CHAPTER 5

THE RIGHTS OF TRADITIONAL OWNERS

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

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

Introduction

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

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

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

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

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

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

The Legislative Framework:

The *Aboriginal Land Rights (Northern Territory) Act 1976*

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

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

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

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

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

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

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

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

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

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

Aboriginal Land Ownership and the Jabiluka Mine

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

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

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

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

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

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

> We do not feel that our people or country have been adequately protected since mining came here. Government has forced us to accept mining in the past and we are concerned that you will force mining development on us again. Previous mining agreements have not protected us or given our communities strength to survive the development.
>
> A new mine will make our future worthless and destroy more of our country. We oppose any further mining development in our country…
>
> Our future depends on our culture remaining strong. It is important for our obligations to each other to be recognised and our responsibilities to country to be met. Our cultural values cannot be traded for money…
>
> We say no to mining at Djabulugku.[5]

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

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

Jabiluka, Ranger and Change in Kakadu

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

> The most fundamental impact … is the fact that their decisions were ignored by Government, that governments totally overrode Aboriginal people's opposition to Uranium mining … It has set up a power relationship where Aboriginal people are powerless and all the rest are powerful. It means that every non-Aboriginal agenda is successful and every Aboriginal aspiration is ignored, trivialised or marginalised. Aboriginal people do not trust non-Aboriginal people here because they always believe that in the end the white man will win…
>
> This has been borne out primarily by the way uranium mining came here, because everything else followed. If it were not for the Ranger uranium mine and if it were not for the Inquiry that caused such a controversy in Australia, there would not be Kakadu National Park. There would not be the township of Jabiru. There would not be the Office of the Supervising Scientist. There would not be all this activity on people's land.[11]

How Fair Was the 1982 Jabiluka Agreement?

Overview

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The 1982 Negotiations and the History of Duress

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

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

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

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

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

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

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

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

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

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

> The opposition to Jabiluka was reportedly stronger than that to Ranger. We know that influenced a train of events which led to the Mirrar people once again being put in an invidious position where they were left with no choice but to agree to a mine going ahead. A land claim known as the Alligator River Stage II land claim was triggered.
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> …
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> We believe Pancontinental made their views very well known to the Northern Land Council: that is, they would take the steps Peko Wallsend had taken by lobbying the Government to again create the legal circumstances where Aboriginal people could not withhold their consent to Jabiluka going ahead.[22]

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

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

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

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

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

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

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

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

> At least 200 Aboriginal people were in attendance at that meeting and they were requested by the Northern Land Council to give permission to the NLC to discuss the opposing arguments that the mining company was putting to the Alligators Rivers Stage II land claim. It was feared by the Northern Land Council that the opposition put by the Pancontinental mining company, along with Peko Wallsend and the Northern Territory Legislative Assembly, could threaten the success of that land claim.
>
> They received permission from Aboriginal people to approach the company and talk about that document of opposition, known as a detriment.[25]

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

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

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

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

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

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

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

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

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

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

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

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

> At 10.40 a.m. Traditional Owners raised concern about a sacred site called Kungarnbu. They were told that the site would only be disturbed 'to the extent necessary for the Jabiluka project'. At 11.20 a.m., just forty minutes later, the NLC chief negotiator Eric Pratt informed local Aboriginal people that the NLC had 'nothing to object to in the draft of the agreement' – that is, forty minutes after people had raised concerns about a sacred site. He then asked whether the 'inside group' of people were ready to decide whether mining should proceed.
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> The Aboriginal interpreter arrived for the first time that day. Half an hour later, at 11.52 a.m., local Aboriginal people told negotiators that they were not ready to decide. They requested more information about what the mine would look like. Nine minutes later, after Aboriginal people had advised the NLC that they were not ready to decide, Eric Pratt advised the mining company that negotiations were concluded. At 12.39 p.m., half an hour later, after receiving a brief explanation of what the mine would look like from the road, Yvonne's father said that he was tired and that he was not going to object to the mine going ahead.[30]

5.42 Mr Fagan concluded that:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Recommendation 11

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

The 1991 Deed of Transfer

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

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

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

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

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

> by the deed made on 24 December 1991 between the NLC and Energy Resources of Australia, the latter acknowledged and agreed that for the preferred option [the Ranger Mill Alternative] to be implemented the consent of the NLC, to be given in accordance with the direction of the traditional Aboriginal owners of the Ranger project area, was required and such consent may be given with conditions.
>
> Energy Resources of Australia has consistently, and again within this EIS, failed to acknowledge that it is bound by the deed ... to obtain the consent of the NLC to the milling of Jabiluka ore at Ranger.[39]

The 1997 'change in scope' Application

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

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

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

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

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

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

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

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

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

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

The Rights of Traditional Aboriginal Owners: Debate and Conclusions

Should the 1982 Agreement Have Been Reviewed in 1996?

