CONFIDENTIAL

"We are not talking about mining"

The history of duress and the Jabiluka Project

Gundjehmi Aboriginal Corporation

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Introduction

In the late 1970s and early 1980s agreements for four uranium projects were entered into by the Northern Land Council on behalf of traditional Aboriginal land owners. These were Ranger, Nabarlek, Jabiluka and Koongarra. Ranger is still operational and is presently expanding its mining and milling operations. The Nabarlek ore body has been exhausted and the mine has been decommissioned. Neither Jabiluka nor Koongarra proceeded due to the uranium export policies of the former Federal Labor Government.

Soon after it was elected in 1996 the Howard Government announced that it intended to consider proposals for new uranium mines and an expansion of uranium exports. Under the previous Hawke and Keating Labor Governments uranium mining was only permitted at the Ranger mine in the Northern Territory and the Roxby Downs mine in South Australia. Energy Resources of Australia Ltd (ERA), the operator of the Ranger mine and the owner of the Jabiluka mining lease, requested permission from the Commonwealth and Northern Territory Governments to start mining activities at Jabiluka.

The proposals for uranium mining in the Alligator Rivers region have been highly controversial. There is very significant opposition to uranium mining in the Australian community. Any mining in the Alligator Rivers region is particularly sensitive to many people because of the potential threats to the natural and cultural World Heritage values of Kakadu National Park. In order to develop its response to the proposal for the opening of the Jabiluka mine, Gundjehmi Aboriginal Corporation has undertaken some preliminary historical research. This research provides an overview of events in the late 1970s and early 1980s when the Ranger, Nabarlek and Jabiluka agreements were negotiated by the NLC.

The research for this report was largely based on material available from a range of sources, particularly the Northern Land Council Library. There is also a considerable number of people who have been involved in the region and many Aboriginal people who live in the region who have been spoken to about present developments and their recollections of past developments in the region.

The unrelenting pressure on Aboriginal people in the region

Nearly twenty years later, it is possible to overlook the pressures that people were under during this period. Aboriginal people in the region were struggling to get title to their land with the assistance of the newly established and inexperienced Northern Land Council (NLC). There was considerable uncertainty about whether they would get title to their land, and even if they did, what would this mean. There was pressure for the development of at least four uranium mines in the region. The NLC, two Governments, a number of mining companies, and many other people and organisations were seeking a stake in the future of the region. They were arranging what seemed to be a never-ending series of meetings and consultations. They were negotiating arrangements between themselves and Aboriginal people and were making decisions that would affect the lives of Aboriginal people living in the region for many years to come. A new large national park was in the process of being created and with it the prospect of many more tourists coming to the region.

For most of the traditional owners it must have seemed that getting title to their land was of little use if they were going to have four uranium mines and thousands of tourists walking all over their country. As one of the NLC lawyers commented in early 1978:

> ... there is hardly any point in winning land claims in the Alligator Rivers Region or the Borroloola region if there is going to be a commercial covenant to develop large mines in the area. Such development would be in total contradiction to the maintenance of Aboriginal culture and lifestyle which is the very reason for running traditional land claims (McGill 1978, 5).

Many of the reports of the Australian Institute of Aboriginal Studies Uranium Impact Steering Committee refer to the difficulties Aboriginal people had with the processes that occurred during the mid-1970s and early 1980s. It is not hard to see why large numbers of Aboriginal people concluded that there was little point actively resisting the extreme development pressures on their land.

> The Project has mentioned before the pressure on Aboriginal people of countless meetings, of meetings where it seems that there is no point in resisting, because "the government" will win in the end, through sheer relentlessness. It has also commented on acrimony which arises as quarrels develop between members of a family, and between families, because their aspirations differ ... The response at Oenpelli to the news that it is going to be necessary to negotiate with mining companies with respect to exploration has been one of desperation at there being no end to these pressures and intrusions (Australian Institute of Aboriginal Studies 1983, 68-9).

With all of the other social and economic problems that exist in many such communities, it is not a simplification to say that Aboriginal people in the region were, and still are, living in a state of crisis and social breakdown.

The Ranger uranium project

In the mid-1970s the Whitlam Labor Government was confronted with a growing political dilemma in regard to uranium mining in Australia. On the one hand the Government could see the economic and commercial opportunities that would come from the mining of a number of large high grade uranium deposits in the Alligator Rivers region of the Northern Territory. The expansion of uranium mining was seen as an opportunity to establish an integrated nuclear industry in this country. On the other hand there was clear evidence of growing public concern about uranium mining and nuclear issues generally. The Government commissioned the Ranger Uranium Environmental Inquiry in July 1975 to examine proposals for the development of the Northern Territory uranium deposits. The Inquiry was chaired by Justice Fox.

At the same time the Government had introduced land rights legislation for Aborigines in the Northern Territory. The legislation was subsequently passed in an amended form by the Fraser Government. Land rights and the Aboriginal interest in the land of the region complicated the Fox Inquiry's consideration of the future of the uranium mining industry. Much of the land where the uranium deposits were located was either claimable under the Aboriginal Land Rights (Northern Territory) Act or became Aboriginal land when the Act was proclaimed.

<u>The Fox Inquiry's comments on Aboriginal attitudes to mining</u>

In the Second Report of the Range Uranium Environmental Inquiry (Fox Report) a summary of Aboriginal attitudes to uranium mining was included:

> 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 that 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 view will prevail; they feel that uranium mining development is almost certain to take place at Jabiru, if not elsewhere in the Region as well. They feel that having gone so far, the white man is not likely to stop. They have a justifiable complaint that plans for mining have been allowed to develop as far as they have without the Aboriginal people having an adequate opportunity to be heard ... 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 as conclusive, or it is set aside ... In the end, we form the conclusion that their opposition should not be allowed to prevail (Ranger Uranium Environmental Inquiry 1997, 9).

When discussing the land claim, the Inquiry made a number of other comments in relation to Aboriginal attitudes to mining:

> While royalties and the other payments referred to in (b) are not unimportant to the Aboriginal people, they see this aspect as incidental, as a material recognition of their rights ... Our impression is that they would happily forgo the lot in exchange for an assurance that mining would not proceed (Ranger Uranium Environmental Inquiry 1977, 269).

One of the strongest expressions of Aboriginal concerns to the Fox Inquiry about development pressures in the region was by Silas Roberts:

> We are worried that we are losing a little bit, a little bit, all of the time. We keep our ceremony, our culture, but we are always worried. We still perform our ceremonies. We are very worried that the results of this enquiry will open the doors to other companies who want to dig up uranium on our sacred land. There are so many I find it hard to remember them all but I can remember Ormac, Queensland Mines, Union Carbide, Reynolds Mining, B.H.P. and Pan Continental. We think if they get in there and start digging we'll have towns all over the place and we'll be pushed into the sea. We want a fair go to develop. We are human beings, we want to live properly and grow strong (Roberts 1976, 3).

On 10 May 1976 the NLC's Ranger Sub-Committee met in Darwin to discuss the draft of this statement. According to unpublished minutes of the meeting the senior traditional owner of the Ranger area, Toby Gangale, stated that he was upset at the use of his land for three reasons:

> 1. He had not been consulted when exploration commenced.
> 2. He had not been told of the nature of the exploration and
> 3. That Ranger Companies had proceeded to build their camp and airstrip without letting him know of their intentions.

The Chairman of the NLC had stressed the opposition to uranium mining at the National Press Club on 10 November 1977:

> Now people are trying to force us to accept that mining, uranium mining, will go ahead. But we insist that we don't want uranium mining (quoted in Roberts 1978, 141)

Traditional owners of the land in the Alligator Rivers region had also written to Prime Minister Fraser stating:

> We are the traditional owners of Alligator River country. We have had meeting today with the Northern Land Council. We do not want any mining here. If you won't do what we ask then make one mine first and then we will see about the others later. We want to see the national park working first like you promised with Aboriginal rangers before any miners come and start building towns and mines (*Land Rights News*, October 1977, 3-4).

In a submission to the Inquiry the Secretary of the Northern Land Council (when it was the Northern Aboriginal Land Committee Inc) explained that while some of the traditional owners of the land on which uranium mining was proposed "do not object to Ranger proceeding ... this is because they feel that it is inevitable" (Wilders, undated, 1).

This was also stated by representatives of the NLC when they appeared before the Inquiry (22 February 1977). The Manager of the NLC Alex Bishaw explained:

> The pressures upon Aboriginal people in that area and around Oenpelli have led them to see mining as probably inevitable just as white people going into the area over the last fifty or so years has been (Transcript, 22 February 1977, page 12,904).

Justice Fox then asked:

> Well, they in fact see it as inevitable and they don't therefore wish to maintain any opposition to it. Is that a fair way of putting it or not? (page 12,905).

Mr Bishaw replied:

> Yes. It was discussed time and time again and there were no direct instructions to, as it were, make a last ditch stand and oppose it (page 12,905).

<u>The national interest provisions of the Aboriginal Land Rights Act</u>

It is important to understand some of the provisions of the *Aboriginal Land Rights (Northern Territory) Act* in regard to mining. While many companies have complained about the complexities of the Act and the time delays in negotiating approvals for exploration and mining agreements, the Act does set out clear procedures for mining companies to follow when they wish to use Aboriginal land. The national interest provisions, even though they have never been used, and the arbitration provisions, can be used to override the wishes of traditional Aboriginal land owners under certain circumstances.

Sub-section 40(b) of the Aboriginal Land Rights (Northern Territory) Act states that:

> An exploration licence shall not be granted to a person in respect of Aboriginal land unless:
>
> (b) the Governor-General has, by Proclamation declared that the national interest requires the licence be granted.

Section 43 of the Act also deals with the national interest cases. If a Proclamation is issued by the

Governor-General then the land council and the applicant have 180 days (or longer if agreed) to try and agree upon the terms and conditions to which the grant will be subject. There is a requirement that the Proclamation be tabled in both Houses of Parliament. The Proclamation can be disallowed by either or both Houses of Parliament (section 48G). While the provisions have never been used the Fraser Government threatened the NLC that it would invoke these provisions in relation to the uranium mines.

When the Whitlam Government introduced the Aboriginal Land (Northern Territory) Bill the Minister (Les Johnson) outlined the Government's view on the national interest provisions of the Bill in considerable detail:

> The Bill also gives Aboriginals the power of veto over mining developments on Aboriginal land, but provides that any such veto may be over-ridden, if such action is required in the national interest and if a proclamation to that effect is not disallowed by either House of Parliament after the proclamation has lain before the House for 15 sitting days. There will, of course, be many interpretations as to what constitutes the national interest. Mr Justice Woodward paid special attention to this term and said it should not be invoked on a mere balance of convenience or desirability but only as a matter of necessity.
>
> I hope that it will not be necessary to invoke the national interest provisions of this Bill, and that with goodwill from all parties - the Aboriginal landowners, the prospective miners, environmental interests and the Government - a reasonable and effective solution can in most cases be found to protect the Aboriginal interests and to meet desirable national development goals. Where such agreement cannot be reached the Government's consideration as to whether the national interest requires the proposed development would need to include an assessment of whether at a particular point in time was vital to Australia, whether the mineral was available elsewhere, or whether it could be left in the ground for future development without irreparable damage to Australia's social and economic development.
>
> Importantly, there is much significance to be placed on Mr Justice Woodward's view that an Aboriginal veto must not be overridden unless the national interest requires that the proposed development proceed. Almost any mineral development could be said to be in the national interest but much more stringent criteria must be applied in an assessment as to whether such a development is required by the national interest. Equally important is the distinction, implicit in the use of this phrase, between the national interest on one hand and sectional interest on the other (House of Representatives *Hansard*, 16 October 1975, 2224).

The Labor Government's legislation was not passed. The Fraser Government introduced an amended version of the Bill. The national interest provisions of the Labor Government's Bill were substantially changed and the provision that the Parliament could override the Proclamation was removed. Instead, as the Minister (Ian Viner) explained:

> Where consent is withheld, the Bill provides for an independent inquiry on the basis of which the Government may determine whether the national interest requires that exploration in mining can proceed (House of Representatives *Hansard*, 4 June 1976, 3083).

However, this Bill was itself amended by the Government and the national interest provisions were reinserted as they were in the 1975 Labor Government's Bill:

> The provision in clause 41 for an inquiry into whether the national interest requires that

> exploration or mining should proceed will be deleted and instead the Bill will provide for the tabling of a proclamation of a national interest decision before both Houses of Parliament. Either House will have the power to disallow the Government's decision to override Aboriginal refusal to consent. This change is proposed in response to the many representations by Aboriginal groups and others seeking restoration of the provision proposed by Mr Justice Woodward for parliamentary review of any Government decision to override Aboriginal wishes in relation to mining (House of Representatives *Hansard*, 17 November 1976, 2780).

The Labor Opposition (Les Johnson) commented on the Government's proposed amendment:

> One of the most obnoxious clauses of the Government's original Bill - that permitting a secret inquiry into whether mining on Aboriginal land is 'in the national interest' - is to be removed. The new clause, recognising the overwhelming vote of the 1967 referendum to give the Parliament legislative power in Aboriginal affairs, will reinstate that provision in the 1975 Bill which makes any such declaration subject to disallowance by either House of this Parliament (House of Representatives *Hansard*, 17 November 1976, 2788).

There are a number of points that can be made about the national interest provisions in the Act. Provisions that enable the Government to invoke the national interest are included many pieces of legislation. Many pieces of legislation give Ministers the power to give directions of statutory bodies "in the national interest". Section 78 of the Australian Broadcasting Corporation Act, for example, gives the Minister the power to give directions to the Corporation "in the national interest".

