and for informing the developer of their reactions and decisions. It is also the legal entity that enters into contracts and agreements with a developer on behalf of the traditional owners.¹³

¹¹ ATSC submission to the Senate Environment, Communications, Information Technology and the Arts Reference Committee (SECITAC) Inquiring into the Jabiluka Mine Project, at para.11.

¹² ATSC submission to the Senate Environment, Communications, Information Technology and the Arts Reference Committee (SECITAC) Inquiring into the Jabiluka Mine Project, p.3.

4.17 The failure to obtain the informed consent from the Mirrar is central to this submission.

– Ranger Uranium Mine – ‘no right of veto’

4.18 The Ranger deposit was discovered in the late 1960s by Peko-Wallsend Ltd and EZ industries Ltd (Peko-EZ), which signed export contracts with the Commonwealth government in 1972 for the supply of Ranger uranium oxide to Japan.

4.19 The Commonwealth government negotiated and signed an agreement (The Lodge Agreement) with the mining Peko-EZ on 28 October 1974 to mine Ranger as a joint venture and pursuant to this agreement committed supply to Japan. It raises questions about the political will to seek informed consent from traditional owners of land when quotas are assured before permission has been granted by Aboriginal people.

4.20 In July 1975, the Ranger Uranium Environmental Inquiry (the Fox Inquiry, after the presiding Commissioner) was commenced. The role of the Fox Inquiry was to determine whether uranium mining should be permitted in the region. ‘Environment’ was given a broad reading, and included social considerations. The Inquiry was charged with the responsibility to report to the Commonwealth government regarding the participation of Australia in the nuclear fuel cycle, the environmental protections required and the issues of social impact affecting Aboriginal people of the region.

4.21 Pre-empting the findings of the Fox Inquiry, on 30 October 1975 the then Minister for Resources and National Development signed a Memorandum of Understanding between Peko, EZ and the Australian Atomic Energy Commission, approving the Ranger project under the *Atomic Energy Act 1953* (Commonwealth legislation), subject to the findings of the Fox Inquiry.

4.22 The Fox Inquiry produced two reports: the First Report delivered on 28 October 1976, and the Second Report delivered on 17 May 1977.

¹³ ATSIIC submission to the Senate Environment, Communications, Information Technology and the Arts Reference Committee (SECITAC) Inquiring into the Jabiluka Mine Project, p.4.

4.23 As the inquiry was held concurrent with the enactment of the *Aboriginal Land Rights (Northern Territory) Act* (under which the Mirrar and other Kakadu traditional owners had made claims to their country) the Government chose to make provision in the *Aboriginal Land Rights (Northern Territory) Act 1976* so that the Fox inquiry could hear the so-called Alligator Rivers Region Stage I land claim:

“if this present Commission [Fox], for the purposes of its Inquiry, makes a finding that a group or groups of Aboriginals are entitled by Aboriginal tradition to the use or occupation of an area of land, the finding is to have effect as if it were a recommendation made to the Minister by the Aboriginal Land Commissioner”.

4.24 The key effect of Fox hearing the land claim was to speed it up. This was naturally in the interests of the Commonwealth, a 50% stakeholder in Ranger. That a government would be patently compromised by conducting an inquiry into whether a mine in which it held 50% equity should proceed and also hear the land claim of Aboriginal people directly affected by that mine, was apparently of no concern to the Australian government.

4.25 The Fox inquiry ultimately delivered a highly cautious verdict that uranium mining should proceed:

The evidence before us shows that the traditional owners of the Ranger site and the Northern Land Council (as now constituted) are opposed to the mining of uranium on that site.....Some Aboriginals had at an earlier stage approved, or at least not disapproved the proposed development, but it seems likely they were not then as fully informed about it as they later became. Traditional consultations had not then taken place and there was a general conviction that opposition was futile. The Aboriginals do not have confidence that their own views will prevail; they feel that uranium mining development is almost certain to take place at Jabiru¹⁴, if not elsewhere in the region as well. They feel that having got so far, the white man is not likely to stop...Having in mind, in particular, the importance to the Aboriginal people of their right to self-

¹⁴ Jabiru township was constructed as an adjunct of the Ranger uranium mine by the Jabiru Town Development Authority (comprising representatives of the government of the Northern Territory province and mining companies). The town accommodates employees of the mine and was intended to accommodate employees of other mines in the local area, including Jabiluka.

determination, it is not in the circumstances possible for us to say that the development would be beneficial to them.

*There can be no compromise with the Aboriginal position; either it is treated at conclusive or it is set aside.....In the end we form the conclusion that their opposition should not be allowed to prevail.*¹⁵

4.26 After prolonged negotiations, and despite opposition from traditional owners of the Ranger Project Area, the Ranger Agreement for uranium mining at Jabiru was concluded between the Commonwealth government and the Northern Land Council in 1978 and the mine became operational in late 1981.

4.27 Aboriginal people did not consent to the Ranger uranium mine. To overcome this opposition the legislation was amended to remove the consent requirement, and an agreement was necessary. Subsection 40(6) of the Act stated “if the land...being known as the Ranger Project Area, becomes Aboriginal land, subsection (1) does not apply to that land.” Subsection (1) provides for Aboriginal veto. If the Northern Land Council failed to secure agreement, the Commonwealth could write the agreement under the arbitration provisions of the Act.

4.28 The decision to legislate around the non-consent to Ranger by Aboriginal people was contrary to the findings of the second Woodward Report which concluded that:

*to deny to Aborigines the right to prevent mining on their land is to deny the reality of their land rights.*¹⁶

4.29 Following amendment to remove the consent provisions, there was no option other than to reach agreement. This placed the Northern Land Council in a difficult position, as noted in an internal memorandum by a legal officer of the Land Council:

.....although the traditional owners of the region and the Northern Land Council have continually objected to mining, it is forced into a position where it must write an

¹⁵ Parliament of the Commonwealth of Australia, *Ranger Uranium Environmental Inquiry: Second Report*, Canberra 1977, p.9. [Emphasis added.]

¹⁶ Parliament of the Commonwealth of Australia, “Aboriginal Land Rights Commission: Second Report, Canberra 1974 at pg.129.

*agreement or else the Government will write the agreement on behalf of the Northern Land Council.*¹⁷

- 4.30 At the time, 'Friends of the Earth' was highly critical of the Ranger and Kakadu agreements, and commented that:

*The sharing powers of the NT [Northern Territory] and Commonwealth Governments, the weaknesses of the terms of the [mining] agreement and the passive role to which the traditional owners and the Northern Land Council were confined combine to give an Agreement which offers little in the way of environmental protection, gives inadequate guarantees of Aboriginal rights and leaves room for substantial changes in its operations... Since setting up the Ranger Inquiry which heard their land claim, the Aboriginal people have received only part of the land they claimed, a National Park whose benefit to them is largely at the discretion of a Commonwealth Government official, and the prospect of a number of uranium mines in what should then be called a controlled disaster zone rather than a National Park.*¹⁸

- 4.31 The terms of the agreement itself provide an indication of the power imbalance during negotiations. The rental payment of \$200,000 AUD per annum is not inflation proofed and over the life of the agreement depreciates, so that today's rent is some 30% of what it would be if linked to inflation (\$661,083.74).¹⁹
- 4.32 The Ranger agreement also contained strict requirements for expenditure of royalties owed to the traditional owners, so that royalty income has substituted service provision and local infrastructure, which the government has an obligation and responsibility to provide and does so elsewhere.
- 4.33 There was such dissatisfaction with the Ranger Agreement by the NLC that from 1985 the Land Council sought to have the agreement declared invalid on the grounds it had been signed under duress, and that the Commonwealth had applied undue political pressure and had acted unconscionably. The NLC dropped its court action in 1993 after

¹⁷ McGill, S. *Northern Land Council' Legal and Strategic Position re: uranium mining*, internal NLC memorandum from legal, 8 February 1978.

¹⁸ Lawrence, *Kakadu*, Melbourne University Press 2000 at pg.105.

¹⁹ Advice, Australian Bureau of Statistics, November 2001.

the High Court rejected its application to inspect confidential Commonwealth Cabinet documents.

– Jabiluka – duress and misrepresentation

4.34 In 1971, uranium was first discovered by Howe Australia Pty Ltd (acting on behalf of Pancontinental) at what was to become the Jabiluka mineral lease. In 1973, Pancontinental discovered the large Jabiluka 2 deposit. In 1982, the mining agreement was signed between Pancontinental and the Northern Land Council. Jabiluka is the second uranium mineral lease on Mirrar land.

4.35 Mirrar assert they were prevented from making informed decisions regarding the Jabiluka agreement to mine their land and desecrate their sacred sites, which raises the issue of misrepresentation and duress.

4.36 To this end, Mirrar support the recommendation of the United Nations Land Study entitled “Indigenous Peoples and their Relationship to Land (the ‘UN Land Study’) that:

*States and intergovernmental bodies, including organs and bodies of the United Nations system should identify means for meeting the serious needs for training, education and financial and technical resources so that indigenous peoples may enter negotiation processes fully informed and technically equipped with respect to the whole spectrum of implications of land rights negotiations. Training and education should also figure prominently in agreements negotiated.*²⁰

4.37 Whilst the consent of the traditional owners was legally required for the Jabiluka uranium mine, it was obtained under unusual circumstances that require further investigation. It took some 18 months to obtain consent from Aboriginal people who spoke little English, in comparison to other more recent agreements that have taken more than four times as long.

²⁰ E/CN.4/Sub.2/2001/21at paragraph 156

- 4.38 During the early stages of the negotiations, the mining company Pancontinental sought to negotiate directly with the traditional owners, despite instruction from the NLC that ‘Pancon’ ensure all communications be conducted through the land council. The mining company decided to proceed regardless, choosing to “bypass the NLC, risking their wrath” and “went straight to the people” it “thought were the traditional owners of the land. Their Chief was Toby Gangali.”²¹
- 4.39 At this time, an Aboriginal land claim was in the process of determination (Alligator Rivers Stage II), and included the Jabiluka site. Hearings commenced on 24 October 1980. As traditional owners of part of the claim area, the Mirrar were party to this land claim.
- 4.40 Pancon indicated it would take action against the claim before the Aboriginal Land Commissioner, arguing ‘detriment’. This claim of detriment was alleged by the Northern Land Council to threaten the success of the land Alligator Rivers Stage II land claim. The proposed detriment action was discussed at a large meeting in January 1981 at Djarr Djarr Billabong amongst approximately 200 Aboriginal people and NLC representatives
- 4.41 The NLC told Aboriginal people at the meeting that Pancon’s claim of detriment would jeopardize the land claim and encouraged Aboriginal representatives to talk to the mining company. An NLC representative told the meeting:

*It’s certainly not a step that says yes or no to mining.....It’s a tactic that we have got to use in the land claim, because it gets Pancon off our backs, it takes them out of it, and it makes it very hard for Peko to say these Aboriginal people are going to give us a very hard time.*²²

²¹ Grey, T. *Jabiluka: The Battle to Mine Australia’s Uranium*, p.210.

