



Submission

to the

UNESCO
World Heritage Committee

on

World Heritage Properties

in

Australia and Kakadu

September 2000

Table of Contents

SUMMARY OF RECOMMENDATIONS	I
INTRODUCTION	1
ATSIC'S ROLE IN THE WORLD HERITAGE DEBATE AND THE UN GENERALLY	1
UNWARRANTED TENSIONS BETWEEN AUSTRALIA AND THE UN	3
AUSTRALIAN DELEGATION PRESSURE ON THE WORLD HERITAGE COMMITTEE	3
DANGER FROM DETERIORATING LEGISLATIVE REGIME IN RELATION TO WORLD HERITAGE.....	4
CONFLICTS OF INTEREST IN HANDLING OF HERITAGE PROTECTION ACT.	6
POSITIVE EFFECT OF THE WORLD HERITAGE COMMITTEE INTERVENTION IN KAKADU DEVELOPMENTS	7
GOVERNMENT FUNDING UNDERTAKINGS FROM THE JULY 1999 EXTRA-ORDINARY MEETING RAISE QUESTIONS	9
AUSTRALIAN GOVERNMENT'S APRIL 2000 REPORT TO THE WHC COMMITTEE.....	9
HERITAGE APPLICATION FOR PROTECTION OF BOWEK ALMUDJ.....	10
ABSENCE OF DEALING WITH TENURE OF JABIRU.....	11
SCIENTIFIC AND CULTURAL INVESTIGATIONS NEED TO BE EXPANDED NOT CURTAILED.....	11
CHANGES TO THE LEGISLATIVE REGIME ADVERSE TO THE TRADITIONAL OWNER INTERESTS	11
KAKADU REGION SOCIAL IMPACT STUDY IMPLEMENTATION SHORTFALL	13
THE SPILL FROM THE JABILUKA MINE.....	14
THE SPILL FROM THE RANGER MINE.....	14
RIO TINTO TAKEOVER OF ERA'S PARENT COMPANY, NORTH LTD	15
DOWNGRADING OF THE JABILUKA MINERAL AND ORE RESERVES	15
CONCLUDING REMARKS	15

Summary of Recommendations

- 1. ATSIIC urges the UNESCO World Heritage Committee to consider its submission in relation to the World Heritage in Danger in Kakadu as ATSIIC represents Australian Indigenous people nationally (p 1).**
- 2. The Australian Government makes no secret that it is attempting to downgrade the United Nations' commitment to Indigenous self determination through redefinition of the term "self determination" used in many UN policies to a loose notion and less well defined term of "self reliance". Such an ideologically driven redefinition is a quantum leap away from Indigenous aspirations and ATSIIC recommends against this course of action (pp2-3).**
- 3. ATSIIC appeals to the Committee to attempt to encourage the Australian Government to adopt a similar approach to the US in the cases of Yellowstone and the Everglades and highlight the remedial measures and resources that could flow if Kakadu was indeed placed on the "in danger" list (p 4).**
- 4. Australia clearly needs to stand aside from any ideologically driven agenda to allow for the Committee to develop a truly independent decision that cannot be perceived as biased by the vehement Australian Government position (p 4).**
- 5. It is ATSIIC's strong view that the Committee ought to consider commissioning a full and thorough review of all the domestic legislation and its administration relevant to World Heritage sites in Australia generally, and in particular, in Kakadu. That review should determine the adequacy of the current Australian legislative regime to afford the necessary protection required of areas as sensitive as Kakadu (p 6).**
- 6. The site (Boywek Almudj) remains unprotected by domestic legislative measures. Instead it has received a temporary reprieve from further drilling and excavation as a result of the positive deliberations of the World Heritage Committee that secured from the mining company and the Australian Government, general undertakings and agreement for a pause and limitation in the development of the uranium mine. ATSIIC urges the Committee to maintain and strengthen these measures (pp6-7).**
- 7. There is clearly merit in a proposition for the relatively more independent World Heritage Committee, on advice from its Scientific Committee and its Cultural Advisory Committee, to consider the significance of the sites of significance in the areas under threat unless an appropriate and agreed domestic remedy can be found (p 7).**
- 8. The continuing interest and involvement of the Committee in the Kakadu issue is highly encouraged by ATSIIC and it should continue to scrutinise developments in the region. This is particularly so as the heritage and**

environment protection regime in Australia has become so seriously flawed, diminished, and has specifically removed ATSIC from the empathetic administration of Heritage Act provisions enabling effective domestic review of threats and dangers to Australia's heritage (p 7).

9. The cultural mapping exercise appears to of lesser importance now that the Mirrar have decided that they desire to see the mine shut down altogether. It would not fit in with their wishes if the mapping exercise only developed "go and no go areas" on the surface to facilitate the continuation of mining at Jabiluka. Under the current circumstances ATSIC believes that the cultural mapping exercise would be contrary to the closure and rehabilitation of he Jabiluka mine site now that the traditional owners have exercised their veto on essential associated mining activities. There are exceptionally good grounds for the Committee to maintain its scrutiny of Kakadu and the legislative regimes purporting to protect the region (p 9).
10. A full examination of the neglectful years where full funding was not achieved, and how much would be needed to catch-up to appropriate levels of funding in this region, would need to be seriously considered (p 9).
11. The current uranium mine development over and under the significant Boywek Almu dj site complex is a completely different proposal that is significantly altered from that proposed in 1979 and 1982. Under domestic land rights laws this ought to invoke the vitiation of any consent purported to be given in 1982. ATSIC's view is that there would be good grounds for such consideration but this does not appear to have been considered at this juncture. Were this to occur it would mean that the traditional owners would be in a better position to consider their consent with appropriate understanding of what it was that they were being asked to consent to in accord with the Land Rights Act (p 10).
12. The Committee should consider an independent analysis of the potential subsidence effects from the underground excavations and other mining activities proposed through the consents process and otherwise, at Jabiluka and compare with the extent of subsidence effects in other underground mining activities elsewhere in the world (p 10).
13. Land under the township of Jabiru should be handed back to traditional owners as recommended by the Kakadu Region Social Impact Study (KRSIS)this measure would be a significant way that Aboriginal people can take better control of their lives and have a say over the use of their land and ATSIC would encourage the Committee to ensure that this recommendation is fulfilled (p 11).
14. The ISP and the cultural committee (including ICOMOS) as well, would need to closely examine a number of matters in relation to the significant changes proposed to the Jabiluka mining operations through the consents processes (p 11).