Sub-section 40(b) of the Aboriginal Land Rights Act, however, states that the national interest requires the licence to be granted. This is not to be taken lightly. It is a stronger statement than simply saying that it is "in the national interest" for the licence to be granted. For the Government to invoke the national interest some very strong arguments are necessary As Senator Cavanagh explained

> Before a proclamation can be made, national interest must require it; it must be urgent; it must be definite; it must be a requirement for our survival. The important word is 'require'. The national interest must require it (Senate *Hansard*, 23 April 1980, 1772).

In an earlier debate Senator Cavanagh had also raised this issue in the context of the debate over the NLC's role in the Ranger negotiations:

> If the traditional owners decide that the land is not to be mined it cannot be mined under any condition unless there is a declaration by the Governor-General on the recommendation of the Government that such mining is in the national interest. But the Government can never declare that this mining is in the national interest. It is not for the defence of Australia. It is not for the protection of Australia. It would be an admission that the Government's economic policy is such that it cannot continue without royalties that could be obtained from mining a dangerous material and exporting that danger to someone else overseas (Senate *Hansard*, 17 October 1978, 1362-1363).

The wording of the Act was based on the arguments put forward by Justice Woodward in the *Second Report of the Aboriginal Land Rights Commission*:

> In this context I use the word "required" deliberately so that such an issue could not be

> determined on a mere balance of convenience or desirability but only as a matter of necessity (Woodward 1974, 104).

The national interest has been dealt with in a number of court cases. In the 1995 Federal Court decision on the declaration made by the Minister for Aboriginal and Torres Strait Islander Affairs under the Aboriginal and Torres Strait Islander Heritage Protection Act 1984 one of the judges highlighted the serious nature of these matters:

> The Act takes as its starting point that there are particularly significant Aboriginal areas and objects which it is in the national interest to preserve. Depending on the nature and extent of the particular significance, that interest may require the subordination both of other governmental interests and of private interests. These are grave issues and it is not reasonable to suppose that Parliament intended a decision upon them to be tossed off at short notice ... they were to be the subject of a full and careful report, made after there had been a true opportunity for participation by all those affected, and involving a personal and informed decision by the Minister.

There is also the fact that it is the Governor-General who makes the Proclamation. Many other Acts give this type of authority to the relevant minister but the Aboriginal Land Rights Act puts the authority in the hands of the Governor-General. While this is largely symbolic it is not without its significance. As the judge commented in the above quote in relation to the Aboriginal and Torres Strait Islander Heritage Protection Act, the decision involves "a personal and informed decision by the Minister". The Governor-General would also, presumably, be required to make a personal and informed decision about whether to override the decision of Aboriginal people.

While not specifically referring to the national interest provisions of the Act, the Minister for Aboriginal Affairs explained that "the Commonwealth had the interests of all the people of Australia in mind when it made its decision" to allow uranium mining to proceed in the region (quoted in the *Northern Territory News*, 29 August 1977).

Did an Aboriginal veto apply to the Ranger project?

Under sub-section 40(1) of the Aboriginal Land Rights Act the Northern Land Council, on the advice of traditional owners, can withhold consent to the granting of a mining interest in respect of Aboriginal land. However, the Ranger project was specifically exempted from this provision under sub-section 40(6) of the Aboriginal Land Rights Act. This sub-section says:

> If the land, or part of the land, described in Schedule 2, being the land known as the Ranger Project Area, becomes Aboriginal land, subsection (1) does not apply in relation to that land, or that part of the land.

By specifically exempting the project the Government avoided having to invoke the national interest provisions of the Aboriginal Land Rights Act.

The insertion of sub-section 40(6) formalised the situation for the companies. In fact, the Commonwealth Government had already entered into a Memorandum of Understanding on 28 October 1975 with Peko Mines Ltd and Electrolytic Zinc Co of Australasia Ltd to "grant any necessary and appropriate authorities" for the project to proceed.

In the absence of a veto over the development of the project, the NLC and the traditional owners

were faced with three options:

- to refuse to negotiate and make Aboriginal rights a big issue;
- to agree to negotiate but on terms unacceptable to the Government; or
- to accept that they had been overruled and try to get the best deal.

As Howitt and Douglas (1983, 71) pointed out, the NLC "basically chose the third strategy". Some of the difficulties confronting the NLC were outlined by one of the NLC's lawyers, Stuart McGill, in February 1978. The fact that Aboriginal people could not prevent the Ranger mine from proceeding meant that the NLC was placed:

> ... in the difficult position that 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 agreement for mining or else the Government will write the agreement on behalf of the Land Council through the arbitration provisions of the Act. This immediately causes some confusion within the members and staff of the Land Council, because on the one hand, the Council is opposed to mining and on the other hand it is making agreements with mining companies for mining to go ahead. Many people say that you must do one thing or the other but you can't do both. My opinion is that it is possible to do both although the Council should stick to its basic opposition to mining (subject to the opinion of traditional owners) and only negotiate with mining companies when it is forced to do so (McGill 1978, 1).

According to McGill, the negotiating strategy of the NLC at the time was to slow down the pace of development. McGill quoted from one of the NLC's Ranger negotiators, Stephen Zorn:

> If possible, negotiations should result in the indefinite deferral of the project (quoted in McGill 1978, 3).

Two days after the Government's announcement that mining would proceed at Ranger the Minister for Aboriginal Affairs, Ian Viner. travelled to Gunbalanya to explain the Government's decision. He was quoted as saying that:

> "I suppose it's like you and me", Mr Viner said. You would not like a big pit dug in your own backyard, and to them that is what an open pit uranium mine will be. "But they have been informed of what will be involved there. I think like you and me they would probably prefer it didn't happen, but knowing it will happen they want to be satisfied that proper controls are imposed on mining so it doesn't harm the physical environment and that the social impact is controlled as much as possible" (quoted in *The Sydney Morning Herald*, 29 August 1977).

<u>The negotiation of the Ranger mining agreement</u>

Since the Ranger Project Area was exempt from sub-section 40(1), sub-section 43(2) of the Aboriginal Land Rights Act required the NLC and the companies to negotiate a mining agreement:

> The mining interest shall not be granted unless the applicant for the mining interest has entered into an agreement under seal with the Land Council containing such terms and conditions as are agreed on by the parties having regard to the effect of the grant of the mining interest on Aboriginals ...

The Minister for Aboriginal Affairs explained the position at the time:

> What has been under negotiation between the Commonwealth and the Northern Land Council has been the terms and conditions under which mining should proceed at Ranger, not whether mining itself should proceed ... the agreement reached between the negotiators reflects, in a very considerable way, the wishes of the traditional owners, especially in such things as protection of the environment and reduction in the social impact of mining (*The Age*, 14 October 1978).

What the Minister did not say was that at the time most, if not all, of the traditional owners of the Ranger Project Area, were opposed to the mine proceeding.

Arbitration under the Aboriginal Land Rights Act

If agreement cannot be reached between the Land Council and the mining companies then under sub-section 45(1) of the Aboriginal Land Rights Act the Minister, after consultation with the Land Council and the mining company, can appoint an Arbitrator. If the Land Council does not accept the terms and conditions of the agreement proposed by the Arbitrator, the Minister can enter into the agreement on behalf of the Land Council

From the mining company's perspective, the granting of the land of the Ranger Project Area to an Aboriginal Land Trust removed a considerable degree of uncertainty in relation to the Project. It meant that the provisions of the Aboriginal Land Rights Act would apply. First, there was no veto in the Act in relation to the Project area. Second even if the company and the NLC could not agree on the terms and conditions of mining the Minister could appoint an Arbitrator to determine the terms and conditions. According to Zorn who assisted the NLC to negotiate the Ranger agreement, the Government threatened to refer the matter to an Arbitrator a number of times when it appeared likely that agreement would not be reached by the parties (*Sydney Morning Herald* 12 August 1978).

The role of the NLC in the negotiation of the agreement

The Commonwealth Government adopted many of the recommendations of the Fox Inquiry in August 1977. One of the recommendations of the Fox Inquiry which was rejected was that the uranium mines in the region should be opened sequentially to minimise the damage to Aboriginal people and the environment. In late 1977 the NLC presented a draft agreement to the Commonwealth in respect of the Ranger project. The Commonwealth responded in May 1978 and negotiations commenced with the NLC on the terms and conditions of the project. The agreement was signed at Oenpelli on November 1978. According to Carroll:

> Ratification of the agreement had originally been given at a full meeting of the Northern Land Council in August, but certain Aborigines took out an injunction to prevent the signing, alleging inadequate consultation with affected communities (Carroll 1983, 342-3).

Lack of adequate consultation has been a recurring theme throughout the region.

The role of the NLC in negotiating the agreement was severely criticised at the time. For example, Bob Collins, who was later to become Opposition Leader in the Northern Territory and is now a Senator, was very critical of the way in which the agreement was negotiated for the NLC almost

single-handedly by Stephen Zorn with little back-up from environmental experts:

> "I'm intrigued at how a deal involving such big sums of money was done with such a small negotiating team consisting of one mining negotiator and a solicitor from the NLC who had little background in natural resources legislation" (quoted in *The National Times* 23 September 1978).

Parsons has documented some of the events leading to the "approval" of the Ranger agreement by the NLC. Only 28 of the 42 members attended the final meeting at Red Lily Lagoon in Arnhem Land (beginning 12 September 1978). Five of the 28 stayed away from the meeting or walked out before the agreement was ratified. Members were "talked to about it [the agreement]" and were told:

> "If we don't sign the agreement, Mr Fraser has told me [Yunupingu] he has power to block the Aboriginal Land Rights Act, and that he will stop the funds to the outstations".
>
> "If the Land Council makes a mistake on this question the whole of Australia will know and many people will support those who want to see Aboriginals without land, without any right to make their own decisions, and without a Land Council to represent them" (quoted in Parsons 1978, 137).

According to Parsons:

> At the Red Lily Lagoon meeting several speakers complained that the NLC was "just an office of DAA and the government". The councillors wished to speak with the traditional owners, only some of whom were present, so they could satisfy themselves that the traditional owners knew and understood what the proposals meant ... Many Councillors later complained that Yunupingu had put enormous pressure on Toby Gangale, one of the traditional owners and that this lead to Toby later complaining that he was "sick of fighting" against the mining (Parsons 1978, 138).

The Member for Arnhem, Bob Collins was highly critical of the way this meeting was conducted.

> Mr Bob Collins produced tapes of the land council's secret meetings last week to support his claim that the ratification of the Ranger agreement was a farce ... On the tapes the chairman of the land council, Mr Galarrwuy Yunupingu, is criticised by several members of the council for acting on his own authority and without consultation with the Aboriginal communities ... "If this paper is signed, it is signed under protest. I'd like to hear you say that. The protest is that we have to agree with the Government. We have been forced to agree. If we don't put that protest in, everybody will say 'Look how easy that was'. The Oenpelli people are under pressure" ...
>
> Mr Collins said the tapes also showed that Mr Yunupingu had told the council meeting they would be in trouble with the ALP and the union movement if they did not sign the Ranger agreement ... Mr Collins said the Aboriginal leaders had been under the mistaken impression that the Government would legislate to change the Act and take everything away from them if they refused. "Theoretically it is possible", he said. "But the Australian people would not stand for this, and in any case the Act provided for a deadlock situation. The Government can take the matter to arbitration if the land council does not sign" (quoted in *The Sydney Morning Herald*, 19 September 1978).

After the first NLC Red Lily meeting there was, according to Parsons, a "galvanizing of Aboriginal opinion never before witnessed" in the Top End. Legal action was taken against the NLC on the grounds that it had not properly undertaken its functions under section 23 of the Aboriginal Land Rights Act. An interim injunction was granted in the Northern Territory Supreme Court on 19 September 1978 stopping the NLC from signing the agreement. The affidavits of Johnny Marali No 1, Dick Malwagu and John Gwadbu were incorporated into the Senate *Hansard* (17 October 1978, 1352-1356). The affidavits include the following statements:

> Throughout the meeting we were told by Mr Yunupingu that we really had no choice in the matter and that the Commonwealth Government was determined to go ahead. I believed I had no choice but to support the motion and I feel that most of the people who were present felt the same way.
>
> To the best of my knowledge the traditional owners of the land, have not as a group or individually been consulted by the Northern Land Council and as deposed to above they did not in fact speak to the council and Mr Yunupingu refused to allow us to have them address the council, saying that he would look after this himself. I am not satisfied that they have been consulted and from my discussions with other Aboriginals from the Oenpelli area, I believe that the Oenpelli people and the traditional owners are very much against the mine, but have been pushed and pressured so much over the last five or six years, that they realise it is useless to keep saying no, and that for this reason they just do nothing.
>
> I believe that the Northern Land Council has a duty to be satisfied that the traditional owners have consented to the agreement and I am not satisfied that this has occurred.
>
> I do not believe that the traditional owners of the area have been consulted by the Northern Land Council and certainly we at the meeting did not have a chance to speak with them to find out their views. One of the traditional owners Mr Toby Gangali was there for some of the time, but he was not asked questions by the council and I believe that he was asking for help and support from the Northern Land Council because of all the pressure that had been placed upon him.
>
> I believe that from his attitude he felt that future opposition was hopeless although he was very unhappy about what was proposed.
>
> I believe that many of the people felt that if they did not agree then they would simply be pushed and placed under more pressure until such time as they did agree and I believe the majority did not feel that they had carried out their responsibilities to the traditional owners and be satisfied that the traditional owners supported the agreement.