²² Northern Land Council, transcript, Djarr Djarr meeting, 27 January 1981.

- 4.42 The NLC conveyed approval for the commencement of “negotiations with Pancontinental Mining Limited on all aspects of the Jabiluka project”²³ and there was no turning back.
- 4.43 It became apparent after this meeting that the Northern Land Council and the traditional owners had very different understandings of what the communication with Pancon was about. The traditional owners thought (or were told) the meetings were to be about the Alligator Rivers Stage II land claim. The Land Council, however, was looking for a trade-off between a mining agreement and the land claim. According to Jacob Nayinggul, who was a translator for the NLC in its consultations with traditional owners of Jabiluka in 1981:

*No one understood....even I tried to interpret what Land Council lawyer told me. I think it didn't come straight out to main traditional owner. Far as I know, he kept saying no. They not agree to mining. No.*²⁴

- 4.44 The Mirrar submission to the UNESCO World Heritage Commission Mission to Kakadu in 1998 provided a blunt analysis:

*Against a backdrop of deceit, distortions and outright lies the traditional owners were finally compelled to sign the mining agreement on the mistaken belief that, just like at Ranger, they would be denied gaining balanda recognition of their traditional ownership under the Land Rights Act unless they approved the Jabiluka mine.*²⁵

- 4.45 Mirrar, supported by the Aboriginal and Torres Strait Islander Commission (Australia's peak Indigenous body), are of the view that there are serious questions that need to be answered regarding the whole consents process beginning with the early 1970s discoveries and applications by mining companies, the degree of haste and pressure to secure consent from traditional owners, right through to the current situation - a

²³ Teitzel, P. Letter from NLC Legal Officer to Messrs Perkins, Stevenson and Linton, Solicitors to Pancontinental, 28 January 1981.

²⁴ Frontline Films, *Jabiluka*, 1997.

²⁵ Gundjehmi Aboriginal Corporation, *Mirrar Living Tradition in Danger*, Submission to the World Heritage Committee Mission to Kakadu, October 1998 at pg.26.

situation that has yet again thrust Australia into the forefront of international criticism in respect of its treatment of Aboriginal people.²⁶

4.46 Essentially consent was obtained under duress, through false promises and thinly veiled threats (of not being granted land title) and creating confusion as to what the agreement actually meant. The Jabiluka mining agreement was signed in July 1982.

4.47 Toby Gangali's summed up the powerlessness and frustration of Aboriginal people during a speech at Red Lily lagoon during the Jabiluka negotiations:

*First you say it won't kill us, then you say you'll give us plenty of money, then you say if we refuse we'll pass it on the basis of the national interest clause. To hell with the meetings. Give it to them! I'm entitled to die first as a sacrifice. The Europeans are oppressing us. I'll be the first to die for this [cause].*²⁷

4.48 Mirrar urge governments to adhere to the recommendation of the UN Land Study that:

*Governments, in consultation with indigenous peoples, should establish fair procedures for reviewing, and taking corrective action in, situations in which indigenous land or resources have been taken or rights to them extinguished through past processes which are claimed or are found to be fundamentally unfair or discriminatory.*²⁸

4.49 From 1995, the Mirrar have disputed the 1982 Jabiluka mining agreement, on the basis it was entered into under extreme duress and that the Commonwealth and its agencies and the mining company Pancon acted in an unconscionable manner. A variety of domestic legal challenges (largely technical in nature) have been mounted, to date the Australian legal system has failed the Mirrar people.

4.50 A grassroots national and international campaign was commenced from 1996 to highlight Jabiluka and the threats it poses to both the environment of Kakadu and the living cultural tradition of the Mirrar people. From March to October 1998 some 5,000

²⁶ ATSIC submission to the Senate Environment, Communications, Information Technology and the Arts Reference Committee (SECITAC) Inquiring into the Jabiluka Mine Project

²⁷ Tatz, C. *Aborigines & Uranium and other Essays*, Heinemann Educational Australia, 1982, p.137.

people travelled from across Australia and the world to blockade the Jabiluka mine site in support of the Mirrar.

4.51 In 1997, the Mirrar took their struggle to the UNESCO World Heritage Committee, seeking to have Kakadu National Park inscribed on the List of World Heritage Properties In Danger on the basis of threats posed by Jabiluka.

4.52 In January 1998 the European Parliament addressed the Jabiluka uranium mine and called:

*on the Australian Government to respect the status of the Kakadu National Park as a World Heritage site... [and] not to proceed with the project.*²⁹

4.53 In December 1998, following persistent lobbying by the Mirrar via Gundjehmi Aboriginal Corporation, a high-level UNESCO WHC Mission visited Kakadu to assess the situation first-hand. In its report, the Mission 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.*³⁰

4.54 Despite this finding, the Australian Government steadfastly went ahead with the Jabiluka project, allowing construction to continue until September 1999. This continued construction completely rejected the request by the World Heritage Committee in December 1998 that construction be voluntarily suspended.

4.55 Following receipt of the Mission report the World Heritage Committee considered inscribing Kakadu on the List of World Heritage Properties In Danger at its Third Extraordinary Session in July 1999.

²⁸ E/CN.4/Sub.2/2001/21 at paragraph 153.

²⁹ European Parliament resolution, 15 January 1998.

4.56 In July 1999, the Environment Committee of the Australian Senate delivered the report of its inquiry into the Jabiluka mine. The inquiry found that the Jabiluka mine threatens the natural and cultural values of Kakadu National Park and recommended:

*... that the Jabiluka uranium mine should not proceed because it is irreconcilable with the outstanding natural and cultural values of Kakadu National Park.*³¹

– Conflicts of Interest

4.57 There have been significant conflicts of interest amongst parties to the Ranger and Jabiluka mining agreements.

4.58 Under the Ranger agreement the Federal Government served to gain commercially from uranium mining on Mirrar country. On 29 October 1973 Whitlam stated his intention for the uranium industry to be fully Australian owned. The Federal government held 50% of the equity at Ranger and met 72.5% of its capital costs. “There is little doubt that as joint venturer the Commonwealth was in a conflict of interest situation in these negotiations.”³²

4.59 There was a great deal of input by the federal government into the 1982 Agreement for the Jabiluka mine. The Agreement stipulates the manner that 80% of funds received by the royalty receiving entity, Djabulukgu Association, shall be spent. It has been said that “in many ways this agreement acts as an indicator of the current Commonwealth policy with respect to payment of royalties to Aborigines.”³³

4.60 The Northern Land Council (NLC), the agency with statutory authority and responsibility to negotiate on behalf of the Mirrar, is a beneficiary of mining royalties derived from mining agreements. Under the land rights legislation, 40% of statutory royalties have to be paid to land councils and it is at the Minister’s discretion what

³⁰ UNESCO World Heritage Committee, Report on the Mission to Kakadu National Park, 26 October to 1 November 1998, Recommendation 1.

³¹ Australian Senate, *Jabiluka: the undermining of process*, Report of the Environment, Communications, Information Technology and the Arts Reference Committee Inquiry into the Jabiluka Mine Project, p. 128.

³² Altman, J.C. *Aborigines and Mining Royalties in the Northern Territory*, Australian Institute of Aboriginal Studies, Canberra 1983, p.56.

³³ Altman, J.C. *Aborigines and Mining Royalties in the Northern Territory*, p.51.

proportion of these funds can be used for land councils' budgets. Also, any surplus funds must be distributed or returned to the Commonwealth Government, so there is no possibility for land councils to accumulate funds, and to increase their autonomy.

4.61 "The NLC's infrastructure, staffing and other costs are met through royalty payments. The future of the organisation depends on these payments and there could be a potential conflict of interest between representing traditional owner's needs and the Land Council's need for financial resources to ensure its survival."³⁴

4.62 The Chairman of the Australian Institute of Aboriginal Studies project examining the social impact of uranium mining in the Northern Territory wrote in 1982:

*In a nutshell, Pancontinental has paid more than \$300 000 to the NLC for the NLC to employ a negotiating team to negotiate with Pancontinental....Neither the NLC nor Pancon emerges well from placing themselves in a situation where the NLC appears – however incorrectly in fact – to be an agent of the principal it is engaging with.*³⁵

5 Benefit Sharing and Compensation

5.1 The Mirrar contend that benefits and compensation arising from mining on their traditional lands has been patently inadequate. This inadequacy is a direct result of the fact that beneficiaries of mining prepared the mining agreements, those very parties (the Commonwealth and its agencies) tasked with representing the interests of the Mirrar. The negotiated agreement and economic income for Aboriginal interests was recognized as poor at the time of settlement.

5.2 Article 2 of the International Covenant on Economic, Social and Cultural Rights, and the International Covenant on Civil and Political Rights, to which Australia has been a signatory since 1976, states that:

³⁴ Banerjee, B. 'Whose Land is it Anyway? National Interest, Indigenous Stakeholders and Colonial Discourses: The Case of the Jabiluka Uranium Mine', *Organization & Environment*, 13 (1), March 2000.

³⁵ Tatz, C. *Aborigines and Uranium and other Essays*, p.185.

All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence.

- 5.3 The principle of mutual benefit has not underpinned the exploitation of natural resources on Mirrar land, nor are the Mirrar free to dispose of their natural wealth and resources.
- 5.4 It has been argued that the main aim of restrictions on the spending of mining royalty monies (such as those in the 1982 Jabiluka Agreement) is to ensure that individuals cannot accumulate or monopolise mining monies. Aboriginal Associations are answerable to the Northern Land Council (representing traditional owners pursuant to the Land Rights Act) acting as a vehicle of government policy.³⁶
- 5.5 For Jabiluka, both the mining company and the NLC had to accept certain conditions in the agreement prior to the Minister for Aboriginal Affairs approving the agreement. Firstly, there was the requirement that a significant portion of funds be expended in a certain manner. Secondly, the Aboriginal organisations in receipt of monies for these purposes are required to submit annual budgets to the NLC to ensure expenditure is in accordance with agreement.³⁷
- 5.6 Of significant concern to the Mirrar is the substitution of government funding for basic infrastructure and service provision which is an obligatory function of government to citizens. The types of community expenditures that are required in the Ranger agreement has resulted in both State and federal governments renegeing on their funding of Aboriginal communities.³⁸
- 5.7 The sorts of infrastructure and services that are absent in Kakadu are usually taken for granted by other Australians being either delivered by State, Territory and Commonwealth governments or contracted to the private sector. It does not appear just

³⁶ Altman, J.C. *Aborigines and Mining Royalties in the Northern Territory*, p.66.

³⁷ J.C. Altman, *Aborigines and Mining Royalties in the Northern Territory*, p.65.

³⁸ J.C. Altman, *Aborigines and Mining Royalties in the Northern Territory*, p.66.

and fair that income for loss of access to and desecration of traditional land and significant social upheaval is required to be used to provide these basic essential services. This is clearly a case of the substitution of government funding.

