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CONVENTION CONCERNING THE PROTECTION OF THE WORLD CULTURAL AND
NATURAL HERITAGE

BUREAU OF THE WORLD HERITAGE COMMITTEE

Twenty-third session
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Information Document: Written independent expert review of the advisory bodies (IUCN, ICOMOS and ICCROM) concerning the mitigation of threats posing ascertained and potential dangers to Kakadu National Park by the Jabiluka mine.

Background

This Information Document provides the written independent expert review of the advisory bodies to the World Heritage Committee (IUCN, ICOMOS and ICCROM) concerning the mitigation of threats posing ascertained and potential dangers to Kakadu National Park (Australia) by the Jabiluka mine as requested by the twenty-second session of the World Heritage Committee (Kyoto, Japan 30 November – 5 December 1998). The reviews of the advisory bodies were prepared after examination of the Australian Government response to the report of the UNESCO mission to Kakadu (see Information Documents WHC-99/CONF.204/INF.9A and 9B respectively).

Other relevant documents

WHC-99/CONF.204/5	Reports on the state of conservation of properties inscribed on the World Heritage List (see section concerning Kakadu National Park, Australia)
WHC-99/CONF. 204/INF.9A	Report on the mission to Kakadu National Park, Australia, 26 October to 1 November 1998
WHC-99/CONF. 204/INF.9B	Australia's Kakadu – Protecting World Heritage. Response by the Government of Australia to the UNESCO World Heritage Committee regarding Kakadu National Park (April 1999)
WHC-99/CONF.204/INF.9C	Assessment of the Jabiluka Project: Report of the Supervising Scientist to the World Heritage Committee
WHC-99/CONF.204/INF.9E	Review of an Independent Scientific Panel of the scientific issues associated with the proposed mining of uranium at Jabiluka in relation to the state of conservation of Kakadu National Park. Undertaken between 22 April and 13 May 1999

Summary

This Information Document provides the written independent expert review of the advisory bodies to the World Heritage Committee (IUCN, ICOMOS and ICCROM) concerning the mitigation of threats posing ascertained and potential dangers to Kakadu National Park (Australia) by the Jabiluka mine, as requested by the twenty-second session of the World Heritage Committee (Kyoto, Japan 30 November – 5 December 1998). The reviews of the advisory bodies were prepared after examination of the Australian Government response to the report of the UNESCO mission to Kakadu (see Information Documents WHC-99/CONF.204/INF9A and 9B respectively).

The document includes four annexes:

- Annex I** Joint ICOMOS and IUCN Statement,
- Annex II** IUCN Expert Opinion Concerning the Mitigation of Threats posing ascertained and potential Dangers to Kakadu National Park by the Jabiluka Mine (14 May 1999),
- Annex III** International Council on Monuments and Sites (ICOMOS) Comments on *Australia's Kakadu* (Response by the Government of Australia to the World Heritage Committee), and
- Annex IV** ICCROM analysis of Australian Government Report - Australia's Kakadu - Protecting World Heritage Report to World Heritage Centre, 21 May 1999.

**JOINT ICOMOS AND IUCN STATEMENT
KAKADU NATIONAL PARK AUSTRALIA**

**TWENTY-THIRD ORDINARY SESSION OF THE BUREAU OF THE WORLD
HERITAGE COMMITTEE, PARIS, FRANCE, 5-10 JULY 1999 AND TWENTY-THIRD
EXTRAORDINARY SESSION OF THE WORLD HERITAGE COMMITTEE, PARIS
FRANCE 12 JULY 1999**

ICOMOS and IUCN have independently reviewed the response of the Australian authorities to the request of the World Heritage Committee made at its twenty-second Session, Kyoto, Japan, 30 November – 4 December to provide: “a detailed report on their efforts to prevent further damage and to mitigate all the threats identified in the World Heritage mission report, to the World Heritage cultural and natural values of Kakadu National Park, Australia.”

This statement complements the individual reports of ICOMOS and IUCN and is presented to facilitate the work of the Bureau and Committee by bringing out the consensus arrived at independently by the advisory bodies in relation to the World Heritage mission’s conclusions that: “there are severe ascertained and potential dangers to the cultural and natural values of Kakadu National Park posed primarily by the proposal for uranium mining and milling at Jabiluka.”

ICOMOS and IUCN underline their advisory role identified in Article 8 of the World Heritage Convention and their shared concern to give advice to the Bureau and Committee out of their expertise and experience and to uphold the integrity of the Convention in an independent and objective manner.

The advisory bodies note that Kakadu National Park is inscribed on the World Heritage List under Natural criteria (ii), (iii) and (iv) and Cultural criteria (i) and (iv) and that, at the time of inscription, Natural criterion (iii) included reference to “exceptional combinations of natural and cultural elements.”