Large community meetings were held in a number of Arnhem Land communities and statements were presented to the NLC on behalf of a number of communities. For example,

> "... nobody was allowed at the East Alligator meeting to express that contamination could ruin the land for our future. Milingimbi community feel that (NLC) chairman had the wrong stories he should listen to his own people we don't want to fight against him we just want him to look after our land" (quoted in Parsons 1978, 141).

The stresses on the NLC were such that there were newspaper reports that the organisation

might disintegrate (see *The Northern Territory News* 20 September 1978). The Government accused the ALP of political interference in the dispute about the agreement (which was vigorously denied by the ALP and a number of Aboriginal leaders). The Country-Liberal Party member for the Northern Territory strongly supported the NLC Chairman for his "courageous stand which included the sacking of one of the NLC's white advisers [Stuart McGill]" (quoted in *The Northern Territory News* 21 September 1978). The Minister for Aboriginal Affairs (Viner) flew to Darwin for discussions with the Chairman of the NLC. The Minister:

> ... declared that not only the future of uranium mining but that of Aboriginal land rights legislation was at stake (*Australian Financial Review*, 21 September 1978).

One newspaper article was headed:

> Viner tries to save Territory black council (Courier Mail, 21 September 1978).

Following negotiations between those opposing the signing of the Ranger agreement and the Chairman of the NLC, a 9 point agreement was lodged with the Supreme Court. Significantly, the first point was that a process needed to be established to ensure that the NLC properly undertook its functions under sub-section 23(3) of the Aboriginal Land Rights Act (*Australian Financial Review*, 26 September 1978).

It was reported that a meeting of 40 traditional owners at Gunbalanya in early October had told the NLC that they did not accept the draft mining agreement. According to newspaper reports 12 of the traditional owners "spoke at length on their dissatisfaction with the present agreement".

> Mr Toby Gangale said yesterday: "I don't like that agreement. I wish it would go away for six months ... I wish it would go away for five years" (*The Northern Territory News*, 12 October 1978).

Further, it appears that the NLC did not adhere to the terms of the agreement to stall the Supreme Court action. A meeting of the NLC executive was held at Bamyili near Katherine (1-2 November 1978) where the members were <u>not</u> told by the Chairman that the agreement would be signed. The executive was told that the NLC still had to undertake further consultations as a result of the 9 point agreement.

> Harry Wilson said "If we accept that agreement now will the lawyers still go out to consult with the communities". Galarrwuy: "Yes. They will still go out to consult. It will be up to the traditional owners to say yes or no to that agreement". The people, including me [Leo Finlay] accepted that the consultation was going to continue. So people put up their hands and someone said, "well, that's ok. If the consultation is going to go on then we can accept it. I voted against it and so did Gordon Lansen. We didn't put up our hands. Galarrwuy asked "what about you Leo?". I said, "no, I won't accept it". I knew it was a trick. Everyone else put their hands up (*National U*, Special Supplement, November 1978).

The executive flew to Oenpelli with the Minister for Aboriginal Affairs on 3 November 1978 for the formal signing. One member (Leo Finlay) who attended the meeting publicly stated that he was not aware that the agreement was to be signed at Oenpelli by the NLC.

> "We thought we were going to the airport, but we went to the office and saw the agreement all set to be signed. That was a big shock to me. A lot of people signed and a platinum pen was

> handed to everyone. I refused to accept one ..." (*National U*, Special Supplement, November 1978).

Other newspaper reports suggested that the signing of the agreement was a "surprise":

> Gold pens with the inscription "Ranger 1978" were distributed to members of the NLC Executive ... Interpreters in a number of Aboriginal communities were still working on translations of the agreement when the signing was announced in Friday ... Instead of following the machinery for ratification foreshadowed by the Land Rights Act - that the traditional owners recommend signing to the NLC - Mr Viner, Mr Yunupingu and executive members of the council flew to Oenpelli on Friday to inform traditional owners that the NLC had recommended the signing of the agreement. The traditional owners of the Ranger site accepted the recommendation and the gold pens were distributed (*Australian Financial Review*, 6 November 1978).

According to newspaper reports, the mining agreement was signed by Mr Viner, Galurrwuy Yunupingu, Dick Malwagu and John Gwadbu. The Kakadu National Park lease agreements were reportedly signed by Mr Yunupingu, Toby Gangale, Marjorie Mundaimi, Professor Derek Ovington (Director of ANPWS) and Mick Alderson (*The Northern Territory News*, 6 November 1978). In a joint statement Mr Viner and Mr Yunupingu stated that the signing was "an historic and significant occasion" and the mining agreement "marks the first of its kind ever signed by an Aboriginal body independently and in the interests of Aborigines with respect for their traditional land" (quoted in *The Northern Territory News*, 6 November 1978).

The historical evidence suggests that many people were concerned that the NLC did not properly undertake its functions under sub-section 23(3) and Part IV of the Aboriginal Land Rights Act. In the end, when the agreement was finally signed, the evidence demonstrates that the NLC did not act on the instructions of the traditional owners. Stephen Zorn, who was one of the negotiators of the agreement, wrote to the Chairman of the NLC arguing that "Mr Yunupingu and the NLC staff had pressured members to ratify the Ranger agreement".

> "There was indeed pressure, and there was not the sort of real, effective consultation that is required both by Section 23 of the Land Rights Act and by ordinary common decency", Dr Zorn said ..."For all of these reasons, I think it quite reasonable for people to conclude that the NLC leadership and staff, pushed, it is clear by the Commonwealth government, have created a situation in which many Aboriginals are not satisfied they have had adequate time", he said (quoted in *The Northern Territory News*, 30 October 1978).

According to Leo Finlay, only a few of the traditional owners were present at the meeting:

> [Yunupingu] never once said the agreement was about to be signed. He never asked even the Oenpelli owners who were there if they agreed to sign the agreement. He just told them that they had heard the traditional owners ie. the one who come with NLC. The people from the community did not say a word. They just sat there. The agreement was never discussed with them. They were never asked their opinion of it (*National U*, Special Supplement, November 1978).

The agreement was signed on Friday 3 November after 6 years of discussion. Leo Finlay was publicly critical of the process:

> The Ranger agreement was signed with lies and trickery, a prominent member of the Northern Land Council said today. Both the Minister for Aboriginal Affairs, Mr Viner, and the NLC Chairman, Mr Galarrwuy Yunupingu, continually misled council members and the traditional owners, Borroloola delegate Mr Leo Finlay said. Aborigines had no idea the uranium mining agreement was to be signed last Friday until they saw the Ranger documents waiting for them, he said ... The process of consultation which had been promised with the communities has never taken place. From the time that we agreed to stop the court injunction we have been lied to and tricked by the Government, the NLC chairman and his manager (*Northern Territory News*, 10 November 1978).

The senior traditional owner, Toby Gangale, when he was finally asked to speak, was quoted as saying:

> "I've given up. It's been six years now. I'm not fighting anymore" (*National U*, Special Supplement, November 1978).

But the Chairman of the NLC was quoted as saying that:

> ... the signing of the agreement had unified the Aboriginal people. "The position of the land council has been strengthened" ... His own position as chairman of the NLC had also been strengthened (*The Canberra Times*, 4 November 1978).

It is hardly believable given the concerns expressed by so many people about the role of the NLC in the negotiations over the project that the NLC Chairman could say at the ground breaking ceremony for the Ranger mine on 11 June 1979:

> Through it all the Northern Land council watched the interests of Aboriginal people.

In a related issue, Parsons concluded his article by expressing another concern that no one was discussing with Aboriginal people how they could secure a more independent economic future other than from mining royalties. Aboriginal people were told that mining would provide employment and funding to enable them to pursue a range of social and economic opportunities. He believed that it was essential that Aboriginal people be provided with a range of alternatives. In retrospect this issue remains one of the most critical in the region today.

While the Ranger agreement could have been challenged at the time, and indeed there were threats to do so (see *Adelaide Advertiser* 6 November 1978), the amendments to the Aboriginal Land Rights Act in 1980, which were themselves introduced because of legal challenges to the NLC's role in the Nabarlek agreement, make legal action much more difficult. However, a challenge was finally undertaken in October 1985.

<u>The mid-1980s NLC legal action</u>

In October 1985 the NLC commenced legal action against the Commonwealth Government and the Ranger project operator ERA. The NLC argued that the 1978 Ranger agreement was invalid because it was signed "as a result of duress, undue influence and unconscionable conduct by the Commonwealth" (quoted in *The Australian*, 29 October 1985). The NLC intended to claim that as much as $200 million had been lost to Aboriginal interests because of the "grossly inadequate payments by comparison with mining agreements in other countries and the modest annual payments for the life of the contract (20 years) are not indexed for inflation" (quoted in *The Northern Territory*

News, 28 October 1985).

> The Chairman of the Northern Land council, Mr Galarrwuy Yunupingu, said: "We have grown up a lot since those days when the Fraser Government used all of its expertise and pressure to have the agreement signed. The NLC and the traditional owners from Kakadu can now stand on their own feet" (quoted in the *Sydney Morning Herald*, 29 October 1985).

A mediation package was presented to the traditional owners in September 1994 but the was not acceptable to the traditional owners. The proceedings were subsequently discontinued because the NLC did not believe it could obtain funding to conduct the case.

The Nabarlek uranium mine

Aboriginal opposition to the development of the Nabarlek deposit was put to the Woodward Aboriginal Land Rights Commission. Justice Woodward concluded that:

> Queensland Mines Ltd should not be permitted to develop mineral deposits in the Nabarlek area without Aboriginal consent (Woodward 1974, 124).

While the opposition to the mine was also explained to Prime Minister Whitlam during his visit to Oenpelli in June 1974, the company persisted and continued to seek further discussions with people in the community.

> As a result of the approach by Queensland Mines discussions began between Queensland Mines and the Aborigines leading to the negotiations later carried out by the Northern Land Council with Queensland Mines on behalf of the Nabarlek traditional owners. One can only speculate as to why the Aborigines concerned changed their attitude. My observation is that both the key members of the Oenpelli Council and the traditional owners of Nabarlek decided that opposition to the development of Nabarlek was futile and that development would occur sooner or latter, irrespective of Aboriginal opinion (Carroll 1983, 345).

The Nabarlek negotiations were similar to Ranger in that the Nabarlek Project was exempted from the operation of the consent provisions of the Aboriginal Land Rights Act. The Project was protected by subsection 40(3) of the Act since the lease application had been made before 4 June 1976. The agreement was signed in March 1979.

<u>The Oenpelli legal action and the amendments to the Aboriginal Land Rights Act in 1980</u>

A number of traditional owners in the region stated that they had not been consulted by the NLC about the use of certain roads in the region by the mining company. The Chairman of Oenpelli Council stated that the traditional owners had been voicing their objection to the use of the road since 1970 when the company arrived in Arnhem Land. On 17 August 1979 the traditional owners asked the NLC to revoke permits for the use of the road to the mine but the NLC only stopped issuing new permits. Two clans then issued a writ against QML seeking an injunction to restrain the company and its agents from using the road and claiming damages. The hearing was set down for February 1980 (Senate *Hansard*, 23 April 1980, 1757-80).

The legal action was adjourned when the Federal Government announced that it planned to introduce amendments to the Aboriginal Land Rights Act. The amendments were to be retrospective to 1977. The announcement by the Government that the Act was to be amended, and therefore

that the legal action was a waste of time, was according to the Australian Institute of Aboriginal Studies, received at Oenpelli with "extreme disappointment".

> It is arguably the case that the question of roads is more important than the question of mines; the use of the road is likely to be more disruptive and socially damaging (as well as being a potential environmental hazard) than the operation of the [Nabarlek] mine itself ... Some people explicitly saw the Government's decision as the product of a conspiracy involving the Commonwealth and Territory governments and the mining companies, and directed at Aboriginal people ... It is clear that no other issue has gripped the interest of the Oenpelli people so intensely as the matter of the road and its use ...Any failure to reach a satisfactory compromise over this issue will have dire consequences (Australian Institute of Aboriginal Studies 1980, 11-12).

In the second reading speech on the legislation the Minister for Aboriginal Affairs outlined the primary intention of some of the amendments:

> The Bill also contains provisions which are designed to ensure than once an agreement has been concluded between a land council and a miner in accordance with procedures set out under the Act, both parties be in a position to honour the agreement and will be bound by it ... the Bill provides that an agreement which has been concluded between a land council and a miner cannot be invalidated in the grounds of non-compliance with sections 23 or 48 of the Act (Senate *Hansard*, 2 April 1980, 1364).

Some explanation of these provisions of the Aboriginal Land Rights Act is necessary at this stage. Section 23 of the Act outlines the main functions of land councils. For the purposes of the amendments, it is the functions under sub-sections 23(1)(c) and 23(3) which are very important:

> 23(1)(c) To consult with traditional Aboriginal owners of, and other Aboriginals interested in, Aboriginal land in the area of the Land Council with respect to any proposal relating to the use of that land.

One of the purposes of the amendments was to ensure that even if the land council did not perform its functions properly under section 23 (it may not have consulted with all of the relevant traditional owners or they may not have been properly informed), and it entered into an agreement with a third party, this agreement could not be invalidated by legal action against the land council or the third party.

The Government also included a provision that the Minister for Aboriginal Affairs could:

> withhold his approval under section 27 of the principal Act unless he is satisfied that the land council concerned has complied with any duty imposed on it by sub-section 23(3).

The new sub-section 27(4) now reads:

> The Minister shall not give an approval under sub-section (3) with respect to entering into a contract relating to Aboriginal land unless he is satisfied that the Land Council concerned has, in taking the action that has resulted in the proposed contract, complied with any duty imposed on it by sub-section 23(3).