5.8 The specific purposes for which 80% of Jabiluka royalties must fund include:

- Funding of Aboriginal business;
- Aboriginal housing and ancillary services;
- Protection of Aboriginal culture and provision of endowing Aboriginal museums and Aboriginal study groups;
- Educational scholarships;
- Recreation and sporting facilities for Aboriginal people;
- The study of utilisation of Aboriginal land and the land aspirations of Aboriginal people;
- Provision of community amenities such as libraries, community halls;
- Provision of basic utilities (water, sewerage, power);
- Purchase of land within the Northern Territory or elsewhere;
- Assisting in the funding Aboriginal Parks and Wildlife Service to operate in the Northern Territory;
- Investment of funds in an investment fund to provide capital and income during and upon expiration of mining;
- Investment of tourism and acquisition of tourist facilities within the Northern Territory;
- Assisting in the development of outstations;
- Provision of a satisfactory transportation system;
- Provision of a communications system;
- Administration costs of Association;
- Provision of group health insurance and hospital scheme for all Aboriginals affected; and,
- Any community purposes for the benefit of Aboriginal people.

5.9 The UN Land Study recommended a number of Fundamental Guiding Principles regarding indigenous peoples' lands, territories and resources. In addressing the issue of non-discrimination, the Land Study recommends:

*All State and international actions and legal and administrative measures in regard to indigenous lands, territories and resources must be non-discriminatory in their application and effect and must not subject indigenous peoples or individuals to any disadvantage or adverse consequence as compared to non-indigenous persons in the State.*³⁹

- 5.10 No other community in Australia is required to consent though application of duress to a major uranium mine in immediate vicinity of their living areas so that they can access a hospital, or send their children to school or have a roof over their heads. These basic human rights are enjoyed by mainstream Australia without an attendant major sacrifice of existing rights or interests.

6 Cultural Rights & Specific Cultural Impacts

- 6.1 Australia ratified the International Covenant on Economic, Social and Cultural Rights (ICESCR) in 1976. Under Article 15 of the ICESCR States Parties are to recognize the right of everyone:

To take part in cultural life;

- 6.2 This is further clarified in the International Covenant on Civil and Political Rights which Australia ratified in 1976. Article 27 goes further to stipulate that not only is there a right of individuals to take part in cultural life but a collective aspect of such right:

In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.

³⁹ E/CN.4/Sub.2/2001/21 at paragraph 144

- 6.3 The capacity of the Mirrar to take part in cultural life, integral to the World Heritage cultural values of Kakadu National Park, is hindered by the on-going mining activities on their land. In particular:
- Mirrar are prevented from accessing sites of significance;
 - Mirrar sacred sites are being desecrated;
 - Mirrar are excluded from effective decision-making over the interpretation of what is significant and integral to their living tradition;
 - The social impacts outlined in this submission have had serious implications for the enjoyment of cultural life and tradition by Mirrar.
- 6.4 The Mirrar and other Aboriginal peoples have hunted, gathered, held ceremonies, lived and died at places all over the Mirrar estate, including the Jabiluka Mineral Lease. The Australian Government believed one of the archaeological sites inside the Jabiluka Mineral Lease (Malakanaja II) to be so important that it specifically referred to it when seeking inscription of Kakadu National Park on the World Heritage List.⁴⁰
- 6.5 The enclave boundaries of the Jabiluka and Ranger Mineral Leases are not recognised by Aboriginal law and custom. The Mirrar living tradition exists both inside and outside the non-Aboriginal borders of the Jabiluka Mineral Lease. It would be nonsense to suggest that Mirrar living tradition is intrinsically less significant within the comparatively recent borders of the Jabiluka Mineral Lease than it is in the surrounding World Heritage Area.
- 6.6 It would be equally nonsensical to suggest that impacts associated with activities on the Jabiluka Mineral Lease that affect the Mirrar do not impact on the cultural qualities for which Kakadu has been inscribed as a World Heritage Area. The combined cultural and natural criteria used for listing Kakadu as a World Heritage property are unusual. There are only 19 other similar ‘mixed properties’ listed out of 582 World Heritage properties. Australia, as a party to the International Convention for the Protection of the World Cultural and Natural Heritage, must ensure that the living culture is not compromised.

⁴⁰ Gundjehmi Aboriginal Corporation, *Mirrar Living Tradition in Danger*, p.14.

- 6.7 Mirrar submit that serious physical and cultural harm can result from an abrogation of Australia's international obligations in this regard. Traditional owners have a paramount duty to protect their land under their traditional law. This needs greater recognition.⁴¹
- 6.8 The Mirrar and other Aboriginal peoples affected by the Jabiluka mine believe that culturally significant sites will be damaged by the construction of the mine. Damage to these spiritual sites not only destroys living tradition from a non-Indigenous anthropological perspective – the Mirrar believe that damage to these sites will have actual cataclysmic consequences. Particular Traditional Owners and Custodians should only explain descriptions of these consequences to particular people at particular times.⁴²
- 6.9 Even after rehabilitation and incorporation into Kakadu National Park, Mirrar are less likely to go to the area of the Jabiluka Mineral Lease because it is land that has been taken from them and damaged in a way that makes the land dangerous. In this way the mine effectively prevents access to a much wider area than is demarcated.
- 6.10 Destruction or restricted access to spiritual sites as a result of mining projects contributes to disempowerment and a general pessimism amongst the Aboriginal people affected, expressed in the defeatist notion that complete loss of culture is imminent. This historical psychological and sociological impact is one of the key reasons for abandonment of traditional living culture by many Aboriginal people and is recognised in symptoms such as alcoholism and other socio-economic indicators of cultural decline.
- 6.11 This loss of cultural significance extends to all aspects of Mirrar living tradition, including food collection, ceremony, customary law, spiritual connection and socio-political systems.

⁴¹ ATSIIC submission to the Senate Environment, Communications, Information Technology and the Arts Reference Committee (SECITAC) Inquiring into the Jabiluka Mine Project, at paragraph 11.

⁴² Gundjehmi Aboriginal Corporation, *Mirrar Living Tradition in Danger*, p.15.

6.12 The Mirrar do not argue that mining alone is impacting on living tradition – the Mirrar argue that mining and its associated social, economic and political impacts are the single greatest impact and that an additional mine, Jabiluka, will push Mirrar culture to the point of cultural exhaustion and irreparable damage.

6.13 The draft Declaration on the Rights of Indigenous peoples says at article 7:

Indigenous peoples have the right to practise and revive their cultural traditions. This includes the rights to define, maintain, develop and protect the past, present and future manifestations of their cultures, such as archaeological and historical sites and structures, artifacts, designs, ceremonies, visual and performing arts, and literature, as well as the right to the restitution and repatriation of cultural, religious, and spiritual property removed without their free and informed consent or in violation of their own laws.

– Control over decision-making

6.14 The living tradition of Mirrar is in a state of crisis. Mirrar consider that mining is the single greatest factor endangering their living tradition. Mirrar and other Aboriginal people in the region have continually expressed this viewpoint at every available opportunity. For example:

“I mean mining worry me, it wrecks the place – look at Jabiru. I seen it, I said that’s enough...I don’t like it, too much trouble, drunk, drunk, kill, die...I am finished mining.”

(Bill Najidji, Bunidj Clan, 1994, Warradjan Cultural Research notes)

“If we allow it to happen, Jabiru will be a bigger town..if we don’t fight it will get bigger and bigger....some people are fighting against it. I am against it too. The old people who are said to have signed the Agreement have gone. We have different ideas. I agree with Yvonne [Margarula] that we should look if there is a way to change that Agreement. Mining helped our Associations, but before mining people got on better, they ate more bush tucker [food] and hunted more instead of going to Social Club to

drink. When I was young, I went with my family to ceremony....Nowadays it doesn't happen. They are forgetting who they are. They are losing their culture."

(Jonathon Nadji, Bunidj Clan, 1994, Warradjan Cultural Research Centre notes)

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

(Yvonne Margarula, Mirrar Clan & Jacob Nayinggul, Manilagarr Clan, 1996, Gundjehmi Aboriginal Corporation Public Statement.)

6.15 However, it seems that non-Aboriginal people largely ignore Aboriginal views on Aboriginal society. Just as noted by Fox some 25 years ago, Aboriginal people have formed the view that it does not matter what they say – these consultations will only eventuate in non-Aboriginal people doing what they want to do anyway.

6.16 Participation in and enjoyment of cultural life by the Mirrar people hinges upon control over decisions directly impacting upon their living tradition. Such living tradition necessarily includes management practices of traditional Aboriginal lands.

6.17 The UN Land Study has recommended that:

*Indigenous peoples should participate in decision-making and policy-making regarding land, resources and development at the international, regional, national and local levels.*⁴³

All State and international measures that may affect indigenous lands, territories and resources, even indirectly, must provide for the full and direct participation of all affected indigenous peoples in the decision-making processes.

6.18 The Human Rights Committee in considering Australia's periodic reports in 2000 expressed concern at the regressive policy of the Australian conservative Howard government to reject the right to self-determination of Indigenous peoples. The

⁴³ E/CN.4/Sub.2/2001/21 at paragraph 162.

Committee made the following remarks and recommendation pursuant to the Australian governments periodic report under the ICCPR last year, a treaty it voluntarily ratified in 1976:

With respect to article 1 of the Covenant, the Committee takes note of the explanation given by the delegation that rather than the term “self-determination” the Government of the State party prefers terms such as “self-management” and “self-empowerment” to express domestically the principle of indigenous peoples exercising meaningful control over their affairs. The Committee is concerned that sufficient action has not been taken in that regard.

The State party should take the necessary steps in order to secure for the indigenous inhabitants a stronger role in decision-making over their traditional lands and natural resources (article 1, para 2).⁴⁴

– Consultation and Interpretation of Cultural Significance

- 6.19 Mirrar are concerned by the external process of determining and interpreting sites of cultural significance integral to their living tradition.
- 6.20 The Mirrar believe that culturally significant sites will be damaged by construction of the Jabiluka uranium mine. Mirrar believe there are a number of sites inter-linked throughout this area. The interconnected sites are collectively referred to as Boyweg- Almodj sacred sites complex
- 6.21 Doubt has been cast by non-Aboriginal parties to the mining agreement about the significance and interconnectedness of this sacred site complex surrounding and within the Jabiluka Mineral Lease, because this interconnectedness was brought to the fore after the 1982 mining agreement was signed.
- 6.22 This matter was dealt with from 1972 to 1974 by the Alligator Rivers Region Fact Finding Study commissioned prior to the Fox inquiry, conducted during the same time

⁴⁴ CCPR/CO/69/AUS at paragraph 9.

as the Woodward Commission. The study found that information about sacred sites was always difficult to obtain and then it would only come over a long period of time.

6.23 In relation to sacred sites, it has been stated that:

European legal agreements assume the disclosure of all relevant information. Yet Aboriginal custodians may withhold secret cultural information because much esoteric data normally is revealed only to appropriate clan elders upon ritual occasions. Awareness that ceremonial pathways of Dreaming ancestors or some adjacent dangerous sacred site may be impacted upon by proposed development may only dawn later...

