



file ref: SG2002/0135

13 November 2002

Senator Lyn Allison
Chair, Senate ECITA References Committee
Parliament House
CANBERRA ACT 2600

Dear Senator Allison

I have been following the evidence presented to the Inquiry into the Environmental Regulation of Uranium Mining. An issue of obvious concern to me is that, on several occasions, the credibility of statements made by me and/or the Assistant Secretary of the OSS, Mr Alex Zapantis, has been questioned either by witnesses or by some members of the Committee.

A primary function of the Supervising Scientist within the current regulatory regime is to provide reliable, independent advice to the Minister and to the Australian community on the environmental impact of uranium mining in the Alligator Rivers Region. The credibility of the Supervising Scientist is of paramount importance in this context. Hence, I believe that it is necessary to provide the Committee with some additional information to assist members in their consideration of the evidence it has received.

I am aware of three issues on which the credibility of my statements has been questioned in evidence. These relate to:

- The suggestion that I misrepresented the Mirrar Senior Traditional Owner in advice that I provided to the Minister,
- The suggestion that I misrepresented the views of the NT Department of Business, Industry and Resource Development in my report on the stockpiling incident at Ranger, and
- The question of whether or not the Alligator Rivers Region Technical Committee (ARRTC) should have been advised of the exceedance of action levels in Swift Creek when it was considering the water management system at Jabiluka.

I address each of these issues below.

Views of the Traditional Owners

In evidence to the Inquiry at Jabiru on 1 October 2002, representatives of the Gundjehmi Aboriginal Corporation (GAC) tabled a letter, dated 10 May 2002, from Ms Yvonne Margarula to the Minister for the Environment and Heritage, Dr Kemp. In

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that letter, Ms Margarula advised the Minister that I had misrepresented her comments and went on to state:

“While I understand the advice provided to you was that I confirmed that I did not believe that the incidents caused any harm to the environment or risk to the health of Aboriginal people, this is simply not the case.”

Following the tabling of the letter on 1 October, members of the Committee discussed the letter and Senator Wong specifically raised the issue of misrepresentation of the views of Ms Margarula by the Supervising Scientist. Since my credibility has now been challenged in the Senate, I am required to respond by recording the events that occurred.

At my meeting with Traditional Owners and staff of GAC on 9 April 2002, I briefed those present on the findings of my investigation of the stockpiling and reporting incidents at Ranger and Jabiluka. In particular, I provided advice that neither incident gave rise to harm to the downstream environment or to the health of people living downstream. One of the GAC staff present, Mr Justin O’Brien, then provided similar advice to the meeting thus confirming the view that I had expressed. Following this, I asked Ms Margarula if she was now comfortable that the incidents had not caused any harm to the environment or risk to the health of Aboriginal people. In reply, Ms Margarula, who was being assisted by a translator throughout these exchanges, said “Yes”.

You should also note that the advice provided to Ms Margarula by Mr O’Brien at the meeting was completely consistent with the advice that he gave to Minister Kemp at a meeting with the Minister in Parliament House on 19 March 2002. I and other senior officials were present at that meeting. The Minister noted this advice in his letter to Ms Margarula dated 26 March 2002, a copy of which is attached for your information.

I have frequently been concerned about reports that Aboriginal people of the region are “fearful” about such incidents and, indeed, at the meeting on 9 April 2002, I preceded my comments about environmental protection by raising this issue and saying that I would like, if possible, to assist Traditional Owners in overcoming any such fear. Hence, I considered Ms Margarula’s assurance to be a very important outcome of the meeting and I included this information both in my advice to the Minister for the Environment and Heritage, Dr Kemp, and in my formal report on the incidents, Supervising Scientist Report 170.

I can certainly accept the possibility that, despite the presence of a translator, there may have been some misunderstanding on Ms Margarula’s part on what I had said or, indeed, that I and Mr Zapantis had misunderstood her response. If that had been the thrust of the letter to Dr Kemp, I would have been disappointed but would clearly have accepted such advice. But a statement that what I described is simply untrue is one that I cannot accept. The Minister noted his concern in his response to Ms Margarula, a copy of which is attached for your information.