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

> The lasting concern that Traditional Owners have is that, although a process of assessment of environmental impacts was triggered, there was no process whereby Traditional Owners had an opportunity to provide their input into the development – no legal opportunity, and no opportunity in any formal process, for their views to be taken on board either by the mining company or by the Federal Government.
>
> They made those concerns known very clearly to Senator Hill. In fact, Yvonne Margarula travelled to Canberra to meet with Senator Hill and discuss with him the reasons we felt the Land Rights Act particularly should be triggered, because of the lapse of time between the negotiations which took place in 1982 and the new proposal being put by Energy Resources of

42 Brett Midena, *Proof Committee Hansard*, Darwin, 16 June 1999, p 142.

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

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

> Australia was 15 years, and because of the fact that it was a new proposal as well.[45]

5.58 Ms Katona indicated this had enforced the marginalisation of Traditional Owners from the Jabiluka process:

> Every opportunity the Traditional Owners have taken they have been forced to take outside the process, when they are legitimate titleholders. They are not merely stakeholders in the process. The question for Traditional Owners and the Northern Territory Aboriginal Community is: what refuge do Aboriginal people have in the Aboriginal Land Rights Act when we are seeing an environmental process construed to be superior to that of title.[46]

5.59 The Committee believes that not merely this question, but the whole of the evidence placed before it regarding the rights of Traditional Owners in this case, raises serious concerns about the legal framework provided by the *Aboriginal Land Rights (Northern Territory) Act 1976* and the Government's exercise of its discretion since 1996. It is clear to this Committee that the Mirrar have been callously and systematically marginalised and their fundamental rights ignored in the negotiation and development of the Jabiluka project. At the very least, the revival of the project in 1996 should have been the occasion for new consultations with Traditional Owners which recognised their authority to make decisions about their land. The Committee supports the view of Ms Katona that:

> At a minimum Aboriginal people must have the opportunity, under the Aboriginal Land Rights Act, to provide some input as to their consent or otherwise for the project to go ahead if there is such a length of time between the different processes.[47]

Can the 1982 Agreement Be Challenged?

5.60 The Australian Government has defended the integrity of the 1982 Jabiluka Agreement by arguing that it has never been subject to legal challenge. The Secretary of the Department of the Environment and Heritage, Mr Roger Beale, told the Committee during Estimates hearings that:

> this agreement has never been contested as to its statutory validity or its conscionability by anyone who has standing in relation to the matter, and the Northern Land Council has never resiled from the applicability of the Agreement.[48]

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45 *Proof Committee Hansard*, Jabiru, 15 June 1999, p 1.

46 *Proof Committee Hansard*, Jabiru, 15 June 1999, p 2.

47 *Proof Committee Hansard*, Jabiru, 15 June 1999, p 7.

48 Senate Environment, Communications, Information Technology and the Arts Legislation Committee, Consideration of Additional Estimates, 5 May 1999, *Proof Committee Hansard*, p 337.

5.61 The Gundjehmi Corporation told the Committee that the Mirrar had long wished to make a legal challenge to the validity of the 1982 Agreement. They believe that they have a persuasive case, using available records, which proves that the Jabiluka Agreement was negotiated in unconscionable circumstances. It also believes that it has a strong case which proves that the Northern Land Council failed to observe the provisions of Section 23(3) of the *Aboriginal Land Rights (Northern Territory) Act 1976* to ensure that Aboriginal people affected by the Agreement understand and agree to the Land Council's actions, and have been consulted and had an adequate opportunity to express their view.