*A further complication is that those persons standing in a custodial role to Dreaming localities and stories may place themselves or their clan in danger by divulging information to inappropriate persons. So there exists a reluctance amongst elders (who alone are entitled to divulge information) to disclose all their knowledge to Europeans...To ignore these realities of Aboriginal custodianship and to assume that elders act like Europeans in legal matters is to place undue pressure on them.*⁴⁵

6.24 The Boyweg-Almudj sacred sites complex is a ‘dreaming’ tract that runs through the Jabiluka mineral lease. There is doubt cast by the mining company and Commonwealth Government about the interconnectedness of the individual sites mapped during the course of the negotiating the Jabiluka agreement.

6.25 There is also an assertion by government and ERA that the area of cultural ‘significance’ does not extend below the topsoil into the terra-forma beneath, and that mining sub-surface minerals will not desecrate the Boyweg-Almudj sacred sites complex. The notion that such a sacred site complex has no underground manifestation is patently nonsense, contradicts the findings of a variety of anthropological reports and ignores the testimony of the Mirrar senior traditional owner, Yvonne Margarula.

⁴⁵ Mulvaney, D.J. “The Landscape of the Aboriginal Imagination and its Heritage Significance”, Unpublished Paper, September, 1998.

– Cultural heritage protection

- 6.26 In its August 1997 *Environment Assessment Report: Proposal to Extract, Process and Export Uranium from Jabiluka Orebody no 2*, the Commonwealth environment department, Environment Australia, 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 construction commencing.” Since its initial recommendation the Mirrar have opposed this process, which would see culturally sensitive information provided to the mining proponent in order for it to develop a ‘management’ plan prior to construction.
- 6.27 The Mirrar maintain that sites of cultural significance cannot be ‘managed’ during the construction and operation of a mine that would destroy the fundamental integrity of such sites.
- 6.28 It is deception to propose the management of sacred sites while desecration is set to take place. It is double-speak to talk of managing sacred sites while destroying them. Mirrar stress that culturally significant sites must be protected, not ‘managed’ as part of a mining project. This fundamental point of difference between the Australian Government and the Mirrar has dogged the cultural heritage management plan from its inception.
- 6.29 The threats to the Mirrar living tradition, including the Boyweg-Almudj sacred sites complex, were brought before an extraordinary session of the UNESCO World Heritage Committee in July 1999. The World Heritage Committee convened for the purpose of examining the threats posed by Jabiluka to the World Heritage values of Kakadu National Park and specifically the living cultural tradition of Mirrar that is under threat by mining development and ‘in danger’.
- 6.30 The World Heritage Committee resolved not to inscribe Kakadu National Park on the List of World Heritage Properties in Danger and instead recommended the Australian Government undertake a range of remedial measures, including a cultural mapping exercise to audit sacred sites before evaluating the impact of the mine.

- 6.31 In February 2000, the Australian Government formally proposed the Mirrar join a reference group that “would assist ERA in developing the Plan”. The group would comprise traditional owners and site custodians, the Northern Land Council, the Northern Territory Aboriginal Areas Protection Authority, ERA and Environment Australia.⁴⁶ Such a reference group process, tailored by the Australian Government for ERA, is exactly the type of forum the Mirrar oppose.
- 6.32 Mirrar submit that cultural mapping exercises, where necessary to establish the threat of mining to their living tradition, must be controlled by the peoples whose very existence and identity is being documented. This is a significant element of their right to enjoyment of cultural life under the ICCPR, and in accordance with their living tradition.

*It is contrary to normal Aboriginal practice to disclose the whereabouts of sacred sites to strangers.*⁴⁷

- 6.33 Mirrar assert the need for cultural mapping exercises to be conducted independent of government, and refer to the United Nations Land Study which says:

*Governments are encouraged to consider the establishment and use of impartial mechanisms, including international mechanisms, to oversee and facilitate fair and equitable resolutions of indigenous land and resource claims and the implementation of land agreements.*⁴⁸

– Trespass on Traditional Land⁴⁹

- 6.34 Mirrar believe the enjoyment of cultural life includes the role of the traditional owners looking after country and defending their lands. As mentioned above the Jabiluka enclave includes a sacred site culturally significant to the Mirrar, and dissects a string of interconnected sites that run through the topography.

⁴⁶ Letter, Senator Robert Hill to Yvonne Margarula, 27 February 2000.

⁴⁷ Woodward, A.E. *Aboriginal Land Rights Commission: Second Report*, AGPS, Canberra, 1974, p.101.

⁴⁸ E/CN.4/Sub.2/2001/21 at paragraph 152.

⁴⁹ Margarula v Rose [2000] NTCA 12 (16 November 2000), for decision see <http://www.austlii.edu.au/cgi-bin/disp.pl/au/cases/nt/NTCA/2000/12.html?query=%7e+margarula>

- 6.35 When the Senior Traditional Owner of the Jabiluka enclave, Yvonne Margarula, exercised her right to access the Jabiluka mineral lease on 1 September 1998 she was arrested for trespass. She had “...trespassed unlawfully on enclosed premises, namely a large storage container owned by Energy Resources of Australia.”
- 6.36 The senior traditional owner was objecting to the construction of fences within the compound that restricted her access pursuant to s.71 of the Land Rights Act, alleged to be in contravention with the terms of the mineral lease agreement.
- 6.37 Section 71 of the *Aboriginal Land Rights (Northern Territory) Act 1976* provides:
- (1) Subject to this section, an Aboriginal or group of Aborigines is entitled to enter upon Aboriginal land and use or occupy that land to the extent that that entry, occupation or use is in accordance with Aboriginal tradition governing the rights of that Aboriginal or group of Aborigines with respect to that land, whether or not those rights are qualified as to place, time, circumstances, purpose, permission or any other factor.*
- 6.38 The right of access to defend and occupy traditional lands pursuant to s.71 of the Land Rights Act was quashed with a spurious legal argument relating to fixtures and chattels, and intent. That is, because the defendant was standing on a chattel owned by ERA, and knew she may be arrested. Ms Margarula was charged with trespass even though the court was satisfied that the storage container upon which Ms Margarula was found to have trespassed was situated upon Aboriginal land and that she is the Senior Traditional Owner of that Aboriginal land.
- 6.39 In the view of the court, Yvonne Margarula did not enter the fenced area to exercise her cultural tradition to defend country in the enjoyment and exercise of her cultural rights. She was simply trespassing and sentenced accordingly
- 6.40 The economic power of institutions and their activities on the estate of the Mirrar are of continuing concern. Substantial economic outcome is derived from economic activity

other than mining to which the Mirrar have little access. The Mirrar have remained disadvantaged through the poor revision of lease agreements regarding Kakadu National Park. There is presently no statutory ability available to traditional owners to trigger renegotiation of leases, other than a confrontational process of lease termination.

7 Jurisdictional Issues

7.1 Mirrar have certain legal rights to land, and these rights are recognised through the *Aboriginal Land Rights (Northern Territory) Act 1976* and the *Native Title Act 1993*.

Mirrar rights and interests and their ability to carry out their obligations and responsibilities to country and people are constrained by:

- the jurisdictions exercised on their country by a range of other organisations and agencies;
- imposed developments on their land including the Ranger mine, and the town of Jabiru;
- that the use of their resources derived from the exploitation of their land is outside their control;
- the limited recognition of Mirrar authority by the organisations with activities on Mirrar land;
- threats of further imposed development imposed by Government on Mirrar land, including the Jabiluka project and further development and expansion of the town of Jabiru.

7.2 The various government and private organisations in the region are on Mirrar country solely because the Government has said they will be here. While the Mirrar understand the Government has certain obligations such as World Heritage protection and the monitoring of uranium, it must be understood that Mirrar have equally serious obligations and responsibilities that predate the laws and powers of those organisations that exercise jurisdiction over Mirrar country.

7.3 While the Northern Land Council is statutorily tasked to represent the Mirrar people in all matters, its historic and present stance on the Jabiluka mine completely undermines its integrity as a representative body. Yet the NLC is the legally recognised representative of the Mirrar, and as such participates on behalf of the Mirrar in all

regional decision-making forums. This is despite the Land Council's repeatedly stated support of the 1982 agreement and its virulent support for the Jabiluka project.

7.4 Of particular concern recently to the Mirrar is the persistence of the NLC in suggesting that the so-called Ranger Mill Alternative for the Jabiluka mine (under which Jabiluka uranium ore would be transported some 22 km to the existing Ranger milling facilities) is the best means of rehabilitating the Ranger site. In other words, to achieve the best possible environmental outcome at the 25 year-old Ranger mine, the Mirrar must consent to Jabiluka going ahead. Persistent suggestions to this effect are not only tantamount to duress, they are also founded on a premise hotly disputed by independent scientists.

7.5 The Office of the Supervising Scientist was established under the *Environment Protection (Alligator Rivers Region) Act 1978* (Commonwealth legislation) as a result of specific recommendations of the Fox Report. The stated primary role of the Supervising Scientist is:

*"... to ensure, through research, assessment and the provision of technical advice, that the environment of the Alligator Rivers Region is protected from the effects of uranium mining to the very high standard required by Commonwealth Government and the Australian people."*⁵⁰

7.6 The Supervising Scientist, as an agency of the Commonwealth Government, has largely sanctioned the environmental assessments and actions of Energy Resources of Australia at both the Ranger and Jabiluka mine sites. The Mirrar have raised concerns regarding the inadequacy of resources available to the scientific agency and the lack of independent data available for analysis.

7.7 An example of this came in October 1998 when the World Heritage Committee, following persistent lobbying by the Mirrar, directed that an independent scientific panel of the International Council of Science (ICSU) prepare an assessment of the

⁵⁰ Supervising Scientist 2000. *Annual Report 1999-2000*. Supervising Scientist, Darwin, at p.2.

Jabiluka mine proposal. While this proposal had received the cautious support of the Supervising Scientist, the ICSU panel identified a broad range of issues of scientific uncertainty. The panel made 17 principal recommendations to address issues, “which needed additional analysis or clarification”.⁵¹ The panel commenced a dialogue with the Supervising Scientist that continued over a two-year period and resulted in significant changes to the Supervising Scientist’s analyses.

7.8 The ICSU panel’s recommendations included the establishment of an independent scientific advisory committee. Unfortunately, the Supervising Scientist and the Commonwealth Minister for the Environment and Heritage chose to simply reconstitute the existing Alligator Rivers Region Technical Committee with the appointment of government and private sector scientists associated with the uranium industry. The Mirrar may attend meetings of the Committee only as observers and only address issues previously canvassed by the Committee. The Northern Land Council is tasked with representing Mirrar interests.

7.9 The Mirrar, once again, remain isolated from the decision-making processes affecting their traditional country. For representation as such forums as the Alligator Rivers Region Technical Committee they must rely solely on a Commonwealth agency, the NLC, that has repeatedly affirmed its support for a mining agreement contested by the Mirrar.