Sub-section 23(3) states:

> In carrying out its functions with respect to any Aboriginal land in its area, a Land Council shall have regard to the interests of, and shall consult with, the traditional Aboriginal owners (if any) of the land and any other Aboriginals interested in the land and, in particular, shall not take any action, including, but not limited to, the giving of consent or the withholding of consent, in any matter in connexion with the land held by a Land Trust, unless the Land Council is satisfied that -
>
> (a) the traditional Aboriginal owners (if any) of that land understand the nature and purpose of the proposed action and, as a group, consent to it; and
> (b) any Aboriginal community or group that may be affected by the proposed action has been consulted and has had adequate opportunity to express its views to the Land Council.

The amendment was defended by the Government on the following grounds:

> The Government does recognise however that the obligations and responsibilities placed upon a land council are both complex and difficult in their fulfilment and there may, on some occasions, be speculation as to whether the Land Council has in fact fulfilled its obligations, particularly as they relate to the negotiation of a mining agreement (House of Representatives *Hansard*, 30 April 1980, 2444).

There are a number of issues that arise in relation to these amendments and the provisions of the Act. The Minister for Aboriginal Affairs (Baume) explained to the Senate the information he needed to give his consent to the agreement:

> Before I give my approval for an agreement for mining to proceed or for any agreement which may be entered into by a Land Council, I am required to satisfy myself that the Land Council has sought and received proper instructions from the traditional owners in the first instance before it starts negotiating. I am required to satisfy myself that the relevant Land Council has acted upon instructions that it has received and not in any other way. I am required to satisfy myself that any agreement which is reached is in accordance with the instructions that were issued. I am also required to satisfy myself that the agreement which has been reached by the Land Council on their behalf is understood and agreed to by the traditional owners (Senate *Hansard*, 18 March 1982, 958).

These amendments have a particular relevance to the Jabiluka project given the manner in which the instructions to the NLC to enter into negotiations with Pancontinental were provided and the handling of the consultations over the negotiation of the mining agreement.

The Jabiluka uranium project

In 1971 Pancontinental Mining Ltd and Getty Oil Development Company Ltd entered into an agreement for uranium exploration. The first of the Jabiluka ore bodies was discovered in November 1971. The Environmental Impact Statement was submitted in 1979.

Pancontinental presented a number of submissions to the Fox Inquiry. The company's submission in December 1976 argued that the Aboriginal community in the region had already had an adequate opportunity to "become acquainted" with mining activity in the previous 6-7 years. The company also argued that the majority of the Aboriginal community was in favour of uranium mining subject to strict regulation and control and the honouring of their rights under the Aboriginal Land Rights

Act.

> A further stringing out of the decision-making process on mining would only add confusion and frustration to a matter which is already difficult enough for the Aboriginal people to deal with (Pancontinental Mining Ltd 1976, 4).

Prior to this the company had begun to deal directly with Aboriginal people in the region. For example, in December 1975 a payment of $5,000 to traditional owners was made for an exploration licence in western Arnhem Land. The NLC (as it was then constituted) was very concerned about the company's dealings with Aboriginal people. The company was also organising Aboriginal Consultative Committee meetings to discuss the proposed Jabiluka mine. The NLC was becoming concerned that the company was starting to make decisions about future mining before the issues raised in the Fox Inquiry were properly dealt with by governments.

The Alligator Rivers Stage II land claim

The land claim for Alligator Rivers Stage II was lodged in July 1978. Hearings for the claim commenced on 24 November 1980. The report of the Aboriginal Land Commissioner was presented to the Minister for Aboriginal Affairs on 2 July 1981. In presenting his report the Aboriginal Land Commissioner was required to comment on the implications of the acceptance of the claim for existing or proposed land use in the region and any detriment that could be suffered by existing interests in the region. In this claim, the Commissioner commented:

> It may seem curious to find treatment of the position of a miner with substantial interests within the claim area, indeed within the land recommended for a grant, dealt with under 'land usage' rather than 'detriment'. But that is how Pancontinental Mining Limited approached the hearing, asserting no detriment. More, it actively supported the claim to traditional ownership of Kundjey'mi (Aboriginal Land Commissioner 1981, 85).

It is unusual for a company with such a large interest in the area under claim to not only assert that there would be no detriment but to actually support the claims of a particular group of claimants. In its main submission the company pointed to the $34.6 million of development expenses already incurred and $3.6 million of physical assets on the land under claim. The company's Final Address to the Aboriginal Land Commissioner was 44 pages of anthropological evidence supporting the claims of the Mirrar Kunjey'mi. When the mining company made its "offer" to the NLC about the Jabiluka project on 9 June 1981 at Jim Jim one of the Pancontinental negotiators, Mr Cole, made a statement which referred to the support given by the company to Aboriginal people in the land claim:

> It was shown by the positive support given by Pancon to the traditional owners' claim for the Mirrar Kunjey'mi land. This is the first time in Australia where a mining company has ever supported an Aboriginal's claim for their land (Cole 1981, 3).

The Land Commissioner pointed out that if the land were granted to a Land Trust:

> the proposal will proceed, at least on all the evidence tendered during the hearing. If there is a grant to a Land Trust, mining can only take place with the consent of the Land Council and the Minister under s.40 of the Land Rights Act. If that consent is forthcoming, it confirms what is otherwise to happen. It is not forthcoming, then, subject to a proclamation by the Governor-General under s.40, there will be no change in usage (Aboriginal Land Commissioner

1981, 88).

The reasons for the company's position on detriment are outlined later in this paper.

Peko-EZ's submissions on detriment

Unlike Pancontinental, Peko-Wallsend Operations Ltd and Electrolytic Zinc Company of Australasia Ltd made detailed submissions concerning the detriment the companies expected to suffer if the land were granted to an Aboriginal Land Trust. In one submission the companies stated:

> ... I am not satisfied Aboriginal consent to explore and mine that land will be forthcoming ... Although the Land Rights Act clearly makes provision for Consent Agreements of the type contemplated by subsections 40(2) and 43(1) of the Act, I share the Australian Mining Industry Council's scepticism as to whether one will ever be negotiated (Peko-Wallsend Operations Ltd 1981a, 13, 15-16).

The companies also argued that the grant of the land to a Land Trust would "necessarily vacate or extinguish the companies' tenements".

> The direct consequence of a grant of the subject claims would be that the Land Council's consent was essential to the grant of a mining interest, in the absence of a proclamation by the Governor General that the grant be made in the national interest (Peko-Wallsend Operations Ltd 1981b, 3,6)

The companies subsequently took legal action against the Minister for Aboriginal Affairs regarding the granting of land to a Land Trust where the company had certain mineral interests. The High Court decided against the company in 1986.

Was there an Aboriginal veto over the Jabiluka project?

Under sub-section 40(3) of the Aboriginal Land Rights Act mining interests that existed before 4 June 1976 were exempted from the consent provisions of sub-section 40(1). Pancontinental Mining had a number of mining lease applications that had been made before 4 June 1976, including SML 61 (13 October 1973), SML 64 (24 November 1974) and gold mining leases (29 July 1975). SML 61 covered 61 square kilometres which included the Jabiluka One and Jabiluka Two ore bodies; SML 64 was in the Hades Flats area covering 6 square kilometres (Pancontinental Mining Ltd 1979, volume 1, 3:1-3:2). The gold mining leases were for the gold deposits discovered within the Jabiluka Two ore body. However,

> it is not feasible to develop the Jabiluka Project and operate it efficiently taking account of engineering, environmental and economic considerations, entirely within the boundaries of those titles applied for 4 June 1976, including SML 61 (Pancontinental Mining Ltd 1981, 137).

Areas applied for after 4 June 1976 included an area within SML 61 (24 November 1976) and a block mineral lease covering the entire project area (6 September 1977). This meant that if the land were granted to a Land Trust for the project to proceed the company either needed to have the NLC approve the grant of a mining interest under section 40(1)(a) or have the Governor-General issue a proclamation in the national interest under section 40(1)(b) of the Aboriginal Land Rights Act. That is, the consent provisions of the Aboriginal Land Rights Act applied to part of the land required for the project to proceed.

The beginnings of the negotiations and consultations

Aboriginal opposition to the Jabiluka project was well known for a number of years. According to business magazine *Rydge's* in September 1978:

> There is well-known [Aboriginal] opposition to the Jabiluka development. This opposition is more deep-seated than that to Ranger (*Rydge's*, vol 51, September 1978).

Land Rights News had commented on the views of two of the senior traditional owners of the area in early 1978:

> If there is to be any mining, it should be kept to the Ranger mine which should be kept small. They did not want the Pancontinental mine at Jabiluka. Toby Gangali and Bill Najidji said they did not want the Pancontinental mine (*Land Rights News* No 20, April 1978).

The Commonwealth Government gave approval in May 1978 for Pancontinental to drill at the proposed mine site so that it could complete the Environmental Impact Statement (see *The Canberra Times*, 13 May 1978). The Government pointed out that there was no legal requirement for Aboriginal people to consent to the proposed work.

Strong opposition was expressed by Aboriginal people, the NLC and the Australian Labor Party spokesman on Urban and Regional Affairs Mr Uren. The Government's approval for the drilling was given during the negotiations over the Ranger agreement and the work included an extension of the Arnhem Highway to the Jabiluka project area.

> The announcement surprised and angered the chairman of the Northern Land Council, Mr Galarrwuy Yunupingu, who has told the Prime Minister, Mr Fraser, that Aborigines in the region are totally opposed to the Jabiluka project because of the dangers it poses to the environment (*Sydney Morning Herald*, 13 May 1978).

In an interview with a West German film producer on 15 May 1978 Mr Yunupingu was quoted as saying:

> Because you will come in with the scientific terms and try to influence us to understand your point of view, of your technology, which is very hard for us to understand, and because we are, we know by experience that uranium as it is, when it comes out from the ground, is dangerous and can be worse however you want to use it (Lichacz 1978, 3).

The NLC Chairman conceded that mining would probably proceed at Ranger and Nabarlek:

> "... but we will fight it to the end at Jabiluka ... There is no way we are going to give in to Pancon, we don't want to see any development there ... the traditional owners of the land are already moving back to the area after having been displaced by the whiteman" (*Northern Territory News*, 2 June 1978).

The ALP spokesman, Mr Uren, was quoted as saying that:

> ... the announcement made a "complete mockery" of the environmental impact assessment procedure, and was a "slight" to the process of consultation with the traditional Aboriginal

land owners. "In effect, the Government is saying that Pancontinental can start work now and finish the environmental studies later ... It is a complete violation of the second report of the Ranger inquiry to allow works to proceed before Aboriginal land claims are heard by a land commissioner" (*The Canberra Times* 13 May 1978).

In 1978 and 1979 the NLC continued to reiterate its opposition to the project, including at least one letter to the Prime Minister (7 November 1978). The NLC was also reported as being:

> ... particularly concerned over Pancontinental's direct approaches to Aborigines on the subject of mining at Jabiluka (*Australian Financial Review*, 4 September 1978).

Even at late as September 1981 *Rydge's* was still reporting that:

> Aboriginal opposition, especially from traditional owners, has been stronger than at either Ranger of Nabarlek, which are now in or near production ... but the story emanating from Darwin is that the aborigines with interests in Jabiluka have been seeing those associated with Ranger and Nabarlek getting cash payments which will flow from development. Whatever has changed the aborigines' minds, their anti-Jabiluka advisers appear to have been dispersed (*Rydge's*, vol 54, September 1981).

The change of staff at the NLC began towards the end of the negotiations of the Ranger agreement (see *The Bulletin* 10 October 1978; *The National Times* 23 September 1978).

<u>"We are not talking about mining": Part 1</u>

One of the problems confronting Pancontinental was how to get permission from the traditional owners to undertake certain preliminary activities on the proposed mine site given their opposition to the mining. A number of meetings were organised by the company to "walk over" the site of the proposed mine

Tapes of one of the meetings between the company representatives and a selected group of traditional owners have been obtained and transcribed. The tapes clearly show how:

- the traditional owners were pressured into accepting, step by step, the beginning of mining activity on their land;

- the company presented its proposals in a way that did not explain effectively the full ramifications of what was being proposed;

- some of the proposals directly related to the mine were presented as though they had no connection to mining.

The meeting on 4 April 1978 was, according to the NLC, a contravention of the spirit of the Aboriginal Land Rights Act. One of the NLC staff attended the meeting as an observer. The following statements are some excepts from these tapes.

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> Tony Grey (Pancontinental): I think for a big thing, like whether mining should go ahead or not, there should be all of the players - have a big meeting. But for little things such as

approval for a tailings site drilling it is too difficult. Very difficult to get that many people together. And if we have to do that every time we have a consultation about a little thing then nothing gets done. So much trouble. So much expense. For big things I can see that it makes sense to have a big meeting like you did before - you talked about the National Park question. That's a big thing. So you have a big meeting. You could talk about whether mining should go ahead - that's a big thing - you have a big meeting. But tailings site drilling for environmental purposes is a little thing. Doesn't make much difference. Therefore it's better just to have the traditional owners. Otherwise it just gets impossible to hold a meeting. The whole system breaks down. See right now the system is not working well - this whole system of consulting with the traditional owners and the NLC - it isn't working well because it takes too long for us to get a decision. See we've been trying to get a decision on this tailings site now for a couple of months - Bob? Three months, three months, and it has cost us $300,000, Toby. It has cost us a lot of money and the people in the company - they are very frustrated. They want to do the right thing by the Aboriginal people. They want to consult with you and have good relationships with you and cooperate because when mining goes ahead in the Northern Territory there is a tremendous need for the white people and the black people to get together and to cooperate. We should be friends and not enemies. And the way to become friends is to talk, is to consult, and get along well together. But it's not good to have a great deal of frustration and take a long time to do something that really can be done very quickly.

