2. Heritage Protection

This issue relates to questions 3, 34 and 35 of the List of issues to be taken up in connection with the consideration of the third and fourth reports of Australia.

Summary of Issue

- The cultural practices of Indigenous people are inextricably linked to land and water.
- Article 1 of ICESCR requires States to protect the rights of Indigenous people to pursue their economic, social and cultural development. Failure to protect cultural heritage and traditional economies results in insufficient compliance with this article.
- Article 2.1 of ICESCR requires the State to take steps to progressively achieve full realisation of the rights recognised by the Covenant.
- In 1995/6, the Australian government commissioned a review of legislative protections for sites of religious, cultural and ancestral significance.
- Extensive reforms were suggested, and widely supported by Indigenous groups.
- The reforms have not been implemented.
- Protection remains inadequate and sites remain vulnerable to desecration and destruction.
- Article 2.2 of ICESCR requires that the rights of the Covenant be enjoyed on a non-discriminatory basis. Inadequate protection of Indigenous heritage results in the preference of non-Indigenous interests over Indigenous. This is clear in the cases of the Mirrar people at Jabiluka and delays over protection of the Boobera lagoon.
- Rights recognised by Article 15 are not sufficiently protected or given full realisation by current Australian law.
- Protection of Indigenous heritage is inadequate, resulting in a failure to comply with the right to take part in cultural life.
- Protection of Indigenous cultural and intellectual property is not sufficiently developed to provide Indigenous authors with benefits from protection of moral and material interests of scientific, literary or artistic production.
- The failure to recognise, protect and promote the rights of Indigenous participation in cultural, scientific and artistic pursuits sufficiently to comply with the requirements of Article 15 is largely due to the failure to provide adequate and appropriate protection for Indigenous cultural and intellectual property.

Relevance to the ICESCR

- Article 1: Self-determination
- Article 2.1: Progressive realisation of right
- Article 2.2: Providing for the rights to be enjoyed on a non-discriminatory basis
- Article 15: Cultural rights

The following section expands on this summary under the following headings:

- Legislative Framework
- The Mirrar People at Jabiluka
- Boobera lagoon
- Protection of cultural and intellectual property

Legislative Framework

2.1 Article 15(1) (a) sets out the right to take part in cultural life. The cultural life of Indigenous Australians is inextricably linked to land. Participation in cultural life requires protection of land, and protection of the relationship enjoyed by Indigenous people to specific culturally important sites. The survival of Indigenous peoples as distinct societies depends on maintaining their cultures and languages. The protection of cultural rights, as required by the Covenant, is of critical importance. Protection of the right of Indigenous people to participate in culture life requires positive action informed by consultation.

2.2 This understanding is evident in ICESCR's *Revised General Guidelines Regarding the Form and Content of Reports to be Submitted by States Parties under Articles 16 and 17.*[1] These Guidelines refer to "the right of everyone to take part in the cultural life which he or she considers pertinent, and to manifest his or her own culture." It refers specifically to the "[P]romotion of awareness and enjoyment of the cultural heritage of national ethnic groups and of indigenous peoples". It asks States parties to "report on positive effects as well as on difficulties and failures, particularly concerning indigenous and other disadvantaged and particularly vulnerable groups". The importance of protecting the cultural rights of Indigenous people under the Covenant is clear.

2.3 Australia has introduced legislation to safeguard indigenous and non-indigenous heritage, but the legislation in inadequate. It fails to provide protection for significant sites and fails to protect the relationship of Indigenous people to land which is essential to take part in cultural life. Recent developments in respect of legislation and threats to important sites indicate a failure to adequately respect Article 15.

Legislation

2.4 In 1984 the Commonwealth Parliament enacted legislation to provide protection in the event of failure of protection at State or Territory level - the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984 (Cth).* This Act was, and

[1] UN Doc E/C.12/1991/1 (1991)

remains, a "last resort" to operate only in the event of failure of protection at State/Territory level.

2.5 The State and Territory standards of protection enacted by States and Territories reflect a longstanding preference for development and mining over Indigenous interests in heritage protection.

2.6 Since enactment of the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984 (Cth*, some 200 applications have been lodged. Of these, emergency declarations have protected five sites of significance on a short-term basis; five long-term declarations have been made, one of which is in force and there is one where the declaration has been delayed (see below).