The advisory bodies recognise that the Australian Government has put considerable resources into addressing the issues raised in the report of the World Heritage mission of October 1998. However, their independent assessments of the analysis in the Australian Government report entitled “Australia’s Kakadu – Protecting World Heritage” is that many of the concerns identified by the World Heritage mission remain valid.

ICOMOS believes that the sacred sites within the enclave form part of a much larger network of sacred sites and dreaming tracks that spread over the entire region and that they must be viewed against that background. This leads to the conclusion enunciated by ICOMOS that: “mining operations beneath what is without dispute an area of great spiritual significance to the indigenous Mirrar people would cause irremediable damage, both tangible and intangible, to its qualities, in contravention of the generally accepted principles of heritage conservation and the World Heritage Convention” and that: “Significant degradation of the Jabiluka sacred sites, whether physically or symbolically in the eyes of the Mirrar people, must therefore be seen as inimical to the integrity of the entire cultural landscape of Kakadu, inside and outside the World Heritage site”.

IUCN has a similar view and, as well as endorsing the cultural issues raised explicitly by the World Heritage mission to Kakadu, is concerned that the development of Jabiluka: “has proved to be a divisive issue within the Aboriginal community and, so, threatens the living cultural heritage of the Aboriginal population. It thus threatens the integrity of the cultural values of the Park and their interaction with the natural values for which Kakadu is justifiably recognised internationally.”

IUCN also considers, in relation to the natural values for which Kakadu was inscribed on the World Heritage List, that the Australian response has not resolved the concerns identified by the World Heritage mission as to: “the unacceptably high degree of scientific uncertainties relating to the Jabiluka mine design, tailings disposal and possible impacts on catchment ecosystems”. IUCN points out that the analysis of these areas by the Supervising Scientist concludes that “The detailed review has demonstrated that there were a number of weaknesses in the hydrological modelling presented by ERA in the EIS and the Public Environmental Review” and that actions to address these can be incorporated into “the final design of the Jabiluka water management system.” In IUCN’s view, these weaknesses and continuing uncertainties emphasise the importance of applying the Precautionary Principle when considering the impact of development activities on World Heritage sites in general and Kakadu specifically.

IUCN also considers that the World Heritage mission’s concern remains valid in relation to the visual impact of the Jabiluka mine which the mission considered constitutes “an ascertained danger for the natural World Heritage values of Kakadu and that it constitutes a deterioration of the natural beauty of the property.”

CONCLUSION

Specific proposals for the future are stated in the individual reports but, in summary, ICOMOS and IUCN share a common view that the conditions still exist to justify the World Heritage mission’s concern that: “there are severe ascertained and potential dangers to the cultural and natural values of Kakadu National Park posed primarily by the proposal for uranium mining and milling at Jabiluka.”

The advisory bodies therefore conclude that the situation warrants the inscription of the Kakadu National Park World Heritage site on the List of World Heritage in Danger and the cessation of operations relating to the proposed Jabiluka mine.

IUCN - The World Conservation Union

**IUCN EXPERT OPINION
CONCERNING
THE MITIGATION OF THREATS
POSING ASCERTAINED AND POTENTIAL
DANGERS TO KAKADU NATIONAL PARK BY
THE JABILUKA MINE**

14 MAY 1999

**IUCN EXPERT OPINION CONCERNING THE MITIGATION OF THREATS POSING
ASCERTAINED AND POTENTIAL DANGERS TO KAKADU NATIONAL PARK BY THE
JABILUKA MINE**

INTRODUCTION

At the 22nd session of The World Heritage Committee in Kyoto, Japan, from 30 November – 5 December 1998, ICOMOS, ICCROM and IUCN were requested to ensure that the 23rd session of the Bureau of the World Heritage Committee be provided with a written expert review concerning the mitigation of threats posing ascertained and potential dangers to Kakadu National Park and World Heritage Site by the Jabiluka mine. In response to this need IUCN requested Professor Thayer Scudder to review the Report of the Committee's October 1998 Mission to Kakadu National Park and the response of the Government of Australia that was submitted on 15 April. Professor Scudder's extensive international expertise in relation to the impact of development projects on local populations is particularly relevant to the issues facing Kakadu in light of the intricate inter-relationship between the natural and cultural values of Kakadu and its inscription on the World Heritage List with reference to "exceptional combinations of natural and cultural elements" (see below). The assessment provided by Professor Scudder is attached in its entirety as Annex 1 to this paper. It is presented here as an independent analysis from which IUCN has drawn in formulating the present Opinion.

WORLD HERITAGE VALUES

Kakadu National Park Stage III was inscribed on the World Heritage List on the basis of both cultural and natural criteria. Cultural criteria that Kakadu National Park were acknowledged to meet were:

- (i) represent a unique artistic achievement, a masterpiece of the creative genius;
- (vi) be directly or tangibly associated with events or with ideas or beliefs of outstanding universal significance (Paragraph 24a., *Operational Guidelines for the Implementation of the World Heritage Convention*, 1991).