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Bob Randall (Pancontinental): We explained what we just said about drilling. You know, it's not opening up or starting off, digging up or mining.

Tony Grey: No, it's not a mining thing, no.

Eugene Semenikow (Pancontinental): Is this what you've been afraid of. Is this what you've been concerned about. Who told you that? Who told you that?

Bob Randall: Oh, people think that way, you know. It slowly starts off. I think we should tell the people that it will be done. We've got to say that. The government made a decision about that.

Gavin O'Brien (NLC): They haven't said that this mine is going ahead.

Bob Randall: No, I mean generally. They made a world statement, all over the world. So much so that other countries have ordered their uranium from us. That's what I'm saying. So the Australian Government said that to the world. Australia will mine its uranium.

Gavin O'Brien: This wasn't the statement of the people at Mudginberri the other week. They said "yes, we understand that mining is going ahead". But I think we passed this on to Pancon some time ago. They said that mining would go ahead. Is that right? They said that ok, well, that can't be avoided but they believe that Ranger is going to go ahead too. But they said they only want a small hole at Ranger. Is that right? They said all that stuff should be taken off the country, processed somewhere else. They have said as far as, well this was a couple of weeks ago, that they are not so keen on Pancontinental.

Bob Randall: Yeah, but really once you say yes to mining then you control the mining after it's started - how it's going to be done.

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Tony Grey: It's so difficult. It really is.

Gavin O'Brien: It is difficult. You should see it as being merely initiatory difficulties.

Tony Grey: It's taken us three months, Gavin. It's the most frustrating thing. We just try so hard to do the right thing and it just ... We can't ... It's costing us $300,000. We've spent $10 million so far. We want to be friends with the Aboriginal people.

Eugene Semenikow: I think it's proved itself, Tony, over the last six years.

Tony Grey: But every time we call a meeting then the right people aren't there. We have to go and talk to somebody else. And then we talk to them and then there's somebody else that comes up - and over something that is really there to protect everybody including the Aboriginal people. That is the tailings site. I mean that's not even mining. That's environmental protection, and we can't get approval for doing that. But the system is just, is a breakdown. If the system is going to work - and the system is that there should be consultation between the Aboriginal people and the mining company - that's supposed to be the system - if that's going to work we have to improve that process. Otherwise there's a breakdown. The only other solution is for the government to come in and do it all. And that is what will have to happen. And I don't think that the Aboriginal people really want that and we don't really want that. So unless we're going to have the government just run everything we have to learn how to consult together and to improve the communications and the decision making process so that we know where we stand and you know where you stand. We give you full information - like we did today - and then we get a decision from you.

Bob Randall: See they gave us a decision on two occasions. We just keeping asking the same thing over and over again. Maybe we deserve to ask more people instead of setting them up to say that.

Tony Grey: But every time we have a meeting there is more people we have to ask. It's been three months getting this meeting and we worked three months to get this meeting with you and now it looks like we'll have to ask some more people. Now what happens when we ask them? Will somebody else come along and say "He's got to be consulted"? Do you understand our trouble? Jacob, do you understand our trouble? Our difficulties?

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Toby Gangale: Somebody might say (inaudible) the birdlife. We're living off the land, you know. Some say, might be, kills animals ... dangerous things

Tony Grey: No, it won't kill the animals and it won't kill the birds because it'll be done in such a way that they are all protected. All over the world new mines are being opened up. All over the world. And they are being done properly now. It used to be in the old days that they weren't done properly and a lot of bad things did happen to the environment. That is true. But today, that doesn't happen any more with new mines being opened up. They are being opened up all over the world - in the United States, Canada and Africa and they are opened up in such a way that the environment is protected - that the birds and the animals aren't

affected by the mining operations. And the reason for that is that the tailings which are the most problematical part of any mining operation are contained in a dam so that the tailings don't get into the environment. It's the tailings that are the problem and once they are contained properly in a dam then nothing bad happens. And that is being done all over the world these days. It has to be because the governments of these countries make it happen. And our government is going to make it happen up here in the Northern Territory. Our government is going to force the mining companies - mining companies will do it anyway - but, in case they don't the government will be there to force them to stop any bad things from happening. And it's quite an easy thing for mining engineers to do all this. It's a lot of work but it's easy from a technical point of view ... It costs a lot of money.

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Tony Grey: ... Toby do you agree on that? As long as we avoid your father's grave with the tailings drilling testing do you feel that you and these people here today can give adequate consent for us to go ahead with the testing?

Toby Gangale: No, we'll agree with the drilling but the mining side - not really, no.

Tony Grey: Oh, well that's different. For the mining that's different.

Toby Gangale: For the drilling, yeah.

Tony Grey: Yes, but we're not talking today about approval for the mining operations. That comes later and I recognise that you may want to consult with more people on that matter. But we're only talking about small things today - drilling and testing, yes - for environmental purposes only. And it doesn't mean that that just because we do the testing that we'll necessarily do the mining because that becomes part of a separate matter. All we are asking you for today is permission to do the testing which is a small thing - not the mining.

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Toby Gangale: ... what we've been talking today ... the drilling, or you know, the roads ... and afterwards we've lost.

Tony Grey: Oh no, you wouldn't be lost because all we want to do is drilling for the testing. This is not mining. It is not mining we're asking to do. We've already done a lot of drilling as you know. We've drilled for the last seven or eight years and for the last four years we've drilled in the Hades Flats area. but now we are coming to ask you - we've never had to ask for your consent before drilling. And in fact one other company recently has just done a lot of exploration drilling without asking anybody for any consent. Now we are trying to do the right thing by the Aboriginal people and that's why we come to you and explain it all to you and ask for your consent. But we're not asking for anything new. This is drilling for environmental testing. It has nothing to do - it's not mining - not opening up a pit or anything like that. So it's perfectly open for you come back later and say you do want mining or you don't want mining. It's without prejudice for you. Your position is still the same but you won't be able to know because nobody will be able to know whether it's a - that's a good site or a bad site unless we do that test drilling. But we are now coming to you out of a spirit of cooperation to get your consent. We don't - we didn't have to legally. You know, the government could let us do that anyway. We're paying you the courtesy of coming to ask you your consent over

this very simple matter. It's a very simple matter. It's only a little bit of drilling in that particular area for environmental purposes and not for mining.

Bob Randall: There seems to be a fair bit of confusion around these people that maybe are thinking that in fact they are giving their consent to mining. I wonder if Gavin, who is a member of the Northern Land Council could explain that there's a difference between the two. There appears to be fear by these people that if they are giving the go ahead for the test drilling for a tailings dam site that that's the ok for mining. It's obviously wrong. Could you explain that where they are wrong Gavin?

Tony Grey: Any more than exploration drilling and engineering drilling that we've done so far is the same thing. To give the ok to drilling doesn't mean you give the ok to mining.

Toby Gangele: yeah, it's alright ...

Tony Grey: See it's costing us a lot of money - these delays are very very expensive, Toby. They cost us $12,000 a week to delay.

Toby Gangele: You've already got that equipment?

Tony Grey: Yes, it's been there for a long time.

Toby Gangale: How many meetings ... I've only been up here ... I don't know what time. Last year? Two or three years? Meetings up here?

Bob Randall: Consultative or what? Three or four years?

Tony Grey: Oh, no , since 1972. Six years.

Toby Gangale: Long time.

Tony Grey: Six years. Albert knows. He was there right from the beginning.

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This is part of only one of a number of meetings organised by the company. The NLC files contain details of a number of meetings and demonstrate its concern over the company's direct dealings with Aboriginal people. The NLC was also concerned that Aboriginal people were dealing with a wide range of issues at the same time, including the land claim, the establishment of the National Park, the roads dispute at Gunbalanya and the formation of the Gagudju Association. Aboriginal people were continually complaining about the number of meetings they were being asked to attend.

Continuing problems were being created by the company's visits to the communities and the showing of a film of Toby Gangale speaking in favour of the mine during a visit to New South Wales. Bill Neidjie and Toby continued to complain to the NLC about the visits by one of the company's staff. The President of Oenpelli Council requested the NLC to withdraw this person's permit.

<u>The January 1981 Djarr Djarr meeting: "we are not talking about mining" Part II</u>

Pancontinental not only argued that it would suffer no detriment from the granting of the land to

an Aboriginal Land Trust but also supported the claim of one group of traditional owners. According to the chief executive of Pancontinental at the time:

> Our policy of co-operation with the [land claim] hearings allowed us to persuade the NLC to commence negotiations for consent to mine before the claim was actually granted. Under the Aboriginal Land Rights Act, the traditional land owners had a right to veto any mining ... Our exploration licence provided us with all the rights ordinarily required to bring in a mine but now we had to seek consent, paying for the privilege (Grey 1994, 230).

On 26-27 January 1981 there was a meeting of about 200 Aboriginal people at the Pancontinental mining camp at Djarr Djarr. According to Tony Grey, "we staged a jumbo meeting of 200 Aboriginals to kick off the formal negotiations" (Grey 1994, 230). The substantive parts of the meeting were conducted by the three main negotiators of the Pancontinental mining agreement (David Parsons, Eric Pratt and Phillip Teitzel). David Parsons had previously reported on the criticism of the NLC's role in the Ranger negotiations. The meeting was also attended by the Chairman of the NLC, Gerry Blitner and the Manager of the NLC, Mr Lanaphuy.

> At the meeting they agreed to give the Bureau of the NLC directions to commence negotiations with Pancontinental on certain issues. The idea is for the Bureau and Pancon to talk about the things that would affect people IF mining was granted. Since this meeting Pancon has taken no active part in the land claim hearings (*Land Rights News*, No 31, March 1981).

In fact, one of the resolutions passed by the NLC on 18-20 February 1981 specifically referred to the mining company's participation in the land claim:

> That the Northern Land Council understands and accepts the resolution passed by the meeting of traditional owners held at Djar Djar on the 26/27 the January 1981 and this Council understands that the formal negotiations in respect of the Jabiluka project are to commence and continue provided Pancontinental Mining Limited does not oppose the Aboriginal claims case in respect of the Alligator Rivers Stage II (Northern Land Council 1985, 16).

One writer at the time suggested that because the Djarr Djarr meeting demonstrated that Aboriginal people were prepared to negotiate and were not categorically opposed to mining then it would have been more difficult for the company to argue that a grant of land to a land trust would have been to the company's detriment (Dreyfus 1981, 124).

Tapes of the meeting have been obtained and have been transcribed. The tapes provide a very interesting perspective on the decisions taken at the meeting. From this meeting onwards the go ahead for the Jabiluka mine was inevitable even though the final decision was not taken until June 1982. The quotes in this section only include what was said by the three negotiators even though there is considerable discussion in language (which has been translated) about the issues.

On the second day of the Djarr Djarr meeting Phillip Teitzel explained that one of the main purposes of the meeting was to discuss the land claim and the proposed Jabiluka mine. Other issues such as roads and the national park were also discussed.

> The third thing we are going to discuss today which we have to get an answer on today is the mining question. The mining question is for Pancontinental mob. We are talking about three

things with Pancontinental and those three things have been told to you yesterday will have an effect on the land claim - on how the land claim will work out.

I will say that the three things are: you could decide to tell us the decision you made before, is that still a good decision and the right way to go? That we would not talk to the mining company until after the land claim.

And the other way, and next way, is that: no, we are not going to talk to the mining company until a long time in the future.

And the third way was you could say: yes you can talk to the mining company, and we can start talk with the mining company now but we can't talk anything about actually digging up the soil in the short time.

Clearly the NLC was concerned about whether the land claim would succeed. David Parsons explained each of the three options that the NLC believed Aboriginal people had to make a decision about at the meeting.

Now that really brings us down to probably the big decision for this meeting and that is about Pancon. Now you will remember yesterday I showed you this book. Now this is the book, this is Pancon's argument that they say that they will give to the Land Commissioner, to Judge Toohey. Now we have got three ways, as Phillip said, of answering that question. There is one way which people have told us about and which Aboriginal people were telling us about before the land claim started and right up to now. And that was we do not want to talk about mining until after the land claim has finished.

What we thought about at the land council was that there are two other ways that we can go and we wanted to make sure that Aboriginal people and the traditional owners, and everybody else could understand those two ways and make up their minds about which way they wanted out of those three ways altogether.

The first one: no talk until after the land claim.

The second one, remember I wrote them down. The first one, the same as now. The second one was yes, start talking to the Pancon but not about mining. Right, yes talk but do not talk about mining. Nothing about whether or not the mine starts.

It's important for everyone to remember. Yesterday and today we are not talking about the mining. We are not talking about whether that mine starts, whether it stops, nothing about that mine. So everybody should feel very strongly that we are not talking about that mining. You should not worry that anything you say today will have anything to do with that mining, about whether it starts, about whether it stops. So don't worry about that.

The first choice as you have already said. The second choice: yes start talking but not about mining. And the third choice is: no, do not talk to Pancon.

He then went on to explain the implications of each of these choices for the land claim.

Now why we have raised all of these questions today and yesterday was because whichever way you choose means that the land claim will go harder or it will be easier. And that's why

we have been talking so much about those three choices. Now you will remember that yesterday I said that you must remember that we have been trying to think very hard about these three choices so that we could explain it to people about what they will mean for the land claim. And what we think they mean is this.