2.7 Problems with the Act became apparent, particularly in connection with a long running dispute concerning the proposed construction of a bridge near the mouth of the Murray River in South Australia to connect the town of Goolwa with Hindmarsh Island (Kumarangk).

2.8 Two orders for long term protection were invalidated by the courts on the basis of problems in the process. Eventually in 1997 the Commonwealth Parliament enacted a special Act which removed the Hindmarsh Island bridge area from the protection of the 1984 Act. A Constitutional challenge to the Act in the High Court of Australia was unsuccessful.[2] The ability of the Government to be able to remove an area from heritage protection by legislation is a cause of concern to Indigenous people.

2.9 The Act was reviewed by the Hon Elizabeth Evatt AC who consulted widely and reported in 1996 providing a range of recommendations which were supported by indigenous parties.

2.10 In November 1999, the Government introduced the *Aboriginal and Torres Strait Islander Heritage Protection Bill* 1998 (the Bill) into the Senate. The Bill was intended to replace the ATSI HP Act.

2.11 While the Bill adopts the structure recommended by the Evatt Review, it fails to provide sufficient reform to protect heritage. State and territory legislation remains the primary source of heritage legislation, subject to accreditation by the Commonwealth. The standard for accreditation is inadequate. Indigenous people must exhaust all remedies at this level however, before accessing the Commonwealth scheme. The Commonwealth will intervene only in the case of matters which effect the 'national interest'.

2.12 Major changes to the Bill are required including reform of state and territory standards of accreditation and increased Commonwealth role in protection and preservation.

[2] *Kartinyeri v Commonwealth* (1998) 195 CLR 337

Reforms to minimum standards at state and territory level require:

- The provision of access to indigenous people to fulfil their religious and cultural responsibilities in relation to significant areas.
- The integration of heritage protection into State and Territory planning procedures.
- Indigenous people to have reasonable access to judicial review of decisions affecting their cultural heritage.
- Heritage responsibilities to be administered by an independent heritage body (with significant Indigenous representation).
- Provision for emergency or interim protection of significant indigenous areas and objects.

Reforms to role of Commonwealth require:

- Open access to the Commonwealth protection scheme where a State or Territory does not have an accredited scheme operating.
- Last resort access to Commonwealth heritage protection where a State or Territory does have an accredited scheme operating.
- Administer and resource indigenous cultural heritage protection in a manner recommended by the Evatt Review.
- Provide an acceptable process for the regulation and repatriation of significant indigenous objects in Australia and elsewhere.

2.13 Article 27 of the ICCPR, has been interpreted by the Human Rights Committee, in its General Comment 23, to impose positive obligations on States parties in respect of the protection of Indigenous rights. In its recent consideration of Australia's periodic report the Human Rights Committee stated the following:

> 11. The Committee expresses its concern that securing continuation and sustainability of traditional forms of economy of Indigenous minorities (hunting, fishing and gathering), and protection of sites of religious or cultural significance for such minorities, that must be protected under article 27, are not always a major factor in determining land use.
>
> The Committee recommends that in the finalization of the pending Bill intended to replace the *Aboriginal and Torres Strait Islander Heritage Protection Act* (1984), the State party should give sufficient weight to the above values. [3]

2.14 Two areas of current concern are the development of a uranium mine at Jabiluka, in the World Heritage-listed Kakadu National Park, and the protection of the Boobera Lagoon sacred site near Moree in northern New South Wales.

The Mirrar People at Jabiluka

[3] Consideration of reports submitted under article 40, Concluding Observations of the Human Rights Committee, Sixty ninth session, 28 July 2000, CCPR/CO/69/AUS Paragraph 11

2.15 The issue of the Jabiluka mining is currently before the World Heritage Committee. Concerns of the Indigenous land owners, the Mirrar[4], include safety and health, social disruption, and possible damage to important mythological sites.