For example, since I was discussing an incidents on the Ranger mine site it is possible that, when talking about the lack of environmental impact, the TO’s may have interpreted my comments as referring to the Ranger Project Area rather than the downstream ecosystems of Kakadu National Park. I fully recognise that they continue to have ongoing concerns about the impact of uranium mining on the area of the lease.

A member of staff of the Northern Land Council who was present at the meeting with Traditional Owners on 9 April 2002 confirmed, in a conversation with Mr Zapantis following our receipt of Ms Margarula’ letter, that I had asked the question described

above and that Ms Margarula had responded positively to my question. He again confirmed that view in a telephone conversation with Mr Zapantis on 30 October 2002.

I understand that the NLC does not wish to express any particular view regarding my conversation with Ms Margarula. I can partly understand the position adopted by the NLC in that it would not wish to be seen to publicly contradict the statement of Ms Margarula. Given this sensitivity in the relationship between the NLC and the Traditional Owners, you may decide not to pursue this matter further. If that is the approach that you adopt, I would request that your committee accepts that I did not mislead the Minister in providing advice on what occurred at the meeting on 9 April 2002 nor did I knowingly misrepresent the views of the Traditional Owners.

Views of the Department of Business, Industry and Resource Development

At the meeting of the Inquiry in Darwin on 30 September 2002, Senator Nettle quoted a statement in my report on the incidents at Ranger and Jabiluka in 2002 (SSR 170, page 14) as follows:

“In discussion with the Supervising Scientist, DBIRD has indicated that the primary test is, in its view, whether or not any prosecution would be likely to succeed. It is the view of DBIRD that, since the actions of ERA did not give rise to any environmental impact outside the Ranger Project Area, prosecution would probably fail.”

She then asked Mr McGill of the NT Department of Business, Industry and Resource Development if this position is still the view of DBIRD in determining the primary test for going forward with any potential breaches of regulation.

The Hansard record of Mr McGill’s response is as follows:

“That is like putting words in my mouth and then asking if I said them, isn’t it? Well, we did not.”

Thus Mr McGill, by this testimony, has implied that, in my report, I may have misled the Minister for the Environment and Heritage.

Further, in previous evidence to the Senate Committee at the Estimates hearings, I and Mr Alex Zapantis were questioned on the DBIRD position reported by us in SSR 170. I advised the Senate that this reported DBIRD position was described to us verbally at a meeting of DBIRD and SSD officers. We then advised the Senate that, prior to finalising my report, I had asked Mr Zapantis to check the wording of this section of the report with Mr McGill, that he had done so and that Mr McGill confirmed that our description of the DBIRD position was accurate.

Thus, Mr McGill’s testimony implies that I and Mr Zapantis also misled the Senate.

I wish to advise you that the views that I attributed to DBIRD in my report were indeed reported to Mr Zapantis and me at a meeting with DBIRD staff. Further, the proposed paragraph on this issue, including the two sentences quoted by Senator Nettle, was checked with Mr McGill on 11 April 2002. He agreed with the proposed text but also wished to have a sentence or two added on the importance of the issue of “what is reasonable”. The paragraph was reviewed to take into account his comments and the report was finalised on 12 April 2002.

Further details are contained in the attached copy of a letter on this issue that I wrote to Mr Brian Ely, General Manager Minerals and Energy, DBIRD, on 17 October 2002. Also attached is his response dated 29 October 2002. You will see from his response that, while he is silent on the issue of Mr McGill’s involvement in developing the text, he agrees that the text itself is “not incorrect”.

Provision of information to the Alligator Rivers Region Technical Committee

At the hearing of the Inquiry in Darwin on 30 September 2002, Senator Crossin questioned me on whether or not I had provided to the members of ARRTC information on the exceedance of action levels in Swift Creek prior to the consideration by ARRTC of the water management system at Jabiluka. The implication of her line of questioning was that I may have concealed crucial information from the ARRTC members.