5.62 The Gundjehmi Corporation told the Committee, however, that the Mirrar are prevented from successfully pursuing an action against the 1982 Agreement for two reasons. The first is that under the principles of equity, Energy Resources of Australia would be protected by having purchased an agreement negotiated by another party. The second is an amendment to the Land Rights Act, Section 48D(3), which in their view negates the obligations incumbent upon land councils under Section 23(3) to properly represent the views of Traditional Owners.[49] This section states:

> Where a Land Council, in entering into an agreement under Subsection (1), fails to comply with subsection 23(3) in respect of Aboriginal land to which the agreement relates, that failure does not invalidate the entry by the land council into the agreement.[50]

5.63 Jacqui Katona argued that the result of this was that:

> The Aboriginal Land Rights Act is now structured in such a way that, although there are explicit provisions about discussions being required with traditional owners, and therefore consent being withheld or consent given to the Northern Land Council to allow projects to go ahead, there are other provisions which really negate that happening at all.[51]

5.64 The Committee believes that this is an extraordinary situation which gravely undermines the credibility of the *Aboriginal Land Rights (Northern Territory) Act 1976* as a vehicle for the exercise and protection of the rights of Traditional Owners. It believes that this provision undermines not only the obligations of land councils under the Act, but the whole intent, purpose and credibility of the Land Rights Act itself. This provision undermines the force of contracts entered into by land councils on behalf of Traditional Owners, endangers the rights of Traditional Owners when negotiating with developers and introduces unacceptable levels of uncertainty into agreements made with Aboriginal people. This ought to be of concern as much to industry and government as to indigenous people. The Committee recommends that this provision be removed from the Act.

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49 *Proof Committee Hansard*, Darwin, 16 June 1999, pp 157-8.

50 *Aboriginal Land Rights (Northern Territory) Act 1976*, Section 48D.

51 *Proof Committee Hansard*, Darwin, 16 June 1999, p 158.

Recommendation 12

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

How Binding Should the 1982 Agreement Be?

5.65 Other witnesses to the Committee put the view that to review the 1982 Agreement, as suggested by the World Heritage Committee mission and by the Mirrar, would undermine the principles of contract law. At its hearing in Darwin, the Committee asked the Gundjehmi Corporation why the 1982 Agreement was different to any other contract which was binding on its signatories. Mr Fagan replied:

> Because agreements reached under the Land Rights Act are extraordinarily strange agreements. The people who own the land are not parties to the Agreement. That, for a start, is a very strange circumstance in regular contract law.
>
> …
>
> another circumstance of the 1982 Agreement … was that it was the first agreement reached under Section 43 of the Land Rights Act – the very first one … it came on top of a very manipulated set of circumstances relating to the Ranger agreement. It is a peculiar situation.[52]

5.66 The submission of the Aboriginal and Torres Strait Islander Commission (ATSIC) commented that:

> [consent] was obtained under unusual circumstances that need further investigation. It appears to have taken less than a year to obtain consent from Aboriginal people who spoke little English, in comparison to other more recent agreements that have taken four times as long.[53]

5.67 The Australian Government and ERA maintain that the contract is binding and must stand. Their views are cited below.

- Professor Jon Altman and Dr Roy Green, members of the World Heritage Committee mission to Kakadu:

> reconsidering the status of the 1982 agreement would overturn the principles of property law in Australia, establishing a precedent that a changing oral consent could over-rule a written contract, thereby privileging the property rights of one group over another, and would jeopardise Aboriginal economic

52 *Proof Committee Hansard*, Darwin, 16 June 1999, p 161.

53 ATSIC, Submission 53, p 1.

> opportunities based on mining futures and, possibly, the credibility of Aboriginal land rights law.[54]

- The Australian Government:

> To set the agreement aside would risk creating a precedent that would unjustly privilege one set of acquired rights over another, to the extent of allowing one party to unilaterally revoke a contract, which was freely given and accompanied by payments, at a later date. [55]

- Energy Resources of Australia:

> it is vital for future associations between Aboriginal groups and major projects that a duly negotiated agreement is adhered to. To do otherwise would undermine a fundamental tenet of our legal system and render any agreement made with Aboriginal people implicitly unreliable.[56]

5.68 The Mirrar-Gundjehmi told the Committee that since 1996, they have refused to accept payments due to them on the start of construction. A sum of $1 million has been paid to the NLC and remains in an NLC bank account.[57]