2.16 The Mirrar speak approximately three Aboriginal languages. Cultural and religious beliefs require protection of sites of significance and sacred sites in Mirrar country. Places regarded as sacred by the Mirrar are sites where ancestral creation beings journeyed and rested. Cultural and spiritual practices of the Mirrar require that these sites and Mirrar burial sites are protected.5

2.17 Knowledge of sites is held exclusively by specific members of the clan, and Aboriginal law requires that detailed knowledge is not revealed to non-Aboriginal people. In order to seek heritage protection under Australian legal processes, Mirrar custodians are called upon to prove their claims by disclosing cultural material to people who are excluded by Aboriginal law. This failure to protect customary religious laws regarding secrecy is inconsistent with article 18.6

2.18 The Mirrar have always opposed the operation of uranium mining on their country.7 They continue to express this opposition at both nationally and internationally.8

Boobera Lagoon

2.19 Boobera Lagoon is a site of acknowledged importance to the Aboriginal people of rural northern New South Wales. It is regarded as the resting place of Garriya, the Rainbow Serpent. The Aboriginal community have petitioned the government for many years to protect the area, specifically to prohibit use of the area by waterskiiers.

2.20 Following an inquiry in 1996 the Minister made a declaration in 1998 under the Aboriginal *and Torres Strait Islander Heritage Protection Act* which prevented the use of power boats and water skiing. The declaration was to commence on July 1 2000 in order to allow recreational Lagoon users to find alternative sites. On that day current Minister announced further postponement of the commencement date until 1 May 2002, in order to allow further time for waterskiiers to arrange an alternative venue.

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[4] Additional information on the Mirrar People is available at http://www.mirrar.net

[5] http://www.mirrar.net *Location of Sacred Site Complexes* para 8.

[6] A similar concern was addressed in the case of the Ngarrindjeri women who were asked to disclose gender specific information in relation to the abovementioned Hindmarsh Island case. This was reported in *Implementation of the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief* Report submitted by Mr Abdelfattah Amor, Special Rapporteur, E/CN.4/1998/6/Add.1. paras 93-96.

[7] The Mirrar state that senior Traditional owners were pressured into consenting to an agreement to mine in 1982. The Mirrar allege duress. *Ibid* para 7.

[8] The UNESCO World Heritage Committee expressed grave concerns over ascertained and potential dangers to the cultural and natural values of Kakadu by the proposed uranium mining at Jabiluka. Decision of the Third Extraordinary Session of the World Heritage Committee, 12 July 1999. Para 1(b) recalls the expression of "grave concern" at the 22nd Session of the World Heritage Committee in Kyoto in 1998. Para 1(e) restates that concern by the 23rd session.

2.21 This decision, preferring non-indigenous interests over indigenous was a major setback to the local Aboriginal community who have been fighting for more than 30 years to have the site protected.

Protection of Indigenous Cultural and Intellectual Property

2.22 The opportunities for Indigenous people to enjoy the rights protected by Article 15 are limited by the failure of Australian law to protect the cultural and intellectual property of Indigenous people. Indigenous intellectual property is characterised by particular attributes. For example, ownership exists generally in perpetuity, rather than for a defined period and the rights are generally held collectively rather than individually. Australian intellectual property law grants rights based on certain criteria. These criteria operate to exclude or inadequately protect material with these characteristics.9

Copyright

The Copyright Act 1968 grants specific rights to the creators of literary, dramatic, artistic or musical works and the makers of sound recordings, film and audio recordings. The work must meet certain criteria including, originality, material form, identifiable author. The nature of Indigenous work make satisfaction of these criteria difficult for the following reasons:

- Indigenous work is frequently derived from pre-existing clan designs.
- Indigenous work may be non-permanent for example stories, song or dance and fail to meet the criterion of reduction to material form.
- Protection may be sought by Indigenous custodians of particular work The Copyright Act does not recognize a continuing right of traditional custodians to limit the dissemination of traditional images or knowledge after the term of protection has expired.
- Rights of traditional custodians may also be difficult to assert as there may be no identifiable author in the case of very old works.

2.24 There is no legislative protection to prevent reproduction of such work. Inappropriate or unauthorized reproduction contravenes the right to benefit from protection of moral and material interests resulting from artistic production.

Patent Protection

Australian law contains insufficient protection of Indigenous medicinal plants and Indigenous traditional medicines. Reasons include the requirement of novelty in patent law, which excludes traditional knowledge.

Trade marks

Australian law contains insufficient protection from incorporation of Indigenous words, sounds, designs and symbols in registered trade marks to comply with Article 15.

[9] Additional material can be obtained from the Our Culture, Our Future. Report on Australian Indigenous Cultural and Intellectual Property by Terri Janke at www.icip.lawnet.com.au.