It is important to note that the NLC will continue to honour the 1982 Agreement to which it is contractually bound and that we remain satisfied that at the time of the 1982 Agreement the traditional Aboriginal owners (Mirrar Gundjeihmi) and relevant Aboriginal people affected by the project had given their informed approval for the project to proceed.⁵²

7.10 The July 1999 report of the Australian Senate Environment Committee addressed the issue of the Supervising Scientist lack of independence from the (currently) pro-Jabiluka Executive and recommended that:

⁵¹ Independent Scientific Panel of International Council of Science, Report September 2000, at p.1.

⁵² Northern Land Council, *Reply to the Australian Government Response to the UNESCO Mission Report*, April 1999, p.2.

*“... 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.”*⁵³

7.11 In addressing the entire approvals process for Jabiluka, the Senate inquiry revealed the extent that the Commonwealth government had influenced the Office of the Supervising Scientist, which had received direction from and advised the Commonwealth Minister for the Environment and Heritage:

“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,

⁵³ Australian Senate, *Jabiluka: the undermining of process*, Report of the Environment, Communications, Information Technology and the Arts Reference Committee Inquiry into the Jabiluka Mine Project, at Recommendation 7.

*radiological protection, project design and cultural heritage protection remained unresolved.”*⁵⁴

- 7.12 To date, the most virulent supporter of the proposed Jabiluka development has been the Northern Territory Government, whose agency the Department of Business, Industry and Resource Development, is the regulator of the mine. The Northern Territory Government would be a direct beneficiary of monies generated by the Jabiluka mine. The inaugural election recently of a less conservative Northern Territory government (Labor Party) may lead to some changes in what has essentially been an organisation strongly promoting the Jabiluka mine.
- 7.13 As the Northern Territory Government is the mine regulator, the Mirrar hold little hope that adequately independent regulation is taking place. This was exemplified in January 2001 when the Northern Territory Government refused to sanction a rehabilitation plan for Jabiluka suggested by Energy Resources of Australia that (the then Northern Territory Government believed) would result in the economic sterilisation of the Jabiluka uranium ore body.⁵⁵
- 7.14 That the mine regulator in effect curtailed the efforts of the mining company to provide better environmental and cultural outcomes at Jabiluka indicated the extent of the Northern Territory bureaucracy's support for the development, at all costs.
- 7.15 In its administration of Kakadu National Park, the Commonwealth Government has similarly revealed its support for the Jabiluka development. While its agency Parks Australia is tasked with, “the promotion of the conservation and appreciation of Commonwealth protected areas”⁵⁶, it has in effect ignored the threats to the environmental and cultural values of Kakadu National Park posed by the Jabiluka mine.
- 7.16 Uranium mining operations at Jabiluka directly threaten the integrity of sites of cultural significance to the Mirrar. Parks Australia has attempted to largely ignore these threats, preferring to remain passive. Culturally, mining has proved to be extremely divisive among Aboriginal people in Kakadu, creating rivalry between what were once

⁵⁴ Australian Senate, *Jabiluka: the undermining of process*, p.10.

⁵⁵ Jabiluka Minesite Technical Committee, minutes of meeting 23 January 2001.

'company' clans and leading to many feuds and, at times, violence. Parks Australia attempts to ignore these problems and in the process provides at least tacit approval for the divisive agenda of the mining lobby and its agencies in Kakadu.

- 7.17 By not supporting the efforts of the Traditional Owners of the Jabiluka area to stop the mine, Parks Australia lends support to the status quo, in which the European mining economic imperative is dominant. Naturally, such a stance is unacceptable to the Mirrar Traditional Owners of Jabiluka, who have all but lost faith that Parks Australia is able to dissociate its work from the political agenda of the Commonwealth Government and assist Mirrar in protecting country and culture from destruction.
- 7.18 The Mirrar are alienated from decision-making processes in a practical and intellectual sense due to the unresponsive nature of the current regime to the notion of living tradition. The fundamental unwillingness or inability of the regime to accommodate independent Indigenous decision-making regarding activity on their land forms the basis of the ongoing impairment of the cultural and human rights of the Mirrar community.
- 7.19 The Australian government has undertaken an ad hoc approach to environmental protection and the consideration of principles of ecological sustainability. The avoidance of Agenda 21 responsibilities demonstrates a rejection of the notion of a multi-disciplinary approach to development, hence the convenience of dismissing the input and indeed the rights of Indigenous peoples. The policy vacuum characterised by a lack of whole of life accounting or social/economic audit signifies a short-term approach to sustainability which is out of step with international convention. The Mirrar believe that any analysis of sustainability of mining must include the potential risk posed to cultural integrity and human rights.

⁵⁶ Department of the Environment and Heritage, *Annual Report 1999-2000*.

8 Social Impact

- 8.1 The social impacts of mining related activities upon the Mirrar are inextricably linked to their cultural life, and their enjoyment of cultural rights as individuals in community pursuant to Article 27 of the ICCPR.
- 8.2 The Mirrar continue to hunt and gather in the traditional manner – to look after country – and seek to pass this knowledge onto their children.
- 8.3 However, the Mirrar recognise that the practice of living tradition is declining at a disturbing rate. There are many social problems associated with a decline in living tradition – including alcoholism, community violence, chronic health problems, disinterest in education, structural poverty and collective despair and hopelessness. These social, economic and political problems impose further constraints on Mirrar exercising their living tradition and have served to create a dangerous cycle of decline.
- 8.4 The Mirrar believe that their living tradition has sustained an extreme attack as a result of the process by which development has taken place. This attack lies in the refusal by the Australian government to recognise fundamental Mirrar rights to land and the exercise of those rights by the Mirrar. This attack is most manifested in the extinguishment of the Mirrar’s right to say “no” to the development of the Ranger Uranium Mine under the *Land Rights Act* and the duress applied to the Mirrar to gain their consent for development at Jabiluka.
- 8.5 The consequences of this attack have further exacerbated the poor social and economic conditions experienced by the Aboriginal community, which in turn are a symptom of the barriers created by the Australian Government to Mirrar exercising their rights and obligations to land.
- 8.6 Government approval for mining on Mirrar land was given with a commitment that social impact monitoring of Aboriginal people in the region be conducted. However, the social impact monitoring has been more a process of documenting devastation caused by development, rather than seeking to ameliorate its effects.

8.7 The Mirrar concur with the observations of the UN Land Study that:

*...though Governments may initiate and require environmental impact assessments, too often indigenous peoples' perspectives and values are overlooked in State efforts to mitigate or minimize environmental degradation.*⁵⁷

*The profound, highly complex and sensitive relationship that indigenous peoples have to their lands, territories and resources must be taken into account in protecting the integrity of their environment from degradation. Again it includes social, economic, cultural and spiritual dimensions which must not be overlooked in the present discussion. Cultures that have flourished as an integral part of the environment cannot continue to tolerate disruption. The dependence of indigenous peoples upon the integrity of their lands, territories and resources remains a highly significant factor.*⁵⁸

– Social Impact Monitoring – Ranger

8.8 The Mirrar contend that the Australian Government has clearly failed to meet its obligations under the social contract imposed with the development of the uranium mining industry in the Kakadu region from 1978.

8.9 Although hundreds of reports have been prepared on the Kakadu region since mining commenced, most of these have been written from a non-human environmental perspective.

8.10 Analysis of social impacts has been characterised by a lack of willingness to allow Aboriginal people to devise their own processes for determining what constitutes social impact and a consequent failure to consult accurately to determine Aboriginal views and solutions. As a result Mirrar have become wholly skeptical about non-indigenous social impact processes designed to help them.

⁵⁷ E/CN.4/Sub.2/2001/21 at paragraph 81.

⁵⁸ E/CN.4/Sub.2/2001/21 at paragraph 82.

- 8.11 In 1977, the Australian Government received clear caution from the Fox inquiry that, “increasing numbers of people are seeking refuge from the growing tensions and pressures either by withdrawing from contact situations (decentralisation) or by seeking relief through the consumption of alcohol”.⁵⁹ Fox regarded the ‘principal threat’ to Aboriginal society as the arrival of large numbers of Europeans; the mining town of Jabiru, would inevitably lead to ‘tensions and conflicts’ between Aboriginal people and Europeans and between Aboriginal people. Fox noted, “there is a serious risk that the influx of a European population in the Region will aggravate the sociological and psychological pressures which are regarded as causes of the excessive drinking of alcohol by the Aboriginal people”.⁶⁰ Successive Australian Governments ignored the majority of Fox’s recommendations aimed at minimising negative social impacts on Aboriginal people, including a scheme to control alcoholism.
- 8.12 The Fox inquiry and the Australian Institute of Aboriginal Studies (AIAS) Social Impact of Uranium Mining Report (1984) both highlighted the need for comprehensive action to ameliorate the negative social impacts of mining, including the need to prevent concurrent mining development in the region and to conduct ongoing social impact assessment. Unfortunately for the Mirrar and other Aboriginal people in Kakadu, the recommendations of both reports were largely ignored.
- 8.13 The first of the major studies into social impacts, the Fox inquiry, was established to provide information to the Federal Government on whether Ranger Uranium mine should be allowed to proceed. Its findings (that mining would have negative social impacts) and recommendations (that mining should go ahead anyway) were to set the tone for most future non-Indigenous studies about Aboriginal people in the region.
- 8.14 The Fox inquiry, reporting on the period prior to mining in the region, noted a disrupted society struggling to come to terms with the effects of non-Aboriginal interference, the consequences of devastation caused by introduced diseases, and the sudden availability of alcohol. The second report concluded that:

⁵⁹ Parliament of the Commonwealth of Australia, *Ranger Uranium Environmental Inquiry: Second Report*, p.46.

⁶⁰ Parliament of the Commonwealth of Australia, *Ranger Uranium Environmental Inquiry: Second Report*, p.230.

*The Aboriginals of the region are a depressed group whose standards of living are far below those acceptable to the wider Australian society. They are a community whose lives have been, and are still being, disrupted by the intrusions of an alien people. They feel the pressures of the white man's activities in relation to their land. In the face of mining exploration, and the threat of much further development, they feel helpless and lost. Their culture and their traditional social organisation do not enable them to cope with the many problems and questions to which this development gives rise... They do not consider the proposed development as being advantageous to them, as their concerns and values are different from those held by the white man.*⁶¹

- 8.15 The Council for Aboriginal Affairs recommended to the Fox Inquiry that there be no development of the uranium deposits for 20 years to allow Aboriginal people to withstand the inevitable impacts.⁶²
- 8.16 The Fox Report recognised that the rate of change required of Aboriginal people in areas affected by uranium mining had been too great, that what was needed was respite from unrelenting pressure that has been applied since uranium was found.
- 8.17 It is surprising that while appreciating the depth of Aboriginal opposition to development on their land, and the likely negative consequence of such development, the Fox inquiry was able to condone the mining development. It was to proceed in accordance with five major factors designed to protect Aboriginal interests:
- The establishment of the Northern Land Council to represent Aboriginal interests;
 - Protection and buffering by establishment of the Kakadu National Park;
 - Limitations imposed upon the mining township of Jabiru, to limit presence of non-Aboriginals to those strictly necessary to mining projects;
 - The granting of land rights under the Aboriginal Land Rights Act, and the ‘Woodward Principle’, *that the clear wishes of Aborigines on any matter related to land should not be over-ruled without reference to some independent authority;*⁶³

⁶¹ Parliament of the Commonwealth of Australia, *Ranger Uranium Environmental Inquiry: Second Report*, p.46.