15. ATSIIC encourages the Committee to have its advisory committees revisit the area for a more thorough investigation and reporting prior to the December 2000 meeting of the Committee (p 11).
16. The whole of Kakadu could become Aboriginal land and this could be achieved by Scheduling the land under the *Aboriginal Land Rights (Northern Territory) Act 1976*. We would strongly recommend that the Committee consider advocating the transfer of those residual lands to Aboriginal people as soon as possible to overcome this anomalous treatment of the Boards of management. This could be done at the same time as recommending parallel amendments to this regulation making power making them consistent across Australia (p 13).
17. The authorisations and consents issued by the Australian and Northern Territory Governments prior to the EPBC Act are subject to criticisms from many quarters. They will need the Committee to consider the Senate review of the consents process and other extrinsic materials to determine the adequacy of the interim and final legislative regime (p 13).
18. The Committee should consider the Commonwealth Grants Commission Review report on Indigenous funding in the context of developments in Kakadu and the KRSIS recommendations and in light of ATSIIC's view on the limitations of its terms of reference (p 14).
19. The extraordinary measure to use existing natural watercourses as mine pollution drains, particularly in proximity to the culturally sensitive sacred site would be a serious act of desecration. The Committee would need to be convinced that appropriate measures were in place and that the living country of the Mirrar was not used as part of the uranium mine waste disposal system (p 14).
20. ATSIIC is concerned to ensure that such an event (the unreported leak from the tailings pipeline) did not occur again, and that if it did, it would be reported to the traditional owners, whose livelihood depends on the hunting and gathering from the areas potentially affected over the long term. It would be incumbent on the Committee to obtain agreement from the Government to remedy this situation in the strongest possible terms (p 15).
21. ATSIIC would recommend that the Committee write to the new Parent Company (Rio Tinto) informing it of the (World Heritage in danger) debate and the essential requirements to fulfil World Heritage Convention obligations (p 15).
22. Scaling down of the identifiable resource at Jabiluka will have a major bearing on the mine rehabilitation and operation and may require specific scrutiny and recommendations from the Committee to ensure that protection of Kakadu is still economically achievable and viable.. This aspect will need further inquiry

and negotiation through the World Heritage scrutiny and review processes (p 15).

- 23. ATSIIC recommends that in the interests of furthering the objectives of the Convention and to avoid reducing the debate and decisions on these important matters to the lowest common denominator through the State Party's actions, that the Committee place Kakadu World Heritage property on the "in danger" list immediately even if the State party refuses to endorse that proposition (p 16).**
- 24. ATSIIC also urges the Committee to immediately commence negotiations with the Mirrar and any relevant authorities to establish the level of support and resources that will be required to remove the dangers to Kakadu permanently by rehabilitation of the mine sites as a matter of priority (p 16).**
- 25. ATSIIC is however concerned that the heroic Mirrar are not abandoned by the world community and this Committee in their valiant struggle to fulfil their living traditional obligation of caring for that country in Kakadu (p 16).**
- 26. The diversity of approaches (from NGOs and other parties) should distil out an appropriate course of action that ultimately benefits the Mirrar in their continuing strong affiliation and connection with that land. ATSIIC supports the Committee in achieving this more equitable result (p 16).**
- 27. ATSIIC will continue pursuing a negotiated treaty between its constituents and the Australian Government domestically in parallel to any other related international (WHC and other UN Committees) and national measures that will fill the burgeoning gaps in Australia's reconciliation with its Indigenous land and sea owners (p 16).**

Introduction

The Aboriginal and Torres Strait Islander Commission (ATSIC) makes the following submission in support of the Mirrar traditional owners of those parts of Kakadu in danger from the Jabiluka and Ranger uranium mines and other impacts. ATSIC urges the UNESCO World Heritage Committee to consider its submission in relation to the World Heritage in Danger in Kakadu as ATSIC represents Australian Indigenous people nationally.

Ten out of thirteen World Heritage properties in Australia are of vital interest to Indigenous people. These include, firstly, Kakadu National Park, Uluru-Kata Tjuta National Park, Willandra Lakes Region and the Tasmanian Wilderness being listed for both natural and cultural criteria. Secondly, the Great Barrier Reef, the Tasmanian Wilderness, the Wet Tropics of Queensland and Shark Bay, all four meeting World Heritage criteria for natural heritage. Thirdly, the Australian Fossil Mammal Sites (Naracoorte/Riversleigh), Central Eastern Rainforest Reserves of Australia, and Fraser Island listed under the World Heritage Criteria for natural heritage all have acute Indigenous interest with native title rights continuing and/or Aboriginal land rights claims over the properties. Leaving the remaining three, the Lord Howe Island Group, Macquarie Island and Heard and McDonald Islands with a much lesser degree of involvement from Indigenous people. Some new areas recommended for nomination include the Blue Mountains National Park, on the outskirts of Sydney, the lake Eyre region of South Australia and some areas elsewhere are also of critical interest to Indigenous people as native title rights continue to exist there also.

ATSIC's role in the World Heritage debate and the UN Generally

ATSIC has to date, not made a formal submission to the World Heritage Committee on this or other related issues. However, ATSIC has approached other United Nations forums and committees on related matters where it considered that it had exhausted all domestic avenues to redress the serious disadvantage and discrimination meted out to Indigenous peoples in Australia. ATSIC is a special organisation that both represents Indigenous interests in Australia while at the same time providing principal advice on these issues to the State Party, the Government of Australia. ATSIC has an administrative function with respect to the State Party and a democratically elected national Indigenous representative body that is mandated and empowered by its Indigenous constituency advance Indigenous rights by various means. Of paramount concern to ATSIC is that Australia does not have a Bill of Rights entrenched in the Constitution of Australia and more importantly, has never settled a negotiated treaty with the Indigenous people of Australia since the waves of invasion, occupation and settlement of traditional lands commenced in 1788. ATSIC's view is that a large degree of the problems emerging in the Kakadu situation may have been averted had there been a properly negotiated binding treaty in place.