5.69 The Committee notes that the substance of the Government and ERA objections is that they believe that to review the agreement would bring uncertainty into contracts negotiated with Aboriginal people, jeopardise the credibility of land rights law, and unjustly privilege one set of acquired property rights over another. In response the Committee makes the following points:

- The 'acquired rights' of Aboriginal people derive from an ancient and irrefutable interconnection with the land, a fact which is only imperfectly recognised in Australian law. The provisions of the Land Rights Act, in which Traditional Owners are not parties to contracts negotiated on their behalf, already create scope for those rights to be unfairly alienated within contracts which otherwise appear legal; and
- The 'national interest' clauses of the Land Rights Act, along with Section 48D(3), unfairly prejudice in law the rights of Traditional Owners, and could be argued to 'unjustly privilege' the 'property rights of one group over another' – that is, of developers over Aboriginals. The Mirrar have already seen those rights alienated in the case of the Ranger mine, and the latent threat of the national interest provisions remained present throughout the Jabiluka negotiations. It is these provisions, not demands to review the 1982 Agreement, which undermine both the credibility of the Land Rights Act and of agreements reached with Aboriginal people under that Act.

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54 UNESCO World Heritage Committee, *Report on the mission to Kakadu National Park, Australia, 26 October to 1 November 1998*, Annex I, p 2.

55 *Australia's Kakadu: Protecting World Heritage*, April 1999, pp x, xiii.

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

57 Mr Matt Fagan, *Proof Committee Hansard*, Jabiru, 15 June 1999, p 17.

5.70 The Committee agrees that certainty in agreements reached with Aboriginal people is an important goal, and that it is important that contract law should evolve to ensure consistency. However, it believes that it is the very framework in which those agreements are reached which undermines those principles. Certainty cannot be guaranteed without fairness.

5.71 The highly prejudicial arrangements of the Land Rights Act, and the sorry history of negotiation and consultation with Aboriginal people in the Jabiluka case, ensured that the historic rights accruing to Traditional Owners under Aboriginal Law and kinship could easily be ignored. This has been compounded by provisions of the 1982 Agreement, such as clause 3.2, which thwarted the opposition of later generations of Traditional Owners after the project was changed.

5.72 The Committee believes that the Land Rights Act should be reformed to ensure that:

- Traditional Owners are fully consulted and informed about developments on their land (in forms they can understand, such as plain English and local language);
- Their agreement to significant changes in scope is also required.

5.73 At the very least, the 'national interest' provisions of the Act should be removed, and consideration should also be given to deeper reform which makes the contracts accord more closely with traditional law and authority.

5.74 This might involve the designated party being Traditional Owners themselves rather than the Land Council, although there will be a continuing need to ensure that other Aboriginals affected be consulted. Independent observers, perhaps from the Human Rights and Equal Opportunity Commission, should also be present at all stages of negotiations to monitor their fairness. The Committee believes that such reforms would restore certainty to agreements entered with Aboriginal people and remove any questions about the underlying credibility of the Land Rights Act.

5.75 During the course of its inquiry the Committee became aware of a significant gulf of understanding between the Government and ERA and Kakadu Aboriginals about legitimate lines of authority and ownership. For example, ERA Chief Executive Philip Shirvington told the Committee that:

> A group of the Aboriginals affected have indicated that they oppose milling of Jabiluka ore at Ranger. The sole purpose of this group's opposition is to attempt to frustrate the Jabiluka project. It is ERA's view that the decision to proceed with that option does not rest with a single clan to the exclusion of other stakeholders, including in particular other Aboriginals affected.[58]

58 *Proof Committee Hansard*, 11 June 1999, p 95.

5.76 Such views misunderstand the rights accruing to Traditional Owners under traditional law. The statement released by the Gundjehmi Corporation, quoted above, and signed by leaders of the Mirrar Gundjehmi, Mirrar Erre, Bunitj and Malikarr clans, stated that:

> We recognise and affirm the responsibility of the senior traditional owner, Yvonne Margarula, to decide on the future of Mirrar lands and we support her opposition to mining.[59]

5.77 In evidence to the Committee, the Northern Land Council also affirmed these rights:

> Our experience has been that, whilst there may be some different views within the Aboriginal community of Kakadu, if you like, the overriding consideration is support for the Gundjehmi clan's rights over that area and their right to assert their stance on the development.[60]

5.78 In the Committee's view it is important that, if a credible Aboriginal Land Rights regime is to be developed, one that provides for both fairness *and* certainty, the rights of Aborigines under traditional law be more clearly recognised in the legal frameworks which shape the development process. That has yet to occur.