⁶² Council for Aboriginal Affairs, *Submission to the Ranger Uranium Environmental Inquiry*, Transcript of Proceedings, Sydney, 5 June 1976, p.1250.

⁶³ Woodward, A.E. *Aboriginal Land Rights Commission: Second Report*, p.94.

- The expectation of sequential development, providing the opportunity to evaluate mining effects and to modify the operation or to withhold approval from subsequent projects.
- 8.18 Unfortunately such protectionist measures have proven tragically ineffective to prevent the continuing erosion of Aboriginal culture. One key recommendation, that mining development should be sequential, has been completely disregarded by successive Australian governments. The present Federal Government's poor understanding of the negative social impacts of mining development is demonstrated by the decision to proceed with the proposed Jabiluka mine.
- 8.19 The most significant social monitoring, but in which Aboriginal people were largely passive, was the work of the Uranium Impact Project Steering Committee of the Australian Institute of Aboriginal Studies (AIAS). The Project delivered six-monthly reports to the Minister for Aboriginal Affairs from its inception in 1978 to 1984. The AIAS Project sought to monitor the impact of uranium mining on Aboriginal communities in the Alligator Rivers region. Its six-monthly reports were consolidated into a final report delivered in June 1984.⁶⁴
- 8.20 The project comprised four major aspects: the collection of baseline data prior to the commencement of mining; an examination of input factor, such as royalty monies and employment in the mining industry; examination of issues arising from mining, such as the creation of Kakadu National Park and Jabiru; and field work recording Aboriginal attitudes.
- 8.21 In the conclusions of the AIAS report, it was recognised that mining had not been beneficial to Aboriginal employment, nor had it alleviated poverty or stopped 'internal decline' generally.
- 8.22 Furthermore, the AIAS report acknowledged that mining was responsible for a generation of 'fringe-dwelling' communities, of impacting upon traditional culture by

⁶⁴ Australian Institute of Aboriginal Studies, *Aborigines and Uranium* – Consolidated Report to the Minister for Aboriginal Affairs on the Social Impact of Uranium Mining on the Aborigines of the Northern Territory, Australian Government Printing Service, Canberra, 1984.

disturbing sacred sites and associated ceremonies, of instilling a greed for money, and of impacting upon Aboriginal civic culture.

- 8.23 Recognising that concurrent mining activity, including the many meetings necessary during negotiations, would place unreasonable pressure on an already strained and divided local Aboriginal community, the AIAS report in 1979 recommended:

*“... a moratorium on new mining developments in the Region. Aborigines, it was said, needed respite and a breathing space. In the present fragile circumstances, the Project concludes that new developments would exacerbate the serious problems besetting the Aboriginal communities.”*⁶⁵

Despite this clear warning, negotiations for the Jabiluka mine continued throughout the period.

- 8.24 In its conclusion, some of the sharpest findings of the AIAS report on the state of Aboriginal culture are revealed:

(ix) The Social Impact of Mining on the Aboriginal Civic Culture

*Aborigines in the area are in a state of transition between a system of imposed wardship and an assertion of independence, one encouraged by the Government. But the civic culture is one in which disunity, neurosis, a sense of struggle, drinking, stress, hostility, of being drowned by new laws, agencies and agendas are major manifestations. Their defeat on initial opposition to mining negotiations leading to Ranger....and the fresh negotiations on Jabiluka...new sources of money, the influx of vehicles, together have led the Project to an unhappy verdict THAT THIS IS A SOCIETY IN CRISIS.*⁶⁶

- 8.25 And a society in crisis it remains. Despite some \$43 million of royalties from the Ranger Uranium mine since 1981, many in the local Aboriginal community continue to live in dire poverty. As a result of the rapid establishment of the white, company run mining township, the local Aboriginal community has been further marginalized,

⁶⁵ Australian Institute of Aboriginal Studies, *Aborigines and Uranium*, p.302.

⁶⁶ Australian Institute of Aboriginal Studies, *Aborigines and Uranium*, p.299.

resulting in ‘chronic alcohol abuse, community violence, and a chronic sense of disempowerment and hopelessness.’⁶⁷

8.26 The living tradition of the Mirrar is ancient beyond imagination yet fragile in the face of sudden change. Mirrar and other Aboriginal people believe that the last thing needed is another uranium mine.

8.27 It was not until 1997 that Aboriginal people in Kakadu were given the opportunity to provide meaningful input in the assessment and reporting of social impacts as a result of uranium mining. The Kakadu Region Social Impact Study (KRSIS), which delivered its first report in July 1997, was, however, limited in the scope of its inquiry. The social impacts resulting from the push to develop Jabiluka, for instance, were not considered by KRSIS. The KRSIS report acknowledged that government responses to the social impacts of uranium mining were patently inadequate:

*There is a history of inaction in the Region despite the fact that many of the social issues and problems... have been identified many years earlier.*⁶⁸

8.28 The KRSIS report also noted that:

*Some of the worst fears of Aboriginal people in the 1970s have come to pass. Whilst conditions are neither demonstrably better, nor worse, than other Aboriginal communities in the rest of the Northern Territory, the living conditions of some of the Aboriginal communities are acceptable, but others are as of the third world. Key social indicators like education, health and employment are as bad as any community in Australia.*⁶⁹

⁶⁷ Gundjehmi Aboriginal Corporation, *Mirrar Living Tradition in Danger*, p.6.

⁶⁸ *Kakadu Region Social Impact Study: Community Action Plan 1997*. Report of the Study Advisory Group, July 1997. Supervising Scientist, Canberra, at p.5.

⁶⁹ *Kakadu Region Social Impact Study: Community Action Plan 1997*, p.ix.

- Environmental Impact Assessment – Jabiluka

8.29 The main vehicle in the government approval process for the proposal to develop the Jabiluka Uranium Mine was the Draft Environmental Impact Statement prepared by Energy Resources of Australia. The KRSIS process from 1997, it should be remembered, did not consider the impacts from the proposed Jabiluka mine.

8.30 The Mirrar, through the Gundjehmi Aboriginal Corporation, wrote in their submission to the 1996 draft Jabiluka EIS that their opposition to the project had not been adequately acknowledged or examined:

The draft EIS does not reveal any basis for a conclusion that a new mine at Jabiluka would not further attack the social and cultural fabric of the region. It points to the same approaches as have been used in the past and which have resulted in the current position.

8.31 The Northern Land Council submitted:

Aboriginal people in the region have faced profound social, environmental and economic changes since the Ranger Uranium Environmental Inquiry [Fox Inquiry]... There has been constant monitoring of biophysical environment changes in the region. In contrast monitoring of the social and cultural impacts of uranium mining, the consequences of growth in the tourism sector and the development of Kakadu National Park, World Heritage Status, development of a wide range of infrastructure projects and the growth of Jabiru as a regional centre has been far from systematic and rarely aimed at securing equitable and sustainable benefits for Aboriginal groups... The potential for further marginalisation of Aboriginal interests is enormous.

8.32 Mirrar assert that the social fabric that underpins the exercise of their cultural rights cannot be healed while mining continues to take place. Report after report considers the social impact of mining, realises its negative consequences, then makes a new set of ameliorative recommendations within the context of the ongoing mining operation.

8.33 Mirrar submit the cycle of oppression and depression will only be broken when they are accorded the authority to speak for their own country within and with the support of institutions that are accorded jurisdictional power.

8.34 The United Nations Land Study has developed Fundamental Guiding Principles regarding indigenous peoples' role in decisions concerning their lands, territories and resources:

All State and international actions and legal measures in regard to indigenous lands, territories and resources must recognize the right of self-determination of indigenous peoples and conform with the obligation to deal with the appropriate indigenous institutions of government and the obligation to respect the right of indigenous peoples to control and protect their own lands, territories and resources; ⁷⁰

8.35 The Mirrar have called for a framework which recognises the need for ongoing social impact monitoring by Aboriginal people in the Kakadu region and have attempted to negotiate provision for this in recent negotiations regarding Ranger Uranium Mine. The Australian Government and Energy Resources of Australia have refused to agree to the proposal.

9 Mining Operations

– Incidents and accidents

9.1 Since the commencement of mining operations in Kakadu, Aboriginal people have expressed concern for the safety and overall quality of the air, water and soil that form the physical environment of their homelands.

9.2 The environment movement, including the Australian Conservation Foundation, Friends of the Earth and others, lists some 110 environmental 'incidents' ⁷¹ with which the Ranger mine has breached its environmental standards, directly threatened the

⁷⁰ E/CN.4/Sub.2/2001/21 at paragraph 144.

surrounding national park or led to an increase in the level of contaminants (salts, radionuclides and heavy metals) leaving the Ranger mine site region. This leads to a direct and significant increase in the risk of contaminant loadings reaching Kakadu National Park.

- 9.3 On 3 May 2000 the Mirrar learned via media reports that a leak of contaminated water high in manganese, uranium, ammonia and other contaminants had occurred at the Ranger uranium mine. Subsequently, the mining company revealed that it had suppressed this information for one (1) month before releasing details publicly – but to the Australian Stock Exchange and not the traditional owners. Mirrar have also discovered that Energy Resources of Australia knew of extremely high levels of manganese in the area around the mine site as early as December 1999.
- 9.4 The leak occurred near the Ranger tailings dam and entered the Magela Creek system adjacent to the mine. It is estimated that some 2,000 cubic metres of contaminated water was released, approximately 17 cubic metres per day over a four-month period. The Ranger mine – surrounded by Kakadu – is just two (2) kilometres upstream of an Aboriginal community.
- 9.5 In failing to report this accident, the mining company was clearly in breach of the Environmental Requirements and the working Arrangements outlined in the Memorandum of Understanding between the Commonwealth Government and the Northern Territory Government.
- 9.6 On 31 March 2000 the Mirrar were informed of a serious design fault in the so-called Interim Water Management Pond (IWMP) at the Jabiluka mine site. In correspondence from the Northern Land Council to Gundjehmi Aboriginal Corporation it was revealed that contaminated water was “accumulating at a rate that cannot be contained within the IWMP”. It was stated that remedial works were required to reduce the volume of water in the IWMP to ensure that it could contain rainfall during the next (2000/2001) wet season.