The Committee may not be aware that ATSIC is a Commonwealth statutory authority established under the *Aboriginal and Torres Strait Islander Commission Act 1989* that consists of Indigenous regional councillors elected from all parts of Australia and a fully elected national Board, of which I am the elected Chairperson representing Indigenous peoples of Australia. Through this voluntary democratic process, with a relatively high voter turnout (in comparison to mainstream voluntary electoral processes), ATSIC has a strong mandate to represent Indigenous interests nationally and where necessary, internationally. ATSIC has many talented administrative staff with skills in anthropology, sociology, archaeology, environmental biology, constitutional, administrative and environmental law, all with a strong Indigenous perspective, to assist it in developing positions and the provision of critical advice on a wide range of matters facing Indigenous people in Australia.

Developments in relation to Kakadu were watched in varying degrees since the proclamation of the Park in 1978. Prior to 1989, the Australian Government Department of Aboriginal Affairs (DAA) took a relatively “hands on” approach assisting with various reviews and consultations in the Kakadu region. Later, after the formation of ATSIC in 1989, ATSIC initially took a more arms length approach until more recently as the issues in Kakadu have become more paramount to Indigenous constituents generally. These issues are now viewed as fundamental to the free enjoyment of land rights legitimately granted under statute in Australia. ATSIC initially measured its responses to particular developments as they have arisen in Kakadu. In more recent years, ATSIC has reviewed its position on Kakadu in light of the harsh treatment of traditional owners of Kakadu and the negative outcomes in relation to some of the very significant on-going developments and proposed developments in the region.

In response to significant appeals from traditional owners in Kakadu and the evident denial of fundamental human rights to unpolluted air, water and living areas so sacred to the Mirrar, ATSIC has seen a need to rapidly escalate its involvement in the issue to assist in achieving more equitable outcomes for the Mirrar. ATSIC will attempt to ensure that basic rights and Indigenous self determination in this region are not trampled on (see ATSIC’s Submission to Senate Environment, Communications, Information Technology and the Arts Reference Committee Inquiry into the Jabiluka Uranium Mine Project in June 1999). It has responded to the concerns of traditional owners who still cannot effectively control what takes place on their rightfully and lawfully granted lands despite securing significant international and national support and attention on the Jabiluka uranium mine issue. The ability of Indigenous people being able to take control of their situation and determine what takes place on their traditional lands is an issue that is fundamental to the very existence and effectiveness of land rights and native title laws in Australia. It is also a fundamental human right that is the basis of the living cultural heritage that is Kakadu. It turns even more on fundamental issues of certainty, sovereignty, positive recognition and affirmation of the strong spiritual connexion with the land, civil and political rights of traditional owners and advancement of their right of self-determination. The Committee members will be aware that the Australian Government makes no secret that it is attempting to downgrade the United Nations’ commitment to Indigenous self determination through redefinition of the term “self

determination” used in many UN policies to a loose notion and less well defined term of “self reliance”. Such an ideologically driven redefinition is a quantum leap away from Indigenous aspirations and ATSIC recommends against this course of action.

Unwarranted Tensions between Australia and the UN

The Committee will no doubt be aware that there have been some tensions and undesirable unilateral action by the Australian Government in relation to other United Nations initiatives such as the lack of full support for the Kyoto greenhouse protocols. ATSIC perceives that this particular position taken by the Australian Government, may impinge of future rehabilitation of some Aboriginal land by limiting its potential to be recognised for carbon credit trading under protocol guidelines being developed. Aboriginal land and sea could be recognised as suitable areas under that Kyoto protocol, and would have the potential to provide resources, from sources other than the Government, to provide care for the land from an Indigenous perspective. The Australian Government also downgraded its involvement in the UN treaty system immediately before a damning report criticising Australia on the state of Indigenous health and delays in social security benefits for migrants. More recently the Australian Government’s Chair of the Joint Standing Committee on Treaties, the Hon Andrew Thompson Member of Parliament for Wentworth, was interviewed on National ABC Radio on 30 August 2000, after spending one day at the UN’s Geneva headquarters two months earlier, stating that:

“They don’t understand their role. They don’t know whether they’re a political outfit or a legal outfit. And, really, they struck me as just a theme park for indulging the fantasies of the global NGO guilt movement. Now, that’s really what got it going, just hearing these unrepresentative NGOs heap abuse on gold-plated democracies like Australia ... some might say that the best human rights, sort of, text around is the King James Bible, you know - what we’re taught in Sunday School - what’s right and what’s wrong”

It is very unfortunate indeed that the Australian Government Party now sees fit to “roll back” its involvement in certain United Nations Committees. The Federal Government says it will only agree to visits to Australia by UN committees if there is a compelling reason. ATSIC is particularly concerned with the conditions imposed by the Australian Government before it would participate in the Human Rights Committees. ATSIC notes the decision taken by the Australian Government not to ratify the Optional Protocol to the Convention to Eliminate Discrimination against Women (CEDAW) now effectively leaves the protocol one State Party short from entry into force.