Recommendation 13

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

Recommendation 14

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

The Ranger Mill Alternative

5.79 A final, and particularly urgent, concern of the Committee is the indications it has received from Energy Resources of Australia that a new round of pressures are to be placed on the Traditional Owners to obtain their agreement to the Ranger Mill Alternative. In evidence to the Committee, ERA's Chief Executive stated that:

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59 *Statement from the Gundjehmi Aboriginal Corporation*. http://www.peg.apc.org/%7Eacfenv/tostate.htm

60 Mr Stephen Roeger, *Proof Committee Hansard*, Darwin, 16 June 1999, p 152.

> The Ranger Milling Option is ERA's preferred development, and has always been so since we purchased the project from Pancontinental … ERA has vigorously pursued this preference … we are now intensifying our focus on finalising outstanding approvals for this option.[61]

5.80 In answer to questions from the Committee about how far ERA would go in pursuit of this option, Mr Shirvington stated that ERA hoped to have approval for the Ranger Mill Alternative by 2001, 'but, if it is not, then we will take as much time as is needed.' He further stated that:

> Prior to 1992 … the Northern Land Council took a broad view of the consultation process with traditional owners and consulted them as a group … that focus by the Northern Land Council since 1992 has since narrowed down to just the Mirrar clan. Our contention is that is not the obligation of the Northern Land Council and we believe that the process should be opened up to the whole of the Aboriginal community in that region.[62]

5.81 The Committee finds the implications of this statement disturbing. While it does not dispute that there may be other views about mining to those of the Mirrar, the statement appears to hint at the possibility, either that the Mirrar could be swayed by these views, or that the NLC could give consent to the Ranger Mill Alternative against the express wishes of the Mirrar. This would involve the NLC in the contravention of Section 23(3) of the Land Rights Act and could provoke legal action. It would certainly lead to the further embitterment of relations between the Mirrar and the NLC.

5.82 Yvonne Margarula was adamant about the Mirrar's opposition to the Ranger Mill Alternative:

> We feel as though we have made our decision quite clear to everybody. With respect to the mill where they want to go and crush the ore at Ranger, we have had meetings about that a number of times. We have clearly said, 'No we don't agree to that proposal,' and still people keep coming back to us and putting pressure on us. [Translator's comment: The term used to 'put pressure' literally means to apply the finger to the nose and push backwards] … Our feeling is that the mining company wants to divide us into two sides, go down the middle, and entice people with large amounts of money and promises of good things.[63]

5.83 During its inquiry the Committee was informed of the divisive social effects of such pressures, which also place pressure on the traditional structures of Aboriginal law and culture. In the Committee's view, for ERA to pursue so aggressively a renewed consent to the Ranger Mill Alternative – especially over an extended period

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61 *Proof Committee Hansard*, Canberra, 11 June 1999, p 95.

62 *Proof Committee Hansard*, Canberra, 11 June 1999, pp 95-97.

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

of time – would be an unwelcome return to the practices of the past that have already caused so much resentment and unhappiness.

5.84 Ms Jacqui Katona told the Committee that this renewed pressure was symptomatic of the saying amongst Aboriginal people in Kakadu, 'You know white people – they just can't listen'. She reminded the Committee of the deeper social and cultural issues that were at stake in the recognition of fundamental Aboriginal rights – sentiments the Committee endorses:

> The poverty is phenomenal and all the other social and economic symptoms of that – like alcoholism, poor health and domestic violence – are just that: symptoms. The Mirrar firmly believe that, until jurisdictionally they have the ability to exercise the rights which they are fully entitled to – not only in Aboriginal law but in non-Aboriginal law – and the Government accepts that and implements that, there will not be any fundamental change here.[64]

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

Recommendation 15

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

64 *Proof Committee Hansard*, Jabiru, 15 June 1999, p 9.