That first choice - the way that people have been talking - that choice about do not talk until after the land claim - what that means is we are not sure whether or not Pancon will give this book to the judge and try and make it hard for us. If this book goes to the judge it will make it harder for Aboriginal people to get their land back. So for that first choice we cannot be sure about whether or not Pancon will give this book to the judge.

That second choice about which says yes start talking to Pancon but not about mining we are pretty sure that this book will not go to the judge and it will make the land claim easier. We would feel happier that Aboriginal people could get their land back than that first choice. Now that is what Eric Pratt, you know Eric Pratt, and Phillip and myself have thought about it - we've thought about it very hard - and but we think that the second choice would make it easier for us to get country back for everybody in the land claim - limilngan, gundjehmi, bunitj, erre and djadjabagu. We think it would be easier.

The third choice was no, do not start talking to Pancon. Now if we said that we know that Pancon would give this book to the judge and it would be very hard for us to win that land. And remember the reason is because the judge would read this book and he would write down about it when he sends off his business - remember I drew on the board - he will send it off to the Minister for Aboriginal Affairs and he will have a good look at it and he might make it hard for Aboriginal people.

The last thing to remember is that any decision you make to start talking you can change. Now you can say today, alright first thing: no, we stick to what we said before, we don't want to talk until after the land claim. You can say: yes start talking but not about mining - no talk about mining, or thirdly do not talk at all. Remember one thing. As I said yesterday that whatever you say today you do not always have to stick with that. Things may change. People can always change their mind - maybe in one month, one day, one week, one year, anytime. People can say no, things have changed and we want to change our minds. So do not think that because you choose one option today you will always have to think that way. The same with balanda, the same with Aboriginal people, any negotiations and talking one mob with another

One the basis of what was explained to people in this part of the meeting it would appear that the NLC wanted to start talking to the mining company but not about mining.

The Chairman of the NLC was concerned about how these issues were being presented to people and the next section of the meeting was between the negotiators and the Chairman.

The feeling I get, they have made a decision, you know that number two seems to be the one. But I fail to see how its going to stop the mining company. We've lost so much already to hesitate.

David Parsons articulated the NLC's strategy to deal with Pancontinental's detriment submissions:

They can't make the running. We make the running because we are making the offer. We tell

them what we are going to talk about. So that way when we go before the judge we can say we are being reasonable, we are talking, this mining company aren't losing out. How can they be losing out when we are talking to them?

To which the Chairman replied:

That's what I said, they might say we are talking about it alright, but not about mining.

David Parsons then began to elaborate on what talking to the mining company was actually going to mean. This was not explained to the main group in the meeting at this time.

We are not going to tell the mining company, saying no, not mining, is probably a little bit wrong. What we are saying is we are not going to talk about mining the next week or the week after or in 10 weeks time. We are not talking about the actual digging out of the mine. We are talking about all the things that have got to happen before people here will even think about it. Including when that digging up will happen.

The NLC Chairman argued:

I reckon the wording ought to be changed on that ... I wouldn't want the council to be named after Mr Blitner has said this and I get the blame. Wherever I go I get, "oh you been do this". I would complain. I would see the necessity there for a complaint through agreement with NLC because Aboriginal people got a land to talk after and it is these people who would be affected.

David Parsons then elaborated further to the Chairman the stages in the talks with the company. The tape suggests that very few of the other people at the meeting could hear what was being discussed and one of the participants actually said in language "Hey, you mob listen to me. These balanda are arguing with each other so why don't we talk ourselves". David Parsons then began to outline how the negotiations and consultations were planned to take place.

No, no all those preliminary talks would be about the environmental impact survey, schools, roads ... the later part of the talk, we tell them what we are worried about, like protecting sacred sites, like getting outstations, like getting roads protected, like making sure there is not too much traffic, like all those sorts of things. They would then say we are prepared to say, we will do this, this and this and after all that talking has been talked out, then we would say all right then, then we'd go back to the traditional owners and say alright we have finished all those talks. Do you want to talk about what we have been talking about, what you want to do now, then we would have another range of options on what would happen then. It's only a first step. It's certainly not the step that says yes or no to mining. That comes much later ... It's a tactic 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 - the other mining company - to say these Aboriginal people are going to give us a really hard time. If we can say well look at Pancon, we are talking to them. So it takes - there are three main objectives. That gets rid of Pancon, Peko and only leaves the Northern Territory Government as the main objectors.

Following considerable discussion in language, the meeting voted unanimously for option 2. It was then left to the negotiators to draft the resolutions for the meeting to confirm this decision. These resolutions were written in "lawyers language" and option 2 was described as "talk now but no mining". This is how the resolution was read out:

A meeting of traditional owners of the land occupied by Pancontinental mining in the Jabiluka area and those people who would be affected by the proposed project, the Jabiluka project, took place at Djarr Djarr on the 26 and 27 January. What that's saying is that the traditional owners of this country and everybody who would be affected by any mining project in this area, all met together yesterday and today. So that is all this first bit is saying is that all of us here had a meeting.

And the next bit goes on to say is that what people said at this meeting is that first of all the Northern Land Council and the Pancon mining company must reach an agreement about what the Pancontinental mining company will say to the judge.

That is the first thing. The first thing we have said is that the Northern Land Council and Pancon must agree about what Pancon will tell the judge. And I can tell you what Phillip, Eric and myself will tell Pancon is that you do not show this book to the judge. That's the first point that we will say to Pancon. You do not show this book to the judge. That's the first condition that we had written down here.

The second point is that the Northern Land Council shall employ people as it deems necessary to examine the proposals made by Pancon in respect of the Jabiluka project. Such people will be employed by the NLC at the expense of Pancon.

What that says is that the NLC will get lawyers to talk with Pancon about the things that we have mentioned. About the environmental impact, about what will happen to the country, about what Pancon says they will Pancon will do about schools, protecting places, roads, outstations, everything ...

The third thing that the Northern Land Council shall not enter into or in anyway commit the traditional owners or those affected by the Jabiluka project to finalisation of any agreement for mining without further consultations with the traditional owners and those people affected by the Jabiluka project.

Now again that's lawyers language for saying very simply that the NLC will <u>not talk to Pancon about mining</u>. The only time when that could happen, the only time the NLC will talk to the traditional owners and everybody here about a mine will be at some time later. There will be no decision made by the NLC about that mine going ahead or not going ahead <u>or anything about it</u>. When it starts, if it starts, <u>nothing about that</u>. That will never happen until the traditional owners and everyone here say that they are ready for that to happen.

These points were then summarised by David Parsons as:

The first one about that big book.

The second one about employing people that Pancon will pay for to make sure everybody here knows what's happening.

And the third one is that there is no talk about whether that mine starts.

They are the three things that are written down here.

The translation by Jacob Nayinggul emphasised the fact that the decision would mean the company would not submit its detriment report to the Land Commissioner. There is no mention of the negotiation of a mining agreement in his translation.

The NLC letters to Pancontinental

The following day (28 January 1981) Phillip Teitzel, a legal officer of the NLC, wrote to Pancontinental's solicitors and outlined the three resolutions The NLC recorded as having been passed by the meeting. These were:

1. Subject to the continuation of satisfactory relationships between the Alligator Rivers Stage II claimants and their advisors, and Pancontinental Mining Limited and their advisors, the Northern Land Council is instructed to commence and conduct formal negotiations with Pancontinental Mining Limited on all aspects of the Jabiluka project.

2. The Northern Land council shall forthwith employ such persons as it deems necessary to examine the proposals made by Pancontinental Mining Limited in respect of the Jabiluka project. Such people are to be employed by the Northern Land Council, at the expense of Pancontinental Mining Limited, and the company shall also pay all Northern Land Council costs incurred directly or incidentally in respect of the proposed negotiations.

3. Any draft agreement that may be reached between the Northern Land Council and Pancontinental Mining Limited shall be referred to the traditional owners and persons affected by the Jabiluka project for their further consideration.

The letter also included the names of the negotiating team and its advisers. The fact that the scientific advisers had already been nominated suggests that the NLC knew that the Djarr Djarr meeting would endorse its preferred course of action: the negotiation of a mining agreement.

In their reply on the same day the company's solicitors asked what the expression "subject to the continuation of satisfactory relationships between the Alligator Rivers Stage II claimants and their advisors, and Pancontinental Mining Limited and their advisors" meant. A telex was sent by Mr Teitzel on the same day stating that this clause meant that Pancontinental would not "place any submissions before Land Commission in relation to detriment or otherwise oppose the claimants case". As was previously mentioned, not only did the company not lodge a detriment submission but it actually supported the claims of one group of Aboriginal claimants.

There is a very serious question here about whether the meeting resolutions as drafted were consistent with the understandings of the Aboriginal people attending the Djarr Djarr meeting. It is apparent from the transcripts quoted above that the NLC was being instructed to talk to the mining company about the detriment submission and not to talk about mining. Over and over again it was emphasised at the meeting that the NLC would not be talking about mining even though the people presenting the information knew that that was precisely what was intended. It is very hard to see evidence of where the Aboriginal people at the meeting understood that they were providing formal instructions to the NLC to negotiate a comprehensive mining agreement with Pancontinental.

The negotiation of the Blue Book (the draft mining agreement)

The negotiation of the mining agreement between the NLC and Pancontinental commenced within

days of the Djarr Djarr meeting. A 100 page draft agreement (the so-called Blue Book) - formally known as the Negotiators Draft Agreement - was finalised at the end of June 1981.

Detailed negotiations were undertaken with the company during the period 26-28 June 1981 and the Blue Book was finalised for presentation to Aboriginal communities in the region. These negotiations were "in the presence of" a number of Aboriginal people from the region. The NLC had also already advised the company on 8 June 1981 that it had no objection to the technical aspects of the Project.

The summary notes prepared by one of the negotiators (after the agreement was concluded) highlighted the continuing problems Aboriginal people were having with the process. The following is taken from the record of meetings on 12 June 1981.

> General points from Gagudju meeting. Joseph Bumarda stressed Aboriginal people were understanding very little.
>
> 1. Nathaniel Maralngurra asked what would Pancon do if Aboriginals pulled out of the negotiations.
>
> 2. Peter Carroll both to the meeting and privately said everything was going too quickly and indeed, Mick Alderson agreed with him. Toby Gangele suggested putting negotiations off till after the land claim decision received.
>
> 3. Mick Alderson reiterated his complaint that even if Aboriginal people said no, the Government would force mining to go ahead.

The fact that Toby Gangale was reiterating his long held view that the NLC should not talk to Pancontinental until after the land claim was finalised suggests that either he did not understand the content of the resolutions passed at the Djarr Djarr meeting in January, or he did not agree with the resolutions from the meeting, or he had changed his mind since that meeting. David Parsons had stated very clearly to the Djarr Djarr meeting that people could change their mind on the resolutions. What was not explained at the meeting was how people could stop the NLC negotiating with the mining company once the process had started. The evidence suggests that the NLC had no intention of stopping the negotiations regardless of the views expressed by any of the senior traditional owners.

The same document records what seem to be continuing reservations on the part of some Aboriginal people expressed at the negotiation meeting on 26 June 1981:

> Cole [negotiator from Pancontinental] further explained that Djarr-Djarr mine could not go ahead unless Aboriginal people say yes and Toby then said that the Traditional Owners would leave it for a while. Considerable discussion ensued. There was discussion regarding the three approvals that would have to be given (Clause 5) and Jacob asked whether Aboriginal people had to say yes and then the other three approvals sought.

Two days later (28 June 1981) the notes record:

> Cole advised that the document was the one that Aboriginal people should think about and then advise Pancon. He said that all the changes that Aboriginal people wanted had been included in that document and that Aboriginal people should decide about the things in the

document. Toby advised that Aboriginal people did not want to have to think about it. Bill Neyidji said that it was best to have a big mob of people all the people must understand, we only have one English word.

The first round of consultations

On 4-5 July a meeting was held with approximately 200 Aboriginal people to explain the provisions of the Blue Book. This included explanations of the provisions relating to mining payments, protection of the environment, rehabilitation, permits, medical treatment, Aboriginal participation committee, employment, sites of significance, Aboriginal culture, traditional owners, liquor, surrender and termination. A resolution was passed that Peter Sutton was to get the views of Aboriginal people about the Blue Book and any changes they would like to see to the agreement. The consultations resulted in the development of the so-called Red Book.

In the period 16 July to 15 September 1981 the Northern Land Council undertook a wide ranging series of consultations in relation to the Blue Book. These were undertaken by Peter Sutton and Silas Maralngurra. The full reports of these meetings are extensive and only a small number of excerpts of some important points are included below.

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16 July 1981 (Howard Springs)

People think the mine will go ahead whether they say yes or no. Peter Sutton said this was not the case.

22 July 1981 (Hayes Creek)

This particular group showed considerable impatience with the consultation process. This was purely on the grounds of a desire to see financial benefits as soon as possible.

Peter Sutton asked the group for an expression of any concerns, problems or ideas they had in relation to the draft agreement or the consultations concerning it. [named individual] replied on behalf of the group 'we just want the money, and to have the meeting'.

18-19 July 1981 (Katherine)

... if a big meeting all agreed that the mine could go ahead then it could go ahead.

2 August 1981 (Jim Jim)

[named individual] said that some Aboriginal people whose own territories were a considerable distance from the Djarr Djarr area, are a bad influence on negotiations because such distant people tend to unequivocally support the commencement of mining. Nevertheless these people should be consulted.

[named individual] complained solidly about the fact that Pancon had stressed Toby Gangele's indebtedness to them because of their support of him during the Alligator Rivers Stage II land claim.