Australian delegation pressure on the World Heritage Committee

ATSIC is also very conscious of the extraordinary pressure exerted by the Australian State Party delegations to prevent your Committee from listing the Kakadu World Heritage property as in danger despite well reasoned advocacy by traditional owners, NGOs and recommendations from WHC advisory bodies. These actions, taken in

relation to Kakadu by the Australian Government, are in sharp contrast to the US Government's handling of recent cases listed as "in danger" in the Everglades and Yellowstone National Park facing similar threats and dangers as in Kakadu. The progress reporting on these areas listed in danger show that significant efforts and resources are being made available in an attempt to remove the dangers and threats to those World Heritage properties. The US administration is handling the listings of major attractions in the US "in danger" in a far more mature and accepting way than the Australian Government is in relation to the dangers facing Kakadu. The current Australian Government appears to have mapped out an ideologically driven course in the handling of its obligations to the Convention for the Protection of the World Cultural and Natural Heritage (1972) in relation to Kakadu. This is of grave concern to ATSIC and many Aboriginal people associated with other World Heritage listed properties and some proposed for listing. This untenable position has placed considerable direct pressure on the traditional owners of Kakadu specifically, and constrains their free and peaceful enjoyment of their traditional lands severely limiting their living cultural role to effectively care for that country. It also has the effect of defeating the objectives of the Land Rights Act and the expectations of Aboriginal people under a native title regime viewed as a model of recognition by Indigenous people elsewhere in the world. Therefore ATSIC appeals to the Committee to attempt to encourage the Australian Government to adopt a similar approach to the US in the cases of Yellowstone and the Everglades and highlight the remedial measures and resources that could flow if Kakadu was indeed placed on the "in danger" list. This also raises the question of the role of the Australia in the Committee and the impartiality that that role requires particularly as Australia will be Chairing the December 2000 meeting. Australia clearly needs to stand aside from any ideologically driven agenda to allow for the Committee to develop a truly independent decision that cannot be perceived as biased by the vehement Australian Government position.

Danger from deteriorating legislative regime in relation to World Heritage

The traditional owners continue to have a special and vital spiritual connection with the very land under threat and in danger in Kakadu. ATSIC has witnessed a situation unfolding in Kakadu with a rapidly escalating diminution of hard won Indigenous rights. Land rights granted under Australian statute, the *Aboriginal Land Rights (Northern Territory) Act 1976* (the Land Rights Act), promised Aboriginal land owners full control of access to traditional lands and developments on those lands with a virtual implied right of veto over mining developments on their lands. This power of veto is a far cry from the very limited right to negotiate provided in certain circumstances by the more recent *Native Title Act 1993* and now amended to provide even more limitations by the current government. You will be aware that these amendments along with some proposed changes to the Land Rights Act and changes to Australia's *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* and its administration, have attracted much criticism from many quarters within and outside Australia including the Australian Senate, and a number of United Nations Committees. In the case of Kakadu, it is evident that the traditional owners have been virtually denied that legislative right through administrative and legislative actions detrimental to their wishes.

The administration of the national Aboriginal and Torres Strait Islander heritage protection laws were stripped from ATSIC and the Minister for Aboriginal and Torres Strait Islander Affairs and given to another Minister by the current Australian Government. This was despite ATSIC's successes in the law's administration, and its well reasoned advice objecting to the patriation of the Act's administration from ATSIC to a state based regime. On 17 December 1998, the laws were placed under the control of the Minister for Environment and Heritage, currently Senator the Hon Robert Hill. You will recall that he has addressed your Committee in relation to the debate on Kakadu at the July 1999 meeting and also, on an earlier occasion, recommended the granting of consent to the development of the Jabiluka uranium mine in 1998.

In addition to this lack of effective heritage protection regime, the very legislation under which Kakadu (*National Parks and Wildlife Conservation Act 1975*) and the World Heritage areas were managed (*World Heritage Properties Conservation Act 1983* (World Heritage Act), have both been repealed recently. They were both replaced by omnibus legislation, the *Environment Protection and Biodiversity Conservation Act 1999* (EPBC Act). That law came into effect on 16 July 2000 (see ATSIC's Submissions to Senator Hill and his Department on the EPBC Bill and report on the legislative regimes for environmental protection). There continues to be significant criticism of the workability of the legislative regime created by these laws generally and more specifically in the context of Kakadu and the significant international debate on whether it ought to be placed on the World Heritage "in danger" list. Parliamentary scrutiny of changes to boundaries of World Heritage areas have been reduced to government by Ministerial decree, in writing, in the Government Gazette.

The original World Heritage Act provided for the prevention of deleterious impacts on a property by regulation prohibiting the impacts. It required the Head of State of Australia, the Governor-General to be satisfied that an act or a number of acts were damaging or was likely to damage or destroy the World Heritage Values of a property. Any person could have made an approach to the Governor General including the traditional owners in this regard within the usual Head of State protocols, but now the Governor General is no longer involved under the EPBC Act in the same way. All similar applications would need to be made to the Commonwealth Environment Minister or a state or territory counterpart, if a bilateral agreement hands responsibility to the Northern Territory government.

The Minister's decision under the World Heritage Act to give or refuse consent to a proposed impact was reviewable under the *Administrative Decisions (Judicial Review) Act 1977* although that review would have more limited application than scrutiny by the Australian Parliament.

However, ATSIC also notes that Management plans required for bilateral agreements with States and Territories that deal with consent requirements for developments in World Heritage areas, are subject to Parliamentary scrutiny, but the bilateral agreements are not. ATSIC recognises that a bilateral agreement cannot be put in place without a

valid management plan. It would, however, be possible through such a bilateral agreement for a state or territory that is not a direct signatory to the World Heritage Convention to approve developments that potentially compromise World Heritage values. The Australian national Government would not intervene unless the action was contrary to the EPBC objectives, or the potential impact from the development affected a specific World Heritage value under which the property was listed. Then the development would become a “matter of national environmental significance” attracting national Government attention under the EPBC Act but it could be too late to prevent permanent damage to the World Heritage value. Therefore, it is ATSIK’s strong view that the Committee ought to consider commissioning a full and thorough review of all the domestic legislation and its administration relevant to World Heritage sites in Australia generally, and in particular, in Kakadu. That review should determine the adequacy of the current Australian legislative regime to afford the necessary protection required of areas as sensitive as Kakadu.

Conflicts of interest in handling of Heritage Protection Act.