At the hearing of the Inquiry at Jabiru on 1 October 2002, Dr Mudd referred to my “apparent selective memory syndrome” and stated that I had chosen, for reasons that “could only be surmised”, not to inform the committee of “this critical information”.

Similarly, in questioning the Chair of ARRTC, Dr Hart, at the hearing on 24 October 2002, Senator Crossin raised the issue again and stated that it was felt that “some people on the committee” (presumably including me) “were being somewhat disingenuous in not providing the committee” with the information on the exceedance of action levels.

First let me comment on the issue of my memory of the date of the reporting of the Jabiluka and the Ranger issues relative to the ARRTC meeting. The simple fact is that the Ranger date was easy to remember because it actually occurred during the ARRTC meeting itself and the ARRTC Chair was present when the ERA Environment Manager advised the NLC, DBIRD and me of the occurrence of the Ranger incident. There was no such fortunate coincidence for the reporting of the Jabiluka incident and, since I did not have the benefit of having a copy of my report with me at the Darwin hearing, I was not sure of the relative timing.

The task being undertaken by ARRTC members needs to be clear. They were attempting to assess the quality of the science that had been used by the OSS and the members of the Minesite Technical Committee when they considered and approved the Jabiluka water management system *prior* to the 2001-2002 Wet Season. Strictly speaking, therefore, anything that happened during the 2001-2002 wet season was irrelevant to that issue. However, if observations during the wet season provided information that we had got the science wrong, that clearly would have been relevant to the considerations of the Committee and should have been reported to it.

An important issue, therefore, is the difference between my perspective on the Jabiluka issue and that of Senator Crossin and Dr Mudd. Senator Crossin referred to the exceedance of the action levels for uranium in Swift Creek as “three major incidents”. Dr Mudd referred to the information on these exceedances as “critical information”. If either of these descriptions were a true reflection on the significance of the data, then indeed one would expect the information to be presented to ARRTC members when they were considering the water management system at Jabiluka.

My perspective on these data was, however, very different. Two of the occasions on which the observed downstream concentration exceeded the action level were clearly natural events because approximately the same concentration was observed upstream of the Jabiluka site. Their occurrence could not be attributed to the Jabiluka water management system. The third incident was one in which the downstream concentration of uranium was reported to be higher than that observed upstream. It was, however, within the naturally occurring range, it was a factor of 100 below the ecologically safe concentration and it was a factor of about 300 below drinking water standards. In addition, the downstream concentration observed in the ERISS program was lower than the ERA result and equal to the upstream concentration. For all of


these reasons, I did not consider that there was any environmental significance to these data at all. My concern in this issue was that ERA had not immediately reported the exceedences as it should have done.

So from my perspective, these data were entirely irrelevant to the issue before the ARRTC members; that is, the assessment of the quality of the science that had been used by the OSS and the members of the Minesite Technical Committee when they considered the Jabiluka water management system prior to the 2001-2002 Wet Season. It would not have been a question of deciding not to report the issue to ARRTC; the issue of reporting the exceedences would not even have arisen in this context.

Thus, I clearly reject any suggestion that I deliberately withheld important information that was relevant to an issue being considered by ARRTC.

The independence and the credibility of the Supervising Scientist is an important component of the current system for regulation of uranium mining in the Alligator Rivers Region. I hope that I have provided you with sufficient information to reassure you and the members of your Committee that the information that I and Mr Zapantis have provided to Minister Kemp, to the Senate and to the Australian community on the above issues has been honest and factual. To the best of my ability I will continue to provide credible, independent and scientifically informed advice to all stakeholders including your Committee.

Yours sincerely,

A handwritten signature in black ink, appearing to read 'A Johnston', with a stylized, cursive script.

Dr Arthur Johnston
Supervising Scientist.



The Hon. Dr David Kemp MP
Minister for the Environment and Heritage

Ms Yvonne Margarula
Mirrar Senior Traditional Owner and Chairperson
Gundjehmi Aboriginal Corporation
PO Box 245
JABIRU NT 0886

26 MAR 2002

Dear Ms Margarula

Thank you for the opportunity to meet with your representatives and members of your staff in Canberra on 19 March 2002. It was a pleasure to establish relations with the Gundjehmi Aboriginal Corporation in such a constructive and positive manner.