[named individual] said, regarding the problems of taking responsibility for consenting to mining, "I'm alright. It's Toby who will cop it".

3 August 1981 (Jim Jim)

Toby Gangele: Since the land claim decision may be subject to some appeal and is not really final, the situation is still up in the air. We should wait for a final result of the Alligator Rivers land claim before making a final decision on mining.

Peter Sutton explained in detail the amounts for the first three years as shown in the draft agreement. Toby Gangele; "Yes, front money big lot of money first year".

4-5 August 1981 (Cannon Hill)

... Big Bill repeated his comment, made before the consultation formally began, that he felt the up-front money payments should be made in a large sum and immediately upon consent, and with firm guarantees.

Big Bill: keep payments low, because family will humbug me.

[named individual] "The government shouldn't interfere with our ideas. It's our country which is being opened up and ruined".

Big Bill: very worried that some workers may take uranium out and make a bomb and come back and kill us all ... at the final meeting, when everything is settled, we should have a big corroboree to show them that we are not losing our culture.

6 August 1981 (Jabiru)

It was noticeable that this particular group especially regards the development of the Pancon mine as a fait accompli.

Peter Sutton raised the option of combining the up-front payments in a single large payment in the first year. Everyone said they would like to have this done ... "yes, because by and by we are all dead, six foot under ground" (exactly the same comments made by each group in each case).

7 August 1981 (Deaf Adder Gorge)

[named individual] "We give hand to Mirarr, Manilagarr all that mob, but we don't give it to Pancon yet - we got to work it out properly. This Koongarra I don't give it, I can't give nobody. For Pancon, we give help to other mob, work it out properly, we don't give it, not yet".

17-18 August 1981 (Oenpelli outstation)

Peter Sutton then asked [named individual] his general attitude to the Jabiluka proposal. He replied that "people say OK", largely on the grounds that they want the money. He also said that since Nabarlek and Ranger had been approved, Pancon would need to be very different and exceptional to be singled out for rejection (cumulative impact does not appear to be a very conscious concern here).

12 September 1981 (Oenpelli)

SM introduced the topic of the association which would be recipient of Jabiluka funds. Big Bill Nayidji's view was that a new association should be created for this purpose, called Djabiluku or Djarr-Djarr; and at the same time the name of Gagadju Association should be changed to Gundjeyhmi.

12 September 1981 (Oenpelli outstation)

It will be no defense for NLC to say, when accused of having rushed these negotiations, that they were only acting on instructions. There has to be someone (else) to blame, in this system, and NLC representatives, those who are not traditional owners of the land concerned, are the perfect scapegoats (both of them having done things with which people disagree, and for having done things with which people do agree, but which come under public criticism to the point where Aboriginal people may wish to dissociate themselves from those actions).

... the conceding of all major decisions to a core TO [traditional owner] group is probably related not simply to the politics of land ownership and the privileges of proximity, but also to the "safety" from dire consequences of those who both take spiritual responsibility for djang and social responsibility for changes to the area. Since virtually all deaths in the society are matters for human blame, and wrong behaviour in relation to djang can result in death, a "political" decision about the relative safety of giving consent to a mining project is potentially a life-and-death matter. (The seriousness of this should not be underestimated).

15 September 1981 (Minjilang)

SM said that the Pancon consent money must be there in Darwin right on the spot within one week of signing.

Dick Malwagu: "It's getting to much, uranium mining. We should look two place (presumably Ranger and Nabarlek), country getting too small. Last time rush, signed on djurra. We on islands might go against it. This time more careful. Promises were broken last time. Country not much left. We on narrow path. Got to be honest one another".

PS pointed out that there is a distinct possibility that the government may reduce its funding to Aboriginal communities in the area, in proportion to the revenue flowing into it from mining agreements. This produced great concern.

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There was some effort made during these meetings to present the no-option to people. In many meetings Peter Sutton said that Aboriginal people did not have to say yes to mining and that no decision had been made. This is in contrast to the record of the second round of meetings where the process was to consult people about each of the terms of the agreement. In effect any discussion about whether the mine should proceed was deferred until a big meeting in mid 1982.

The second round of negotiations

The Executive of the NLC met during the period 22-24 September 1981 to consider the Red Book. This led to the beginning of further negotiations with the company on 29 September 1981 where the financial package in the Red Book was rejected by Pancontinental.

In the document headed Pancontinental Negotiations dated 29 September 1981 it is stated that Jacob Nayinggul had a meeting with the so-called "inside group" (the main traditional owners of land likely to be affected by the project) and these people said:

> ... NLC lawyers should talk to Pancon lawyers about people's ideas and the feed back from people was that no Agreement should take place between the two parties until a full written response was given to all negotiators and then explained to them to the Inside Group (page 18).

The NLC and Pancontinental initialled a draft of the agreement on 27 February 1982. According to one set of notes from the meeting, the instructions to initial the agreement were given by the Inside Group. From this date onwards the negotiations in relation to the agreement were being formally conducted under section 48 of the Aboriginal Land Rights Act. One set of notes recording the meetings specifically refer to section 48 meetings for all of the subsequent meetings.

The second round of consultations

A series of consultations about the draft agreement were undertaken during the period 11 March - 5 June 1982 by a different group than those who undertook the first round of consultations. This second group were actually involved in negotiating the agreement with the company. One of the quarterly reports to the Minister for Aboriginal Affairs by the Australian Institute of Aboriginal Studies on the *Social Impact of Uranium Mining on the Aborigines of the Northern Territory* commented:

> To an external observer, the shift by the Northern Land Council midway through the Jabiluka negotiations from using a specialist consultant -who was not a member of the negotiating team - to seek the views of the Aborigines affected, to the use of members of the actual negotiating team to carry out follow-up consultations has undesirable overtones in that it represents the abandonment of the principle of "disinterested interpreter". There was merit in the initial arrangement where there was a clear line drawn between consultations and negotiations (Australian Institute of Aboriginal Studies 1982, 47-8).

The content of the second round of meetings were somewhat different to the first round of meetings. The second round were almost exclusively concerned with consultations over the main clauses of the draft agreement. A number of interesting comments were raised during these meetings.

> What happens if people say no to mining. Bining want to say no but are a bit greedy for Balanda things
>
> [named individuals] then said that they wanted a decision regarding the mine to be made by the Inside Group.
>
> DP then explained the anticipated procedure for further meetings and indicated that comments from the Outside Groups' meetings would go to the Inside Group and the Inside Group will then select the ideas that they think are good ideas and tell the negotiating team to negotiate

> on those ideas, or they may tell the NLC that what is in the White Book is not good enough and they want renegotiation on certain points. DP explained that after that negotiation session, then there would be a big "YES/NO" meeting and the results of that meeting would be advised to the NLC and the NLC will then have a meeting under Section 48 of the Aboriginal Land Rights Act to confirm the Agreement should be signed or not signed.
>
> DP talked to Toby about the procedure that will follow the Section 48 meetings, that is more meetings of the Inside Group, possible renegotiation, instructions back to Traditional Owners, consent of the NLC, and then final consent by Traditional Owners. He also indicated that Big Bill had suggested the idea of a corroboree and asked Toby what he thought. Toby said he thought the idea of a corroboree was a good one.

One of the reports to the Minister for Aboriginal Affairs by the Australian Institute of Aboriginal Studies on the *Social Impact of Uranium Mining on the Aborigines of the Northern Territory* commented on the difference between the two groups of consultations. The report noted that there were still deficiencies in the process:

- Aboriginal people complain of too many meetings;
- old people do not or cannot understand the issues as presented;
- failure to attend meetings is interpreted as lack of interest, not an expression of deliberate abstention or disapproval; and
- that express instructions that meetings should be delayed or should not occur at all during particular periods of time have been ignored (Australian Institute of Aboriginal Studies 1982, 47).

<u>Government approval for the companies to negotiate sales contracts</u>

Even while the second round of consultations with Aboriginal people on the draft agreement were being undertaken Deputy Prime Minister Anthony announced that the project had received conditional approval under the Government's uranium export policy (16 March 1982). This enabled the companies to enter into the marketplace to negotiate export contracts. Approval to export and the grant of the mining lease were conditional on agreement being reached with the NLC. Practically speaking, however, the Government could confidently proceed with this course of action because it could, if necessary, have invoked the national interest and arbitration provisions in the Aboriginal Land Rights Act. However, more significantly:

> In making this decision I have taken account of the views of the Northern Land Council which has indicated its support for market entry (Anthony 1982, 280).

Presumably the Government believed that the initialling of the draft agreement by the NLC and Pancontinental in the previous month was a clear sign that the final agreement would be approved by the traditional owners in the near future.

Undoubtedly the Government's decision must have put considerable pressure on the Aboriginal land owners to give their consent to the project. It certainly was a very clear indication that whatever the views of the traditional owners the mine would proceed. It was really a question of which sections of the Aboriginal Land Rights Act needed to be invoked by the Government to

ensure that the project would proceed. In fact, the Shadow Minister for Aboriginal Affairs (Susan Ryan) at the time pointed to this charade:

> Does not such action reinforce the attitude that is to be found within Aboriginal communities right throughout the Northern Territory, that is, that irrespective of any opposition that they might have to mining, their values and their views will be overridden by a government determined to have mining, a government that prefers to achieve its mining objectives by a legal charade that could project the view that Aboriginal approval to mining is an approval that is freely given (quoted in House of Representatives, 25 March 1982, 1466).

More amendments to the Aboriginal Land Rights Act

Two days after this announcement by the Deputy Prime Minister the Government introduced a bill to further amend the Aboriginal Land Rights Act in the Senate. The legislation passed the Senate on the same day (18 March 1982) and was debated and passed by the House of Representatives on 25 March 1982. As a result of High Court action at the time by Peko-Wallsend Ltd against the Minister for Aboriginal Affairs it was not clear that the Minister could grant the land recommended for grant by the Land Commissioner, including the Jabiluka project area.

The amendments allowed the Minister to deal immediately with those parts of the claim area not affected by the legal proceedings. This meant that a grant of land including the Jabiluka project area could be made to a Land Trust.

As the Opposition pointed out at the time, the mine could not proceed unless the land was granted to a Land Trust and therefore became subject to the mining provisions of the Aboriginal Land Rights Act. The Opposition also highlighted the difficulties the Deputy Prime Minister's decision to allow the company to negotiate export contracts posed for traditional owners:

> Mr Anthony's approval means that the Jabiluka project partners can begin negotiations for the sale of uranium from Jabiluka before the Aboriginal owners have agreed to allow mining to proceed. While the Northern Land Council has initialled an agreement on Jabiluka, the agreement has still to be discussed by the Aboriginal owners of the area as specified under Section 48 of the Northern Territory Land Rights Act (Senate 18 March 1982, 956).

The Opposition was reported in *The Northern Territory News* (26 March 1982) as saying that the amendments ensured that the Government could hand over the land covering the Jabiluka project "so traditional owners could be pressured into ratifying an agreement between the NLC and Pan Continental".

One of the Opposition speakers in the debate (Stuart West) claimed that the senior counsel for the NLC, Mr Eric Pratt, had telexed the Minister for Aboriginal Affairs 9 months previously and stated:

> The mining is justified environmentally and economically and will result in substantial benefits to Aboriginals (quoted in the House of Representatives *Hansard*, 25 March 1982, 1451).

Mr West indicated that the telex had been sent without NLC approval and on "a Pancontinental telex machine". Mr Holding later in the debate referred to "legal paternalism" in the NLC:

> ... in which negotiations are entered into by legal advisers for and on behalf of the Northern

> Land Council and when, after Mr Pratt has reached what he regards as satisfactory arrangements with the mining companies - who, after all, ultimately pay his fees - considerable pressures are applied to traditional owners to give their approval and to comply with those agreements (House of Representatives *Hansard*, 25 March 1982, 1466-7).

Did the NLC have a conflict of interest in the uranium negotiations?

There are two aspects to this issue. One is the way that the land councils are funded under the Aboriginal Land Rights Act. The other is the financial relationship between the NLC and Pancontinental at the time the Jabiluka agreement was negotiated.

As a result of the public debate over the Ranger, Nabarlek and Jabiluka projects a number of people questioned whether the NLC had a conflict of interest as a result of its funding arrangements. For example, Peter Carroll, who was later to be involved in the Jabiluka consultations as an employee of the Department of Aboriginal Affairs, stated:

> The establishment of the NLC through the Land Rights Act provides for funding of the Council through mining royalties. This could be interpreted to say that the NLC has a vested interest in promoting mining on Aboriginal Land (Carroll 1978, 3).

A newspaper reporter from *The Age* (16 April 1982) commented:

> Conflicts of interest abound. None is more poignant than that experienced by the Aboriginal land councils themselves - particularly near Yinkididi near the Jabiluka site, where traditional owners are still negotiating with Pancontinental Mining Ltd. There is no doubting that land councils are committed to promoting Aboriginal strength and ability to survive the 20th century intact. But now the councils are established, well run and well funded, it may be time to modify them in the light of experience to ensure they protect all the interests of all the traditional owners - even those who want no mining at all.

All of the Northern Territory land councils are now funded, to undertake their functions under the Aboriginal Land Rights Act, by mining royalty equivalents payable into the Aboriginals Benefit Trust Account (ABTA) by the Commonwealth from Consolidated Revenue. While the land councils do not receive royalties directly to undertake their functions, they do benefit from more mining activity on Aboriginal land because of higher royalty equivalent payments into the ABTA.