This new legislative regime has put into serious doubt the independence and objectivity required in the assessments and decisions required to be taken by the Minister. This has now clearly expressed itself with the attempt by the Mirrar Gundjehmi to make an application to the Minister for an emergency declaration under the Heritage Protection Act through a determination to protect the complex Bowek Almudj sites of significance. Prior to making a determination, the Minister appointed an inquirer to report to him, whom the Mirrar perceived had an acute conflict as he had represented significant detractors in native title cases and the Hindmarsh Island “Womens’ Business” case. The traditional owners had no alternative under this situation but to withdraw their application not from lack of merit in their case of the significance of the site but mainly because they felt they would not get an impartial inquiry into their very sacred site complex. Under their strong cultural traditions, it would have been difficult to reveal matters in relation to the significance of the site where the inquirer did not have the trust and confidence of the traditional people. This heritage legislation was known as Australia’s law of last resort for Indigenous peoples, where heritage areas or Indigenous sites are threatened by developments or other actions and state and territory legislative avenues have been exhausted by people concerned about deleterious impacts on sites under threat.

ATSIK is aware of claims made to the Committee by representatives of the Australian Government that it only learned of the significance of the Boywek Almudj site in 1998. Contrary to that view, ATSIK’s records clearly show that the site was known to the Government at least since Aboriginal Land Claim hearings conducted by Justice Toohey in the late 1970’s when the site was reported in exhibits to that inquiry. The site remains unprotected by domestic legislative measures. Instead it has received a temporary reprieve from further drilling and excavation as a result of the positive deliberations of the World Heritage Committee that secured from the mining company and the Australian Government, general undertakings and agreement for a pause and limitation in the development of the uranium mine. ATSIK urges the Committee to maintain and strengthen these measures.

The emerging conflict of interest in the Minister for the Environment and Heritage considering application for emergency heritage protection orders to protect significant sacred sites in the case of Kakadu, where he has already approved the development under environmental laws, needs urgent attention. That Minister is required to not only appoint an inquirer, but must also make a determination based on the inquirer's report that may go against his original decision to recommend the grant of development approval by the action Minister. There is clearly merit in a proposition for the relatively more independent World Heritage Committee, on advice from its Scientific Committee and its Cultural Advisory Committee, to consider the significance of the sites of significance in the areas under threat unless an appropriate and agreed domestic remedy can be found.

Positive effect of the World Heritage Committee intervention in Kakadu developments

ATSIC greatly appreciates that the World Heritage Committee has treated the representatives and traditional owners from the Mirrar Gundjehmi in much the same way as a sovereign government by allowing those representatives to address your committee directly in July 1999. The treatment of the Mirrar as a government in their own right by the Committee, similar to the Clinton Administration's change in policy for handling dealings with American Indian nations, is a refreshing and significant change from the usual marginalisation felt by Indigenous peoples, particularly in Australia. ATSIC is also heartened that the World Heritage Committee and its advisory bodies have provided the vehicle for international peer review of the numerous deleterious activities, developments and remedial measures in this sensitive world heritage property. The Committee has effectively facilitated greater scrutiny of environment and heritage protection measures that are absent or loosely in place in this sensitive area so vitally significant to its Aboriginal owners. The continuing interest and involvement of the Committee in the Kakadu issue is highly encouraged by ATSIC and it should continue to scrutinise developments in the region. This is particularly so as the heritage and environment protection regime in Australia has become so seriously flawed, diminished, and has specifically removed ATSIC from the empathetic administration of Heritage Act provisions enabling effective domestic review of threats and dangers to Australia's heritage. This effectively prevents consideration of lasting remedial actions to remove dangers and threats to Australia's and Indigenous peoples' heritage.

ATSIC notes the significant concessions that were made by the Government and ERA to the World Heritage Committee. In summary these included:

- mining works at Jabiluka would be scaled down and not exceed the production of the Ranger Mine until the Ranger mine was finished (originally thought to be 2010 during negotiation of the extended Ranger agreement, but later during negotiation in Paris, ERA indicated that it could achieve a finalisation of mining at Ranger by 2006, and recently ERA announced that it could achieve full production at Jabiluka within 18 months ie December 2000!)

- a full cultural assessment of the Boyweg-Almudj sacred site complex be undertaken, and
- a \$6 million essential services infrastructure package was offered to provide services that the KRSIS pointed out were neglected for many years.

ATSIC notes that the World Heritage Committee decided on 12 July 1999, for the time being, not to inscribe the site, which has been on the World Heritage List since 1982, on the List of World Heritage in Danger. It did however report on its deliberations as follows:

".....In a document adopted at the close of the Session, the Committee emphasised the fact that "whilst fully respecting the sovereignty of States on whose territory the cultural and natural heritage is situated [...] States Parties [...] recognise that such heritage constitutes a world heritage for whose protection it is the duty of the international community as a whole to co-operate."

It further expressed "deep regret" that the voluntary suspension of the construction of the mine decline at Jabiluka [...] has not taken place" and grave concern "about the possible serious impacts to the living cultural values of Kakadu National Park posed by the proposal to mine and mill uranium at Jabiluka."

There is also concern about "the lack of progress with the preparation of a cultural heritage management plan for Jabiluka" and the Committee expressed "significant reservations concerning scientific uncertainties relating to mining and milling at Jabiluka."

.....

It also requests the Australian government to submit a progress report by April 15, 2000 on the following: "progress made with cultural mapping of the Jabiluka Mineral Lease and the Boyweg- Almudj site and its boundaries and the completion of the cultural management plan with the necessary co-operation of the Mirrar, and appropriate involvement of other stakeholders"; on "the implementation, in response to the Kakadu Regional Social Impact Study of a comprehensive package of social and welfare benefits, together with the Northern Territory Government, for the benefit of the Aboriginal communities of Kakadu (including the Mirrar)"; and "more precise details of the meaning of the output and scale of any parallel activities at the Ranger and Jabiluka uranium mines."

ATSIC agrees with the Committee's view in this regard and believes that with current changes in the situation, that these positions will need to be revisited. In particular, ATSIC notes that there is still no effective cultural mapping of sacred sites, major elements of the KRSIS recommendations are yet to be delivered and the more precise details of activities at Ranger and Jabiluka are yet to be clarified. The cultural mapping

exercise appears to of lesser importance now that the Mirrar have decided that they desire to see the mine shut down altogether. It would not fit in with their wishes if the mapping exercise only developed “go and no go areas” on the surface to facilitate the continuation of mining at Jabiluka. Under the current circumstances ATSIC believes that the cultural mapping exercise would be contrary to the closure and rehabilitation of the Jabiluka mine site now that the traditional owners have exercised their veto on essential associated mining activities. There are exceptionally good grounds for the Committee to maintain its scrutiny of Kakadu and the legislative regimes purporting to protect the region.