⁷¹ SEA-US, 2001, <http://www.sea-us.org.au/ranger/atrocious.html>; see also, Mudd, G M, 2001, Appendix 4 – Ranger Research Report, Due for Publication in early 2002.

- 9.7 In the same letter the Mirrar were told of a meeting (to which they were not invited) at which the mining company had presented a series of scenarios to alleviate the water management problem. Eight suggestions were made, including the Reverse Osmosis treatment of contaminated water prior to its release into the surrounding environment.
- 9.8 The traditional owners of the land in question were given no opportunity for input into this process. The Mirrar were presented with a *fait accompli* – that the company would soon apply to the Northern Territory Department of Business, Industry and Resource Development (formerly the Department of Mines and Energy) for the installation of a pilot reverse osmosis plant at the Jabiluka site, to “test the suitability of the method in this application”.
- 9.9 This process totally excluded Mirrar concerns and was in clear breach of commitments given by ERA only two months earlier that it was “committed to a program of ‘zero-release’ of any mine water at the Jabiluka mine”.⁷²
- 9.10 The reverse osmosis unit was subsequently installed by ERA and, after a series of apparently successful pilot tests, full-scale treatment began on 28 August 2000. Output from the plant was irrigated on 3.76 ha of the Jabiluka site. The use of reverse osmosis, supplemented by a second unit in October (which did not become operational until late November 2000), has experienced repeated malfunctions and failed to maintain expected targets, mostly relating to the quantity of water treated per day (output water quality targets were apparently met most of the time). These ongoing water management problems have further eroded what little confidence the Mirrar have in the ability of the company and Government to adequately protect the Kakadu environment.
- 9.11 At a meeting of the Governing Committee of Gundjehmi Aboriginal Corporation on September 18 2001, the Mirrar were informed by the NLC that ERA had made an application to spray irrigate both reverse osmosis treated and untreated water from the so-called Interim Water Management Pond (IWMP) at Jabiluka. This new water management system, which subsequently received approval from the mine regulator (the Northern Territory Department of Business, Industry and Resource Development), results in a land application of both treated and untreated contaminated water onto 6.34

⁷² ERA Internet site www.energyres.com.au/jabiluka/overview.html 20 January 2000

hectares of land within the fenced area at Jabiluka. The IWMP water, before irrigation, is passed through a small sand filtering system. This removes larger particles from IWMP water but fails to address the fact that virtually all of the uranium and other contaminants are in a dissolved form – and would therefore pass through the sand filter to be irrigated on the Jabiluka site.

- 9.12 ERA plans to irrigate contaminated IWMP water at the rate of 400 cubic metres per day for 15 days in November and 600 cubic metres per day for a further 15 days in December. The treated water from the reverse osmosis system (whatever output can be maintained), will be mixed with this water, which on 16 November 2001 led to the irrigation water being 25% from the reverse osmosis system and 75% contaminated IWMP water.
- 9.13 The Mirrar are also concerned at the shift in the company's focus at Jabiluka (approved by the regulatory authorities, the Northern Territory Department of Business, Industry and Resource Development and the Supervising Scientist) from 'operations' to 'outcomes'.⁷³ The water management system will be judged by its outcomes (based on readings of contaminant levels downstream) today rather than by the possible or even likely effect of its operations in the long-term. For example, analysis of the net effect of repeatedly spraying uranium and other contaminants on the 6.34 ha land application area is of less priority than regular monitoring downstream. ERA argues that they prefer to operate Jabiluka without "*stringent operational guidelines*"⁷⁴, as long as the end result from monitoring downstream shows no unacceptable environmental impact. The Australian environment movement shares the Mirrar's concerns at this apparent philosophy of the end justifying the means.

– Right to a clean environment

- 9.14 Mirrar assert their right to a clean environment in accordance with Article 3 of the Universal Declaration of Human Rights that everyone has the right to life, liberty and security of person, and the Stockholm Declaration on the Human Environment which, though not ratified by Australia, proclaims that human beings have the "fundamental

⁷³ Jabiluka Minesite Technical Committee, minutes of meeting 21 September 2001.

⁷⁴ Jabiluka Minesite Technical Committee, minutes of meeting 21 September 2001.

right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being”.

- 9.15 Mirrar also assert their rights to participate in decision-making over matters relating to the natural environment; have their identity, culture and interests recognised and supported, and to share equitably in the benefits arising from the use of traditional knowledge. These rights have been variously recognised in the 1992 Rio de Janeiro Declaration on Environment and Development, the UNCED Statement of Forest Principles, and in many of the Agenda 21 strategy's of 40 chapters and over 500 pages of general prescriptions.⁷⁵
- 9.16 The International Covenant on Economic, Social and Cultural Rights, ratified by Australia in 1976, stipulates that States Parties must recognise the right of everyone to the enjoyment of the highest attainable standard of physical and mental health. The steps to be taken to achieve the full realisation of this right shall include those necessary for the improvement of all aspects of environmental and industrial hygiene.⁷⁶
- 9.17 As stated by the Director of the United Nations Development Programme (UNDP), Mr Klaus Toepfer, “Human rights cannot be secured in a degraded or polluted environment. The fundamental right threatened by soil degradation and deforestation and by exposures to toxic chemicals, hazardous contaminated drinking water.....Environmental conditions clearly help to determine the extent to enjoy their basic rights to life, health, adequate food and housing, and traditional livelihood and time to recognise that those who pollute or destroy the natural environment are not just committing against nature, but are violating human rights as well.”⁷⁷
- 9.18 Further, the UNDP states that when people are denied access to clean water, soil and air to meet their basic human needs, we see the rise in poverty, ill-health and a sense of

⁷⁵ Sutherland, J. “Representations Of Indigenous Peoples' Knowledge And Practice” in *Modern International Law And Politics*, 2(1) AJHR, 1995.

⁷⁶ ICESCR Article 12.

⁷⁷ Klaus Toepfer, Executive Director of the United Nations Environment at the 57th Session of the Commission on Human Rights.

hopelessness. Desperate people can resort to desperate solutions. They may care little about themselves and the people they hurt.⁷⁸

9.19 Mirrar submit that Environmental Impact Studies must include the human environment, and indigenous knowledge of this environment. However, there has been tendency to consider the environment to the exclusion of living tradition of Aboriginal peoples, such as the Mirrar. The recent United Nations Land Study noted that “though Governments may initiate and require environmental impact assessments, too often indigenous peoples’ perspectives and values are overlooked in State efforts to mitigate or minimize environmental degradation.”⁷⁹

9.20 The United Nations Study on Land noted:

*The profound, highly complex and sensitive relationship that indigenous peoples have to their lands, territories and resources must be taken into account in protecting the integrity of their environment from degradation. Again it includes social, economic, cultural and spiritual dimensions which must not be overlooked in the present discussion. Cultures that have flourished as an integral part of the environment cannot continue to tolerate disruption. The dependence of indigenous peoples upon the integrity of their lands, territories and resources remains a highly significant factor.*⁸⁰

9.21 Environmental impacts of activities of resource companies include pollution of fresh water, of the land, flora and fauna that in turn threaten the livelihood of indigenous peoples who may hunt and gather on the land.

9.22 Mirrar hunt and gather on their traditional lands in the area around the Ranger uranium mine and Jabiluka. Although there are guidelines that must be followed in setting minimum standards for public and occupational radiation dose exposures, the special circumstances under which Aboriginal people live in Kakadu must be addressed.

⁷⁸ Press release: Klaus Toepfer, Executive Director of the United Nations Development Programme (UNDP) speech at a launch in Kazakhstan of a regional environmental action plan for Central Asia, September 21, 2001.

⁷⁹ E/CN.4/Sub.2/2001/21 at paragraph 81.

⁸⁰ E/CN.4/Sub.2/2001/21 at paragraph 82.

9.23 *They live in, bath in, drink the water and hunt and gather food from the environments that may have additional radiation dose burdens from airborne and waterborne effluent discharges. Although these may be small when averaged over a year or a working month, as applied in occupational exposures, Aboriginal people may gather a large feed of bioaccumulators and filter feeders such as mussel, or mangrove worms, they may hunt for long neck turtles that inhabit muddy burrows in the floodplains or edge of billabongs that may have been long-term receiving waters for uranium mining contaminants. If they consume these hunted and gathered foods in a very short space of time, which is the usual practice, then the adults and more particularly the children, could be exposed to radiological hazards not experienced by the general public, nor mine workers.*⁸¹

9.24 The UN Land Study also noted:

*An important dimension in affirming indigenous land rights is the exercise of a measure of control over lands, territories and resources by indigenous peoples through their own institutions. Though rights to lands, territories and resources may be affirmed, the exercise of internal self-determination, in the form of control over and decision-making concerning development, use of natural resources, management and conservation measures, is often absent. For example, indigenous people may be free to carry out their traditional economic activities such as hunting, fishing, trapping, gathering or cultivating, but may be unable to control development that may diminish or destroy these activities.*⁸²

9.25 Mirrar are of the view that there is a special case for more stringent radiological protection for Aboriginal people in the area surrounding the Ranger uranium mine and Jabiluka.

9.26 The question of the appropriateness of existing standards must be dealt with. More stringent standards on the accidental and planned release of contaminants need to be considered to apply in the case of living cultures in Kakadu. In particular, even more

⁸¹ ATSIAC submission to the Senate Environment, Communications, Information Technology and the Arts Reference Committee (SECITAC) Inquiring into the Jabiluka Mine Project, p.21.

⁸² E/CN.4/Sub.2/2001/21 at paragraph 83.

stringent standards should apply to exposures that may affect children who are far more susceptible to these radiation exposures than mine workers or infrequent visitors as members of public.⁸³

- 9.27 Dr Rosalie Bertell, an esteemed researcher in the field of epidemiological research from low-level exposure to radioactive contaminants has stated:

*There are further differences in health effects based on differences between people receiving the radiation. Special consideration needs to be given to those who, because of heredity or previous experience, are more susceptible to further damage than the norm or average. Special consideration should be given to an embryo or fetus, the elderly or those chronically ill.*⁸⁴

- 9.28 The government is of the view that existing mines are operating within minimum standards prescribed by the Australian National Health and Medical Research Council and the National Health and Occupation and Health Safety Commission. It anticipates that any future mines would have to also operate within these minimum standards.

- 9.29 Other countries such as Germany and the UK adopt more stringent dose standards than currently recommended. “Australia needs to follow advances in setting of standards in the interests of the survival of Aboriginal people in the region, the precautionary principle and the international obligations to Aboriginal people in Australia. To do otherwise would deny Aboriginal people the freedom to inhabit, quiet enjoyment, use and care for their country as required by their traditional laws and under Australia’s international obligations.”⁸⁵

⁸³ ATSIIC submission to the Senate Environment, Communications, Information Technology and the Arts Reference Committee (SECITAC) Inquiring into the Jabiluka Mine Project, p.21.

⁸⁴ ATSIIC submission to the Senate Environment, Communications, Information Technology and the Arts Reference Committee (SECITAC) Inquiring into the Jabiluka Mine Project at paragraph 22m quoting R. Bertell, *No Immediate Danger – prognosis for a radioactive earth*, 1985.