However, at the time of the Ranger negotiations the NLC was funded under different arrangements than apply today. Because the original Aboriginal Land Rights legislation needed to be amended there were delays in the establishment of the ABTA into which mineral royalty equivalents are now paid. The NLC was at the time funded, in part, from the Aborigines' Benefits Trust Fund. The Fund operated during the period 1952 until June 1978 and received all royalties from mining on Aboriginal reserves other than the royalties from the Groote Eylandt mining operations (Altman 1983, 27).

Given the resource demands on the NLC at the time, both from the uranium mining negotiations and the land claims, the NLC Chairman at the time stated that mining would need to proceed on Aboriginal land to generate royalty income for the Land Councils:

> The Northern Land Council's prime function is to protect and further the interests of Aborigines within their domain. As the council's present resources are totally inadequate for

> this purpose the only way they can generate some wealth for the Aborigines in the foreseeable future is by permitting at least some uranium mining on the lands in their custody. Yunupingu says: "If we want to see the NLC run successfully to run Aboriginal development, to see Aboriginal people running their own businesses on their own land, there should be development of mining ... [but Jabiluka] will never go. No hope unless the local people change their minds" (*The Bulletin*, 11 July 1978).

One of the NLC's lawyers at the time commented that while the land councils required adequate funding to fight on behalf of Aboriginal people "this should not be an argument for encouraging uranium mining" (McGill 1978, 5). Even after the present Land Council funding arrangements were put in place after June 1978 there were still claims of a potential conflict of interest for the NLC. In his report on the Act in 1980, Rowland pointed to a conflict of interest situation that arises where:

> the Land Council is funded in part from royalty type payments received from mining on Aboriginal land (s.64(1) and s.35(1)). It may be at times be seem to have a financial interest that could temper the objectivity of its advice to the traditional owners (Rowland 1980, 54).

During the debate in the Senate on the 1982 amendments to the Aboriginal Land Rights Act (see above) one of the Opposition members (Holding) quoted from the Rowland report, and stated:

> these titles include areas of land which are currently the subject of negotiation between the Northern Land Council and Pancontinental Mining Ltd in respect of the mining project at Jabiluka. My concern is that, given the opportunity to amend the Act, the Minister or the Government has continued to ignore some of the problems inherent in the legislation, which were pointed out by Mr Rowland ... in the legislation that created the Aboriginal Land Rights Act and which gave birth to the Northern Land Council we have created an organisational framework which was not related to the structures of Aboriginal society, and in which the potential for conflict of interest was endemic (House of Representatives *Hansard*, 25 March 1982, 1465).

Another member of the House of Representatives (West) raised the same issue. The model of land councils set up under the Act was showing signs:

> of being used not for the benefits of the traditional Aboriginal owners but in the interests of the prevailing and snowballing bureaucracy in the land councils which are taking the decisions and not properly informing the people, on the grounds that the people are not, because of their traditional life style, capable of understanding these highly complicated agreements (quoted in *Australian Financial Review*, 13 April 1982).

This same article questioned whether the traditional owners had ever had a no-mining option put to them by the NLC.

> A spokesman for the land council said that it had not been put and could not be put as the legislation did not permit such an option. However, another spokesman was adamant that the question had been put (*Australian Financial Review* 13 April 1982).

Further,

> Mr Holding said on the evidence that he did not believe that the no mining option had ever

> been seriously available to the traditional owners. His discussions with traditional owners have confirmed this ... (*Australian Financial Review* 13 April 1982).

Tony Grey from Pancontinental also pointed to this financial arrangement:

> The negotiations were not easy and not cheap. The NLC insisted that all their costs be paid by us. They refused to commence unless we agreed. It was largely because we were paying their legal fees, which were charged out at big city rates, that there was little incentive to reach a speedy conclusion (Grey 1994, 232).

Colin Tatz, who was Chairman of the Australian Institute of Aboriginal Studies project examining the Social Impact of Uranium Mining on the Aborigines of the Northern Territory commented in his book:

> The details apart, one aspect of the Pancon-NLC negotiation is disturbing to many. A treasured precept of law is that justice must be not only be done but be seen to be done. In parallel, a precept of negotiated agreements of this kind is that total freedom to negotiate must not only be available but be seen to be available. 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. That this may be a recognized practice in big business is not relevant here. 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 (Tatz 1982, 185).

The Northern Land Council responded to the claims of conflict of interest in the Commonwealth Parliament and that it was a "pro-mining" organisation. The *Australian Financial Review* commented that the NLC responded in an "unnecessarily defensive manner". However, the NLC was forced to undertake further discussions with the traditional owners as a result of the criticism that the no-option was not being put to the land owners.

> The Northern Land Council asked the Traditional Owners if they wanted to stop further negotiations on the Pancontinental mining agreement. The Traditional Owners said they wanted more talks, but not until May this year. They said the negotiating team should talk to other Aboriginal people who were affected by the agreement and then come back to talk more to the Traditional Owners (*Land Rights News* March/April 1982, 5).

At the same time Bill Neidjie wrote a letter to the Bureau of NLC which included the following statements:

> Everyone is pushing us. Pushing, pushing, pushing. Now they want us to sign but they don't know what it means for us. This is our life. Everybody said 'You're asking far too much money. You Aboriginal people have got to have good reasons for asking for a lot of money. What do you want this money for?'
>
> Now I'll ask you one question. How much is your life worth? How much do I have to pay you so I can take your life away? People will say that we are just trying to make trouble now and stop everything, but we don't want trouble. We just want you to understand what we are giving up ... our life. It will cost Pancon money. It will cost us our life ...
>
> I am not trying to stop you. I know you have been trying but you are all the time pushing and

> wanting us to sign. Some ceremonies take six years or seven years, but you have only given us six months or seven months to negotiate ...
>
> We don't know what is wrong with you. We are always straight with you. but now we must do something ourselves. We have seen what happened to others when mining came to quickly. They've lost. They're getting skinny. They don't believe in that mining any more. We don't want that to happen to us and so we have asked for our stories to be written (quoted in House of Representatives *Hansard*, 25 March 1982, 1467).

Apart from possible conflicts of interest, the Government also clearly stated that part of the reason for the 1980 amendments to the Aboriginal Land Rights Act was to deal with the difficult role that land councils are required to undertake under the Act. One of the quarterly reports of the Australian Institute of Aboriginal Studies social impact project provided some general comments on how the consultations were undertaken in the region and the role of the NLC and other organisations:

> The problem is that of ensuring that all people have access to relevant information. One could say that information flow does not cater for these matters in the Alligator Rivers region. People who attend meetings do not report back to their community ... Their job is seen to attend the meeting, and once the meeting is over, so is their job: there is no obligation to inform others of what went on. The lack of clarity about what transpires at meetings is often compounded because people are unclear about the purpose of the meeting. Matters to be discussed are not canvassed beforehand; the full range of information necessary to make decisions is not provided, and hence people are not only being asked to make decisions, but they are being asked to assimilate new information and assess it prior to making the decisions. Aborigines in the Alligator Rivers region frequently complain of the tiresome nature of negotiations: the amount of time they take, the way that the Aborigines' stated wishes are never heeded, and their exhausting nature. It is not uncommon for people to have spent two or three days at a meeting, and not have understood what went on ... The decisions that are made at the very beginnings of negotiations are apt to determine everything that comes after (Australian Institute of Aboriginal Studies 1983, 47-8).

The final sentence has obvious relevance to what happened after the Djarr Djarr meeting in January 1981

The Project Director had earlier raised a number of other issues about the role of the NLC and the organisations in the region. He pointed out that there had been much criticism of the Land Councils because:

- their structures seemed to be totally at odds with the principles and reality of land ownership by Aboriginal people;
- they were centralised and bureaucratic;
- council members were appointed by delegation from particular regions, charged with the final decisions on all land falling with the Land Council's region; and
- the delegates are not directly accountable to the land owners (von Sturmer 1981, 26).

Von Sturmer argued that the Aboriginal Land Rights Act recognises traditional ownership yet

never confronts the difficult question of translating it into appropriate administrative machinery. As an alternative to the Land Council structures as they then existed (and continue to this day) von Sturmer proposed the following:

> The alternative direction would be to make the fact of ownership paramount; to allow decisions to be made locally; to provide structures - the associations being formed in the Alligator Rivers region would be appropriate - which could record and ratify these decisions; to create a Land Council which consisted of delegates from component associations (the real locus of field activities) whose only powers would be to report decisions made locally, and to discuss matters of general moment. In short, the Land Councils should be regionalised - not, as current developments within the Northern Land Council suggest, by delegation to regions (essentially by the appointment of field staff attached to regional offices the prime responsibility of which is to report to the central Bureau) but from regions. The Land Councils would continue to serve important functions: advice on request to the land owners and associations on the political, economic and other implications of matters about which they are required to make decisions; a court of appeal and redress for particular land owners or others dissatisfied with their treatment at the hands of the regional association; a forum for the discussion of long-term goals and objectives ... (von Sturmer 1981, 26-27).

The final agreement

What is clear from the notes of the meetings and other documents obtained during the research for this report is that once the negotiations and consultations were underway (following the January Djarr Djarr meeting) the process really had only one logical conclusion: the approval of the agreement and the go ahead for mining at Jabiluka. When the agreement was finally signed the Chairman of the NLC, Gerry Blitner, was quoted as saying:

> Although the negotiating process has been a long one, it has reduced the pressure that has usually been associated with such negotiations on the traditional owners. Because of the fairness of the negotiations and the careful and delicate ways in which they have been handled, and the long and lasting benefit to the Aboriginal people, the NLC is proud to have been a part of them (quoted in Niklaus 1982a, 6).

The Chairman pointed out that there had been 48 meetings with traditional owners during the 18 month period from the beginning of 1981.

> The Government wanted it that way so there would be no criticism that they've pushed mining without consulting with Aboriginal people (quoted in Niklaus 1982a, 6).

The meetings were certainly very comprehensive and were very well documented. It seems that the main participants were conscious of the requirements imposed by amendments to the Aboriginal Land Rights Act in 1980. These amendments, which were previously discussed, meant that the Minister needed to be satisfied that the Land Council had sought and received proper instructions from the traditional owners and had acted in accordance with these instructions when it negotiated agreements on their behalf (see Senate *Hansard* 18 March 1982, 958). This ensured that any agreement entered into by the Land Council could not be invalidated by legal action against the Land Council because it had not properly undertaken its statutory functions under section 23. It appears that the extensive documentation of the meetings and other material was made available to the Minister for Aboriginal Affairs, Ian Wilson, specifically to ensure that the mining agreement could not be challenged. The Minister stated:

> I have examined the extensive documentation submitted to me by the NLC recording the meetings held with Aboriginals who are the traditional owners of the Jabiluka project and with those groups who may be affected by the mining proposal. I have also examined detailed reports provided by officers of my department who were invited to observe certain key meetings held with the traditional owners and other Aboriginals with strong associations with the project area. My conclusion is that the NLC has fully met its obligations under the Aboriginal Land Rights Act (quoted in Niklaus 1982a, 7).

There remains, however, a very serious matter whether the NLC actually received proper instructions at the meeting held at Djarr Djarr in January 1981 to negotiate a mining agreement for the Jabiluka project. The NLC certainly recorded that it received proper instructions and would have informed the Minister accordingly.

While the NLC and the Minister obviously believed that the process of consultations was handled well by the NLC (and they were certainly handled better than the Ranger consultations), there is still a view being expressed by Aboriginal people in the region today that the process resulted in a mining agreement for a mine that most of them did not, and still do not, want on their land. This view was expressed at the time by a number of people, including the Australian Institute of Aboriginal Studies. The article by Niklaus also quotes from a NLC staff member who believed that the "seemingly endless stream of meetings" had a "totally divisive, fragmentary" effect on the Aboriginal communities (quoted in Niklaus 1982a, 6). The records of the meetings suggest, as one other person commented, that:

> A lot of meetings amount to pressure, out and out. It's a long process - it's a blitzkrieg towards the end. The old blokes have just been worn down" (quoted in Niklaus 1982a, 7).

The Opposition spokesperson at the time also raised this issue:

> Traditional owners I have met with do not perceive that they have any real choice about mining. They believe they will be harassed continually until they agree to mining. If as seems probable, the Jabiluka agreement is signed this week, it will not be because the aboriginal traditional owners really choose it, but rather because they see agreement as the only way out of a situation of intense and sustained pressure (quoted in Niklaus 1982a, 7).

One set of the negotiators' notes of the final session confirm this view: At the meeting on 29 June 1982 when the agreement was finalised Toby Gangale was quoted as having said:

> Eric, David, Phil, I myself am tired, everybody is tired, and everybody agrees we can go ahead (page 46).

A final comment

The present owner of the Jabiluka mineral lease, ERA, has argued that it has a valid mining agreement with the NLC that was entered into in June 1982. The company has stated that even though it is aware that many Aboriginal people in the region today still object to mining at Jabiluka, including the senior traditional owner for the area, the agreement must stand. It is understandable that the company would seek to protect its commercial interests in this way.

The present Chairman of the Northern Land Council has stated publicly that the NLC will abide

by the 1982 agreement. The NLC has refused to provide any substantive support to the traditional owners in their attempts to challenge the validity of the agreements and the project. As it did nearly twenty years ago, the NLC is arguing that it cannot challenge the agreement (morally or legally) because it will undermine the cause of Aboriginal land rights and the land councils in the wider Australian community.

Given the circumstances that led to the signing of that agreement, and the continuing pressure that has been applied on Aboriginal people to approve mining in this region, there is a very real issue about whether imposing this mine without the permission of the traditional owners will do anything other than contribute to the already obvious social and cultural distress being experienced by many Aboriginal people in the region.

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