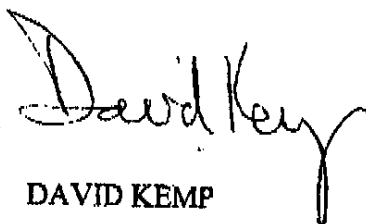
I share your concerns regarding the lapses in the environmental management and internal communication systems of Energy Resources of Australia, however I was pleased that your representatives and I reached agreement that no harm was caused to the natural values of Kakadu National Park, and at no time was the health of the Traditional Owners at risk.

I would also like to repeat to you the invitation I extended at the meeting to provide suggestions on how the environmental management and internal communication systems currently utilised by ERA could be improved to be more confidently relied upon. I welcome any suggestions you may have and ask that these be forwarded to me as soon as practicable.

I also appreciated the opportunity to learn more about the relationships between the Gundjehmi Aboriginal Corporation and other Traditional Owner organisations, Parks Australia and the World Heritage Branch of Environment Australia in relation to the broader social and cultural issues the Corporation is engaged in.

I look forward to visiting Kakadu National Park and meeting you personally within the next few months.

Yours sincerely



DAVID KEMP

Parliament House, Canberra ACT 2600 Australia

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The Hon. Dr David Kemp MP
Minister for the Environment and Heritage

Ms Yvonne Margarula
Chairperson
Gundjehmi Aboriginal Corporation
PO Box 245
Jabiru NT 0886

Dear Ms Margarula

Thank you for your letter of 10 May 2002 on the Supervising Scientist's report on the recent stockpiling incident at the Ranger uranium mine.

The Supervising Scientist's conclusion that the Commonwealth's Environmental Requirements for the Ranger uranium mine were not breached in connection with the incorrect stockpiling incident is discussed in his report. I note that you do not agree with his conclusion. In essence, it appears from your letter that this disagreement is due primarily to the difference in interpretation of the Environmental Requirements between yourself and the Supervising Scientist. As you would be aware, it is quite common for there to be more than one interpretation of legal requirements. Having considered the issues you have raised and the Supervising Scientist's report, I have accepted his advice that the Environmental Requirements have not been breached.

I was very concerned by your statement that the OSS had provided me with incorrect advice on comments made by you at the meeting which took place on 9 April 2002. I recall that, at the meeting of Gundjehmi Aboriginal Corporation officers with me on 19 March 2002, Mr Justin O'Brien advised me that he accepted that the incidents at Ranger and Jabiluka during the 2001-2002 wet season did not give rise to harm to the natural values of Kakadu National Park and at no time was the health of traditional owners at risk. I understand that the same officer confirmed that advice to you at your meeting with the Supervising Scientist and the NLC on 9 April 2002. The Supervising Scientist has confirmed that he and others present at the meeting understood that you had accepted these assurances. It is, therefore, very disturbing to learn that this is not the case.

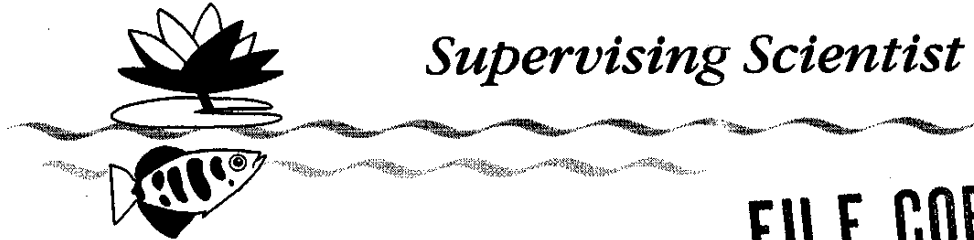
This misunderstanding demonstrates the need to improve communication between the OSS and yourself. I can assure you that your concerns about the objectives of the OSS in seeking discussions with you are unfounded. The Supervising Scientist believes that such meetings are extremely important to provide him with feedback on your concerns. They also enable the Supervising Scientist to describe the outcomes of his scientific and technical assessments.