⁸⁵ ATSIIC submission to the Senate Environment, Communications, Information Technology and the Arts Reference Committee (SECITAC) Inquiring into the Jabiluka Mine Project, pp.23-24.

– Best Practicable Technology

- 9.30 The Mirrar are concerned at the emphasis placed by both the mining company and government agencies on Best Practicable Technology (BPT) in all aspects of environmental management, monitoring and actions. At Jabiluka, BPT is factored on age and effectiveness of equipment, environmental benefits versus risks, location, social factors and cost. All BPT assessments are undertaken by the mining company and then presented to regulators and stakeholders for approval and possible implementation.
- 9.31 An alarming concern is that ERA is allowed to undertake actions which are contrary to its statutory Environmental Requirements, provided that the non-compliance is assessed as being BPT and is agreed to unanimously by all major stakeholders⁸⁶ (Clause 12.2 of Ranger uranium mine's Environmental Requirements). The major stakeholders are considered to be the Northern Land Council, ERA and government regulators, thus leaving the traditional owners with inadequate involvement in BPT assessments and decision-making. If unanimous agreement is not reached, the Commonwealth Minister for the Environment will make a determination with advice from the OSS, again leaving traditional owners little or no options for substantive input to ensure satisfactory outcomes.
- 9.32 The Mirrar contend that not enough weight (described as points) is allocated to 'social factors' in the matrix used to determine the BPT and that the legitimate concerns of traditional owners should not be a sub-category of broader social concerns. There needs to be a separate and appropriately weighted factor in the BPT matrix that takes the concerns of traditional owners into account and provides for BPT outcomes which are adequately reflective of such concerns.
- 9.33 The Mirrar contend that not enough weight (points) is allocated to 'social factors' in the matrix used to determine the BPT and that the legitimate concerns of traditional owners should not be a sub-category of broader social concerns. There needs to be a separate and appropriately weighted factor in the BPT matrix that takes the concerns of

⁸⁶ Alex Zapantis, 2001, Presentation to the Alligator Rivers Region Technical Committee meeting, November 8-9, 2001.

traditional owners into account and provides for BPT outcomes which are adequately reflective of such concerns.

- 9.34 The Mirrar contend that in BPT analyses, such as those applied in Kakadu, too great an emphasis is placed on the cost of technology associated with environmental safety measures. The Mirrar submit that such measures should be driven by the desire to achieve the best possible environmental outcome, not the desire to save mining company money by using the best practicable technology based on cost.
- 9.35 For example, the Jabiluka Minesite Technical Committee in early 2000 identified two options for the treatment of contaminated water at the Jabiluka Project area: the land irrigation and Reverse Osmosis (RO) treatment of contaminated water as the two prime options for reducing the volume of contaminated water in the Interim Water Management Pond (IMWP) at Jabiluka. Both scored about the same in ERA's BPT assessment of water treatment options, with land application apparently scoring marginally higher than RO. Since land application was considerably cheaper (by at least an order of magnitude), this was ERA's preferred option. Fortunately, the NLC and others argued that traditional owners' perceptions were critical and that RO was therefore preferable.
- 9.36 This would indicate that not enough weight is given to 'social factors' in the BPT matrix used, especially since BPT assessments are undertaken by ERA. It also suggests that a distinctly separate 'weighting' should be allocated to the real concerns of traditional owners, rather than simply incorporating them into 'social factors'. The Mirrar have primary care responsibilities for looking after country, and their concerns must comprise an independent component of BPT assessments.
- 9.37 In a recent submission to the World Heritage Committee Energy Resources of Australia admitted that ineffective procedures had been undertaken in relation to water management at the Ranger Uranium Mine, particularly in the area of consultation with traditional owners. There has been no negotiation initiated by Energy Resources of Australia to address this issue.

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11 Attachment A: 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: *Aboriginal Land Rights (Northern Territory) Act 1976 (Cth)*
- 1977: Australian Government judicial inquiry (Fox Inquiry) finds that Mirrar People are Traditional Owners of the land for which the Ranger and Jabiluka mines and the mining township of Jabiru are proposed. Finds that Mirrar people are opposed to mining. Recommends that mining proceed despite Mirrar opposition.
- 1978: Mirrar people gain formal legal recognition as Traditional Owners of the Ranger Project Area and other land that becomes part of Kakadu National Park Stage One, however *Aboriginal Land Rights (Northern Territory) Act* amended to remove Mirrar right to veto the Ranger mine. Township of Jabiru excluded from land grant to facilitate mining.
- 1979: Construction of Ranger uranium mine and town of Jabiru commences; Stage I of Kakadu National Park proclaimed; EIS submitted for development of Jabiluka mine by Pancontinental.
- 1980-2: Australian Government judicial inquiry (Alligator Rivers Stage II land claim) finds Mirrar people are Traditional Owners for the Jabiluka Mineral Lease. Simultaneously, Northern Land Council (NLC) agrees to enter into negotiations for Jabiluka uranium mine in return for mining company not opposing land grant.
- 1982: Under extreme duress, Mirrar people do not oppose NLC entering into an agreement to develop a “stand alone” Jabiluka uranium mine. Mirrar people gain formal legal recognition as Traditional Owners of Jabiluka Mineral Lease and other land that becomes part of Kakadu National Park Stage Two.
- 1983: Australian Government prevents development of Jabiluka uranium mine as part of “Three Uranium Mines” policy.

- 1984: Australian Government social impact study (AIAS) finds the Aboriginal community affected by the Ranger mine to be a “society in crisis”; Stage II of Kakadu National Park proclaimed.
- 1987: World Heritage listing of Stage II; Stage III (Phase 1) proclaimed
- 1989: Stage III (Phase 2) of Kakadu National Park proclaimed.
- 1991: Stage III (Phase 3) of Kakadu National Park proclaimed.
Ranger mining company, Energy Resources of Australia (ERA), buys Jabiluka Mineral Lease and the 1982 Mining Agreement. Mirrar have no right to veto the purchase. NLC negotiates agreement with ERA to give Mirrar the right to veto any proposal to use Ranger Project Area to mill uranium from Jabiluka.
- 1992: NLC and ERA informed by senior Aboriginal custodian that important sacred sites near the proposed Jabiluka mine site were not adequately recorded in period leading to 1982 Agreement. Kakadu Stage 3 inscribed on List of World Heritage under natural and cultural criteria (following Stage 1 in 1981 and Stage Two in 1987.)
- 1996: Australian Government abandons “Three Uranium Mines” policy. ERA applies to develop Jabiluka on basis of 1982 Agreement. Mirrar people declare unequivocal opposition to Jabiluka proceeding.
- 1997: Australian Government approves Jabiluka uranium mine on basis of milling Jabiluka uranium at Ranger (the Ranger Milling Alternative or “RMA”). Mirrar people exercise veto of RMA based on 1991 agreement.
- 1998: ERA develops proposal to mill uranium on-site at Jabiluka (the Jabiluka Milling Alternative or “JMA”). Australian Government gives approval for construction to begin “on elements common” to both RMA and JMA. Mirrar effectively exhaust domestic legal remedies to prevent construction proceeding.
Construction commences in June without required cultural mapping having taken place Bureau of WHC resolves to send a mission to Kakadu. JMA given conditional Australian Government approval in August, despite ERA’s tailings management proposal being rejected.
UNESCO World Heritage Committee Mission visits Mirrar country in October. Twenty-Second World Heritage Committee in Kyoto considers mission report in early December.

- 1999: Australian Government and ERA reject Mirrar pleas to halt construction until sacred site assessment undertaken. WHC considers Jabiluka at Third Extraordinary Session. Construction suspended in September as ERA decides on interim basis not to proceed with JMA. Mirrar halt Australian Government sacred site assessment process after unsuitable person nominated by Australian Government without consultation. Mirrar advise NLC that no negotiations to take place on RMA for a minimum period of five years. WHC briefly considers Jabiluka at Twenty-Third session in Marrakech.
- 2000: NLC reveals that interim water retention pond at Jabiluka unable to contain contaminated water past 1999/2000 monsoonal wet season. Australian Government reports to Bureau of WHC on 15 April. On 28 April 2000 a three-month leak of Manganese from Ranger uranium mine was reported to authorities, nearly one month after being discovered by ERA. On 11 August 2000, Rio Tinto acquired 68.4% of ERA parent company North Limited.
- 2001: Rio Tinto announces it has no short-term plans to mine Jabiluka, and has placed a 10-year 'moratorium' on the project. Jabiluka mine site plagued by persistent water management problems, resulting in the land irrigation of both treated and untreated water onto 6.35 hectares of land. Conservative (and pro-Jabiluka mine) Coalition Government of Prime Minister John Howard re-elected, Mirrar vow to continue opposition to Jabiluka.

Attachment B: Australian Senate Inquiry Recommendations

“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

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.

Attachment C: European Parliament Resolution

Passed Unamended: 15/1/98

The European Parliament:

A: Mindful of the objection of the Australian Government to a human rights clause within the co-operation agreement between Australia and the European Union;

B: Concerned about the recent decision of the Australian Government to consider the development of the Jabiluka Uranium project which is located in an area surrounded by the World Heritage Kakadu National Park;

C: Aware of the motion of the Australian Senate from 20 October 1997 calling on the Australian Government not to proceed with the project;

D: Aware of the fact that the Jabiluka site as well as the nearby Ranger uranium operations are located on legally recognised Aboriginal territory;

E: Considering the fact the sites are of significance for the cultural heritage of the Aboriginal peoples;

F: Noting that the project evaluation by Environment Australia has resulted in concerns regarding its impacts on wilderness and world heritage values as well as on radioactive tailings;

G: Concerned that the health effects of the already existing mining facilities at Roxby Downs , Ranger and the currently planned Jabiluka Project for the Aboriginal people;

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- 1.** Calls on the Australian Government to respect the status of the Kakadu National Park as a World Heritage site;
 - 2.** Calls on the Australian Government to respect the land rights of the Aboriginal Peoples as well as the provisions on indigenous peoples provided by the Vienna Declaration;
 - 3.** Calls therefore on the Australian Government not to proceed with the project;
 - 4.** Calls on the Commission to obtain an independent study about the imports of the European Union analysing the impact of uranium mining and processing on health and environment, on the rights of indigenous peoples and on waste production of the mining operations in regard to the respective country of origin;
 - 5.** Calls on the Member States, as a first step, to ban all imports of uranium from mines where the land rights of Indigenous Peoples are being compromised;
 - 6.** Calls on its SubCommittee on Human Rights to closely monitor the case;
 - 7.** Instructs the President to forward this resolution to the Council, the Commission, the Member States, the Australian Government; the Australian Senate, the Northern Land Council and the International Atomic Energy Agency.

**Attachment D – Northeast region of Kakadu National Park,
showing the Ranger, Jabiluka and Koongarra uranium mineral leases**