Government funding undertakings from the July 1999 extra-ordinary meeting raise questions

However serious questions are raised in relation to the A\$6 million resource package announced by Australia’s representative, Senator Hill in July 1999 as much of these funds were not new proposals. At that time ATSIC had already come close to finalising National Aboriginal Health Strategy (NAHS) and Commonwealth Housing and Infrastructure Program (CHIP) funding to redress the years of neglect by the Northern Territory administration in the Kakadu region. The funds were already in the pipeline and the undertakings given to the Committee in July 1999 was not all “new” money for these initiatives. A full examination of the neglectful years where full funding was not achieved, and how much would be needed to catch-up to appropriate levels of funding in this region, would need to be seriously considered.

Australian Government’s April 2000 Report to the WHC Committee

The Government report attempts to show cause to the Committee that Kakadu is not in danger on a number of specific issues raised at the July 1999 WHC meeting but it fails on a number of counts. It makes a number of assertions, is inaccurate and misleading in a number of respects. Of grave concern to ATSIC is that it attempts to "divide and rule" the Indigenous people on whose land all this is taking place on (p 7,8 and 11). The Australian Government report is prone to create substantial divisions by reporting on differences of opinion amongst the wider Aboriginal community. This would be likely to be translated into “on the ground” dealings with the people and the issues in this region by various authorities unless stringent measures are put in place to remedy those effects. Some of the Aboriginal people purported not to support the Mirrar position have given up all hope to secure basic health, housing, education and infrastructure for their children other than through further development of uranium mines in the Kakadu region. Years of neglect and substitution of basic funding with mining royalty equivalents by the Northern Territory Government is a common experience in remote Aboriginal communities in Northern Territory (NT) where mining takes place on Aboriginal land. The NT receives a much larger share of Commonwealth funds due to the recognised disadvantage and remoteness of the 25% Aboriginal population of the Territory, but the common complaint is that very little of this finds its way to remote Aboriginal communities. Some Aboriginal people in the Kakadu region are resigned that they can only resort to accessing royalty equivalents provided as compensation for loss of use of their land while it is affected by mining to fulfil basic human needs. These basic human needs are taken for granted by

the wider Australian community so the treatment of Aboriginal people in the Kakadu region is highly discriminatory.

Some examples of the errors and misleading information includes in the introduction to the Government report where it states erroneously that:

"The mining company, Energy Resources of Australia Ltd (ERA), is now focussing on progressing the Jabiluka Mill Alternative (JMA). The Traditional Owners, through the Northern Land Council (NLC), gave consent to the JMA in 1982 in accordance with the Aboriginal Land Rights Act."

ATSIC submits that its records support the considerable doubt cast by the Mirrar in their 1998 submission to the Committee on way that the 1982 Jabiluka agreement was extracted.

The Jabiluka Mill proposal that was presented to the TO's in 1982 planned to construct the milling plant and tailings dams at Hades Flat on the edge of the Magela Creek floodplain many kilometres to the south of the Jabiluka outlier. In the lead up to 1982, the then mining company, Pancontinental, never proposed that the uranium mill and tailings dam was to be constructed on top of the Jabiluka outlier as it is in the current JMA. The current uranium mine development over and under the significant Boywek Almudj site complex is a completely different proposal that is significantly altered from that proposed in 1979 and 1982. Under domestic land rights laws this ought to invoke the vitiation of any consent purported to be given in 1982. ATSIC's view is that there would be good grounds for such consideration but this does not appear to have been considered at this juncture. Were this to occur it would mean that the traditional owners would be in a better position to consider their consent with appropriate understanding of what it was that they were being asked to consent to in accord with the Land Rights Act.

The Government reports that dust and vibration effects were to be studied according to page 4 of the its report but the potentially more significant mine subsidence surface and sub-surface effects are not covered adequately, if at all. The recently proposed excavation of the mine and the "large cavities" in the Kombolgie sandstone to store the tailings in the vicinity of the Boywek Almudj sacred sites could exacerbate these effects and add weight to the argument that this forms part of a completely new mining proposal. Such mine subsidence effects in this ancient escarpment country with significant Aboriginal sites could be disastrous and no amount of planning could remedy subsidence cracking, stream capture, and potential cliff and overhang collapse were it to eventuate through the proposed uranium mine development. The Committee should consider an independent analysis of the potential subsidence effects from the underground excavations and other mining activities proposed through the consents process and otherwise, at Jabiluka and compare with the extent of subsidence effects in other underground mining activities elsewhere in the world.

Heritage Application for Protection of Bowek Almudj

The Government submission does not give the reasons for the withdrawal of the Heritage application by the Gundjehmi Aboriginal Corporation on page 7 of its report. This gives the impression of a biased view that reflects badly on the traditional owners as being indecisive and uncooperative when the contrary position is more to the point. ATSIC understands that the application was withdrawn after the traditional owners discovered that Minister Hill had appointed a lawyer from his home state as an "inquirer" who had previously acted for clients opposed to native title claims and other Indigenous issues in South Australia. The reasons for the withdrawal of the application for the time being, by the Mirrar, should have been accurately reported rather than creating the impression to the Committee that the traditional owners and their representatives have refused to maintain a dialogue as encouraged by the July 1999 Extraordinary meeting outcomes.

Absence of dealing with tenure of Jabiru

The land under the township of Jabiru being handed back to traditional owners as recommended by the Kakadu Region Social Impact Study (KRSIS) received little mention in the Government report (on pages 10-14). This measure would be a significant way that Aboriginal people can take better control of their lives and have a say over the use of their land and ATSIC would encourage the Committee to ensure that this recommendation is fulfilled.