This misunderstanding also underscores the importance of you and I meeting personally to discuss these important issues. I am looking forward to discussing these and other issues with you when we meet in Jabiru on 13 June 2002 and hope we can resolve what seems to have been a very unfortunate miscommunication.

Yours sincerely

DAVID KEMP

Parliament House, Canberra ACT 2600 Australia



Supervising Scientist

FILE COPY

file ref: SG2002/0135

17 October 2002

Mr Brian Ely
General Manager Minerals and Energy,
Department of Business, Industry and Resource Development
GPO Box 3000
Darwin NT 0801

C2002/0227

Re: Evidence at the Senate Inquiry, Darwin Hearing

Dear Brian,

I am writing to express some concerns that I have about the implications of evidence given by Mr Tony McGill, Director of Mines, at the hearing of the Senate Inquiry into the Environmental Regulation of Uranium Mining in Darwin on 30 September 2002.

Senator Nettle (see ECITA 114) quoted a statement in my report on the incidents at Ranger and Jabiluka in 2002 (SSR 170, page 14) as follows:

"In discussion with the Supervising Scientist, DBIRD has indicated that the primary test is, in its view, whether or not any prosecution would be likely to succeed. It is the view of DBIRD that, since the actions of ERA did not give rise to any environmental impact outside the Ranger Project Area, prosecution would probably fail."

She then asked Mr McGill if this position is still the view of DBIRD in determining the primary test for going forward with any potential breaches of regulation.

The Hansard record of Mr McGill's response is as follows:

"That is like putting words in my mouth and then asking if I said them, isn't it? Well, we did not."

Thus Mr McGill, by this testimony, has in effect stated that, in my report, I have misled the the Minister for the Environment and Heritage.

Further, in previous evidence to the Senate Committee at the Estimates hearings, I and Mr Alex Zapantis were questioned on the DBIRD position reported by us in SSR 170. I advised the Senate that this reported DBIRD position was described to us verbally at a meeting of DBIRD and SSD officers. We then advised the Senate that, prior to finalising my report, I had asked Mr Zapantis to check the wording of this section of the report with Mr McGill, that he had done so and that Mr McGill confirmed that our description of the DBIRD position was accurate.

Thus, Mr McGill's testimony implies that I and Mr Zapantis also misled the Senate.

The full text of the relevant paragraph in my report to the Minister is as follows:

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The Supervising Scientist is part of Environment Australia

"Whether or not the actions of ERA legally constitute a breach of the MMA is most appropriately judged by DBIRD, which administers the legislation and would be responsible for undertaking any prosecution under the Act. In discussion with the Supervising Scientist, DBIRD has indicated that the primary test is, in its view, whether or not any prosecution would be likely to succeed. It is the view of DBIRD that, since the actions of ERA did not give rise to any environmental impact outside the Ranger Project Area, a prosecution would very probably fail. Further, DBIRD advised that the issue of 'what is reasonable' must be considered. The incident did not result in any change which has any environmental significance downstream of Ranger, so it would not be reasonable for the regulator to interpret ERA's actions as breaching NT legislative requirements. Hence, it does not interpret this incident as a breach of Northern Territory legislative requirements."

The DBIRD position summarised in this paragraph was described to Mr Zapantis and me by Mr McGill at a meeting in the small conference room next to Mr McGill's office, on 28 March 2002 I believe. Mr Alan Hughes was also present and you were present for most of the meeting.

You will recall that, at the beginning of the discussion, I reported that at that stage I was tending towards a conclusion that ERA's actions in the stockpiling incident probably did constitute an infringement of the Authorisation and a breach of the Environmental Requirements but I wanted to hear the DBIRD assessment prior to reaching a final conclusion. Mr McGill presented a very convincing argument that there had been no such infringement or breach. The main thrust of the argument centred on the interpretation of what is "reasonable".