Scientific and cultural investigations need to be expanded not curtailed

ATSIC notes that that the Government appears to be effectively attempting to curb the investigation by the International Scientific Panel (ISP) from the language used in its report on page 21. The Government argues that the ISP should be limited to an examination of the Australian Government's Supervising Scientist (SS) response to the ISP's report (SSR 138 of 14 April 1999). In ATSIC's view, the ISP and the cultural committee (including ICOMOS) as well, would need to closely examine a number of matters in relation to the significant changes proposed to the Jabiluka mining operations through the consents processes. Restrictions on their independent examination is hardly scientific and is unwarranted interference in our view. ATSIC encourages the Committee to have its advisory committees revisit the area for a more thorough investigation and reporting prior to the December 2000 meeting of the Committee.

Changes to the legislative regime adverse to the traditional owner interests

Changes to the legislative regime under the *Environment Protection Biodiversity Conservation Act 1999* (EPBC Act) referred to in a "positive light" on p 24 of the Government's report also needs very close scrutiny. Many matters (instruments etc) that required the consent of the Australian Parliament have now been replaced by simple and less accountable Ministerial decrees published in writing in the Government gazette that are not disallowable instruments capable of being reviewed by Parliament and the Senate in particular (see earlier detailed discussion). On the other hand, instruments for the enhancement of World Heritage Boundaries, addition of new areas or additions to endangered species and habitats lists are disallowable instruments. Therefore, one House

of Parliament could block more effective environmental and biodiversity protection by disallowing the instrument and curtail giving effect to the “precautionary principle” that is one key objective of the EPBC legislation.

There are also regulation making powers in the EPBC Act applying specifically to Kakadu. As Kakadu is not all Aboriginal land (Jabiru, parts of old Mudginberry and Munmalary cattle stations are not yet Aboriginal land) it could result in significant diminution of the requirement for a majority of traditional owners on the Board of management for a quorum. Section 383 of the EPBC Act states:

***ENVIRONMENT PROTECTION AND BIODIVERSITY
CONSERVATION ACT 1999 - SECT 383***

Procedure of a Board

(1) The regulations may provide for:

(a) matters relating to the operation of a Board, including:

- (i) procedures for convening meetings of the Board; and*
- (ii) procedures for determining who is to preside at a meeting of the Board; and*
- (iii) determining who may attend a meeting of the Board; and*
- (iv) the constitution of a quorum for a meeting of the Board; and*
- (v) procedures relating to a member's interest in matters being dealt with by the Board; and*
- (vi) the way in which matters are to be resolved by the Board; and*
- (b) the appointment and rights of a deputy of a member of a Board.*

(2) The regulations may allow a Board to determine a matter relating to the operation of the Board for which the regulations may provide.

(3) If there are no regulations in force, a Board may operate in the way it determines.

(4) A meeting of a Board for a Commonwealth reserve consisting wholly of Indigenous people's land:

- (a) must not start; and*
- (b) must not continue;*

unless the majority of the members of the Board present are persons nominated by the traditional owners of the Indigenous people's land for appointment as members.

(5) Subsection (4) has effect despite subsections (1), (2) and (3).

Subdivision G—Special rules for some Commonwealth reserves in the Northern Territory or Jervis Bay Territory

As Kakadu does not yet consist "wholly of Indigenous people's land" a regulation could be made that does not require a majority of traditional owners before a meeting of the Board commences. This would be so unless Jabiru which is in the Park but not yet Aboriginal land, Mudginberri, Munmalary, Goodparla and other pockets of old lease holdings that precluded title being handed over earlier, are in fact made Aboriginal land. The whole of Kakadu could become Aboriginal land and this could be achieved by Scheduling the land under the *Aboriginal Land Rights (Northern Territory) Act 1976*. We would strongly recommend that the Committee consider advocating the transfer of those residual lands to Aboriginal people as soon as possible to overcome this anomalous treatment of the Boards of management. This could be done at the same time as recommending parallel amendments to this regulation making power making them consistent across Australia. The result would be that partly Aboriginal owned parks and reserves will all require a majority of Aboriginal owner members of the Board to be present before a quorum of the Board forms.

Current amendments to the EPBC provide that "*actions with prior authorisation*" will not require environmental authorisation under the EPBC Act. This will undoubtedly mean that the Jabiluka operations will not require further assessment and authorisations under the EPBC Act despite significant changes proposed to the uranium mine after the Government hastily gave its authorisations in 1998. The authorisations and consents issued by the Australian and Northern Territory Governments prior to the EPBC Act are subject to criticisms from many quarters. They will need the Committee to consider the Senate review of the consents process and other extrinsic materials to determine the adequacy of the interim and final legislative regime.

Kakadu Region Social Impact Study implementation shortfall

ATSIC has earlier in this paper, discussed the infrastructure "package" that was already in the pipeline being part of the National Aboriginal Health Strategy (NAHS) and Community Housing and infrastructure money. It was to make up for the significant shortfall built-up over decades due to NT Government's failure to provide adequate funding for such activities. ATSIC reiterates that the NT Government gets a large loading as a result of Grants Commission recommendations based on remote and disadvantaged Aboriginal communities. There is currently under way, a Grants Commission inquiry, the outcomes of which, could be available towards the end of 2000 that could be useful to consider in this regard by the Committee. However ATSIC is concerned about the restrictive scope of the term of reference for that inquiry because they exclude consideration of the absolute needs of Indigenous Australians and, equally importantly, the needs of Indigenous Australian relative to non-Indigenous Australians. The sorts of infrastructure and services that are absent in Kakadu are usually taken for granted by other Australians to be delivered by State, Territory and Commonwealth

governments. In the Kakadu context, this lack of provision of essential services is discrimination against the Mirrar in particular. ATSIC makes the point that no-one else in Australia is expected to consent (under duress) to a major uranium mine in their own backyards so that they can visit a hospital accessing universal health care, or send their children to school or have a roof over their heads. These are basic human rights enjoyed by mainstream Australia without an attendant major sacrifice of existing rights or interests. ATSIC asserts that these are basic life support systems that have been neglected and have placed the living culture in Kakadu "in danger" for many years. Kakadu supports the vibrant living culture of the Mirrar and whilst it is in danger, these brave Aboriginal people, the Mirrar, are deliberately and systematically restricted from effectively managing their country, Kakadu and beyond through the lack of fulfilment of the KRSIS recommendations. The Committee should consider the Commonwealth Grants Commission Review report on Indigenous funding in the context of developments in Kakadu and the KRSIS recommendations and in light of ATSIC's view on the limitations of its terms of reference.