Prior to completion of my report on the incident I asked Mr Zapantis to check with Mr McGill the wording used in the 3rd paragraph of section 4.3 of the report to ensure that our interpretation of the DBIRD position was correct.

Mr Zapantis contacted Mr McGill by telephone. He read out the proposed paragraph which at that stage read as follows (text taken from penultimate draft of report dated 11 April 2002.):

"Whether or not the actions of ERA legally constitute a breach of the MMA is most appropriately judged by DBIRD, which administers the legislation and would be responsible for undertaking any prosecution under the Act. In discussion with the Supervising Scientist, DBIRD has indicated that the primary test is, in its view, whether or not any prosecution would be likely to succeed. It is the view of DBIRD that, since the actions of ERA did not give rise to any environmental impact outside the Ranger Project Area, a prosecution would very probably fail. Hence, it does not interpret this incident as a breach of Northern Territory statutory requirements."

Mr McGill agreed with the proposed text but he stated that it was important to also include the issue of "what is reasonable" as had been discussed at our meeting on the issue. Hence, the following two sentences were added to the text prior to the last sentence in the previous version of the paragraph:

"Further, DBIRD advised that the issue of 'what is reasonable' must be considered. The incident did not result in any change which has any environmental significance downstream of Ranger, so it would not be reasonable for the regulator to interpret ERA's actions as breaching NT legislative requirements."

Following this discussion and the insertion of the additional text, the report was finalised on 12 April 2002.

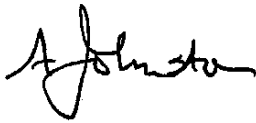
Mr McGill may well have failed to recollect our discussions and Mr Zapantis' phone conversation in the "heat" of Senate Inquiry questioning. I have provided a fairly detailed description of these issues because I am confident that, when this description is brought to Mr McGill's attention, he will recall the discussions at our meeting and

the conversation with Mr Zapantis. Mr Hughes' recollections of the meeting should also assist.

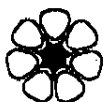
Because of the discrepancy between the evidence provided to the Senate by me and Mr Zapantis and that provided by Mr McGill, I will need to write to the Chair of the Committee providing the detailed information supplied in this letter. It would resolve the issue if Mr McGill also wrote to the Chair explaining his lack of recollection of the above events during the hearing and setting the record straight.

I would be grateful if you would follow up on these issues and let me know the outcome. I would also appreciate receiving a copy of any letter to the Chair of the Committee.

Yours sincerely,

A handwritten signature in cursive script, appearing to read "A Johnston".

Dr Arthur Johnston
Supervising Scientist



Northern Territory Government

Department of Business, Industry & Resource Development

Minerals and Energy
4th Floor, Centrepoint Building
48-50 Smith Street Mail
DARWIN NT 0800
AUSTRALIA

Ref:

Dr Arthur Johnston
Supervising Scientist
GPO Box 461
DARWIN NT 0801

Dear Arthur

I am responding to your letter of 17th October concerning evidence, which was given to the Senate Inquiry by Tony McGill. The question raised by Senator Nettle presumed that DBIRD makes a determination about potential breaches of regulations. During his evidence to the Inquiry, Mr McGill made it quite clear that in the event of a potential breach the matter was referred to the Department of Justice for a determination and recommendation. DBIRD may have a view about whether an action breaches a regulation or what tests may have been applied by the Department of Justice, but it does not determine whether potential breaches of regulations go forward without legal advice.

When the question was put by the Senator, it was not possible to agree with the quote as given and no was the correct short answer. The leading question from Senator Nettle could not have been answered without qualification. The extracts of the meeting with OSS and DBIRD on 28 March in SSR170 are not incorrect, but they are also not a complete statement of the DBIRD enforcement policy. However, I believe the end result is that your comments to your Minister and the Senate Estimates Committee are not at odds with the evidence given at the Senate Inquiry.

As I believe there is no issue I will not be copying this letter to the Chair of the Committee.

Yours sincerely


BRIAN ELY
General Manager Minerals and Energy

29 October 2002