The spill from the Jabiluka mine

ATSIC notes that due to the recent heavy wet season, contaminated run-off water from the Jabiluka uranium mine site overflowed into Kakadu National Park in April 2000 due to design faults in the significantly altered mine operation. This poses a constant threat to the World Heritage listed park and appears to be as a result of inadequate approvals for construction granted for this constantly changing mine. The interim water management pond (IWMP) at Jabiluka was ready to over-top its embankments and at the time, ERA proposed to release the water into the surrounding wetlands via the Swift Creek tributary near the Bowek Aludj site complex. This extraordinary measure to use existing natural watercourses as mine pollution drains, particularly in proximity to the culturally sensitive sacred site would be a serious act of desecration. The Committee would need to be convinced that appropriate measures were in place and that the living country of the Mirrar was not used as part of the uranium mine waste disposal system.

The spill from the Ranger mine

ATSIC views with great concern that, despite the changes to the EPBC Act and related instruments, that the mining company, Energy Resources Australia (ERA), did not declare as it was required to do, that it had allowed the release of tailings water from a tailings pipeline for a lengthy period of time. The volume of tailings released into the environment outside the non release zone was also not insignificant. On estimates provided after the spill was examined by the Supervising Scientist Group, it would flood about a football field with almost ½ metre of contaminated uranium mining tailings water (about 2,000 cubic metres). The Office of the Supervising Scientist (OSS), which is responsible for monitoring the mine, told a Senate hearing in May 2000, that 2,000 cubic metres of waste leaked from an underground pipe and some did reach the park's wetlands. It is not absolutely clear how long this spill was known about and what exact volume was released. Only estimates could be made. But the essential point is that the ERA did not report the incident as it was required to do under the legislative regime that we have

argued already has many flaws, until after the Government reported to the Committee in April 2000. This raises many concerns about potentially more serious future spills that would need to be dealt with by stricter measures. ATSIC is concerned to ensure that such an event did not occur again, and that if it did, it would be reported to the traditional owners, whose livelihood depends on the hunting and gathering from the areas potentially affected over the long term. It would be incumbent on the Committee to obtain agreement from the Government to remedy this situation in the strongest possible terms.

Rio Tinto takeover of ERA's parent company, North Ltd

The parent company (North Ltd) of the current mine operator ERA has recently been taken over by Rio Tinto.

If this new parent company continues with the ERA operation, this may require much greater scrutiny by the Committee to ensure that undertakings and agreements are adhered to by the new parent company. Remedies to prevent the present and potential future dangers such as the adequate rehabilitation of the Ranger mine, and the Jabiluka mine and all associated activities will need to be in place. ATSIC would recommend that the Committee write to the new Parent Company informing it of the debate and the essential requirements to fulfil World Heritage Convention obligations.

Downgrading of the Jabiluka mineral and ore reserves

The mine operator ERA issued a Media Release on 30 August 2000 to the Australian Stock Exchange revising the Jabiluka Mineral Resource and Ore Reserve the Jabiluka Mineral Resource and Ore Reserves. The estimates have been revised following the first underground exposure and drilling of the upper eastern section of Jabiluka 2 during 1999. These revisions estimate the total proved and probable ore reserves for the Jabiluka deposit to a reduced 71,000 tonnes U3O8 at an increased average grade of 0.51 per cent U3O8.

Scaling down of the identifiable resource at Jabiluka will have a major bearing on the mine rehabilitation and operation and may require specific scrutiny and recommendations from the Committee to ensure that protection of Kakadu is still economically achievable and viable.. This aspect will need further inquiry and negotiation through the World Heritage scrutiny and review processes.

Concluding remarks

ATSIC recommends that in the interests of furthering the objectives of the Convention and to avoid reducing the debate and decisions on these important matters to the lowest common denominator through the State Party's actions, that the Committee place Kakadu

World Heritage property on the “in danger” list immediately even if the State party refuses to endorse that proposition. To give support to this recommendation, ATSIC also urges the Committee to immediately commence negotiations with the Mirrar and any relevant authorities to establish the level of support and resources that will be required to remove the dangers to Kakadu permanently by rehabilitation of the mine sites as a matter of priority.

ATSIC is however concerned that the Mirrar are not abandoned by the world community and this Committee in their struggle to fulfil their living traditional obligation of caring for that country in Kakadu. After so many frustrating efforts to have their situation adequately recognised, it is entirely probable that their position may be more tempered than other NGO’s also concerned about the dangers in Kakadu. In ATSIC’s view this ought not be interpreted by the Committee as a divided voice of NGO’s on remedial approaches. Instead the diversity of approaches should distil out an appropriate course of action that ultimately benefits the Mirrar in their continuing strong affiliation and connection with that land. ATSIC supports the Committee in achieving this more equitable result. ATSIC will continue pursuing a negotiated treaty between its constituents and the Australian Government domestically in parallel to any other related international and national measures that will fill the burgeoning gaps in Australia’s reconciliation with its Indigenous land and sea owners.

I thank the Committee for the opportunity to present this paper on behalf of ATSIC to highlight these matters and trust that it will assist in ensuring that the World Heritage properties under Indigenous ownership, will receive special attention in the measures developed to protect our living cultural heritage.



Geoff Clark
Chairman

20 September 2000

Attachments:

1. ATSIC’s Submission to the Senate Environment, Communications, Information Technology and the Arts Reference Committee Inquiry into the Jabiluka Uranium Mine Project June 1999.
2. ATSIC’s Submission to the Minister for the Environment, Senator Hill on the Jabiluka Supplement to the Environmental Impact Statement (EIS) June 1997 (?)
3. ATSIC Submission to the Department of the Environment on the Final EIS for the Jabiluka Uranium Mine August 1998 (?)
4. ATSIC’s submission to the Minister for the Environment, Senator Hill on EPBC Act