Natural criteria that Kakadu National Park were acknowledged to meet were:

- (ii) be outstanding examples representing significant ongoing geological processes, biological evolution and man's interaction with his natural environment; as distinct from the periods of the earth's development, this focuses upon ongoing processes in the development of communities, of plants and animals, landforms and marine and freshwater bodies.
- (iii) contain superlative natural phenomena, formations or features, for instance, outstanding examples of the most important ecosystems, areas of exceptional natural beauty or exceptional combinations of natural and cultural elements.
- (iv) contain the most important and significant natural habitats where threatened species of animals or plants of outstanding universal value from the point of view of science or conservation still survive (Paragraph 44a., *Operational Guidelines for the implementation of the World Heritage Convention*, 1991).

“The natural World Heritage values of the Park relate to its outstanding natural features and processes. The extensive size of the Park, along with the fact that it has suffered relatively little disturbance from European settlement, mean that these features and processes are particularly well preserved. Climatic records preserved in coastal and floodplain sequences elucidate significant geomorphological processes. In relation to biological evolution, the Park provides a special opportunity to investigate large-scale evolutionary processes in an intact landscape, especially those relating to wet-dry tropics. The archaeological remains and rock art of the Kakadu region represent an outstanding example of man’s interaction with the natural environment.

Kakadu National Park contains features of great natural beauty and magnificent sweeping landscapes. The focal points are the internationally important wetlands and the spectacular escarpment and its outliers.” (Environment Australia, September 1998).

INCLUSION OF PROPERTIES IN THE LIST OF WORLD HERITAGE IN DANGER

The operational Guidelines for the Implementation of the World Heritage Convention outline criteria for the inclusion of natural and cultural properties in the list of World Heritage in Danger. These list threats under the headings of ascertained and potential danger.

ANALYSIS

The Mission of the World Heritage Committee to Kakadu National Park in October 1998 concluded that “Kakadu National Park is exposed to a number of serious threats which are placing it under both ascertained and potential dangers”. These conclusions focused upon three principal issues as set out in the Recommendations of the Report. They can be summarised as concerns over scientific uncertainties and the application of the Precautionary Principle (Recommendations 2), over the visual encroachment on the integrity of Kakadu National Park (Recommendation 3), and over a series of threats to the culture values of the Park (Recommendations 4, 5, 6, 7 and 8). In the interest of brevity IUCN has restricted the present analysis to these three issues.

1. Scientific Uncertainties and the Precautionary Principle.

Recommendation 2 states that *“The mission noted the serious concerns and preoccupations expressed by some of Australia’s most eminent scientists as to the unacceptably high degree of scientific uncertainties relating to the Jabiluka mine design, tailings disposal and possible impacts on catchment ecosystems. The mission shares these concerns and therefore recommends application of the Precautionary Principle which requires that mining operations at Jabiluka be ceased.”*

In reviewing the report on the status of the 1998 Unesco Mission, the World Heritage Committee in its meeting in Kyoto requested the Australian authorities to “direct the Australian Supervising Scientist Group to conduct a full review of the scientific issues” about which the Mission had noted uncertainty. This review “will be submitted to peer review by an independent scientific panel composed of scientists selected by Unesco in consultation with the International Council of Scientific Unions [ICSU] and the Chairperson of the World Heritage Committee.” While IUCN was not requested by the World Heritage Committee to analyse the results of the review carried out by the Supervising Scientist prior to the peer review being performed by ICSU, IUCN wishes to record its appreciation to the Government of Australia for the opportunity to attend a presentation on the results of this study in Paris and at IUCN Headquarters in April 1999.

IUCN notes that the report of the Supervising Scientist concludes that “contrary to the views expressed by the Mission, the natural values of Kakadu National Park are not threatened by the development of the Jabiluka uranium mine and the degree of scientific certainty that applies to this assessment is very high” (Exec. Sum. P14). However, IUCN notes that the review of the hydrological model adopted by Energy Resources Australia Ltd (ERA), one of the areas of concern identified by the Unesco Mission, has led to “a number of recommendations for improvement of the model” (Exec. Sum. P5) and the conclusion that

“The combined effect of adopting the recommendations of this review on each of the above topics rather than the model used by ERA is that the pond volume required to achieve a given exceedence probability will increase by about 10%” (Exec. Sum. P6). Similarly in analysing the effect of climate change on hydrological modelling the report concludes “climate change modelling also suggest that there could be significant increase in the magnitude of Probable Maximum Precipitation (PMP) events, with increases of up to 30% being suggested. Possible increases of this magnitude should be taken into account in the final design of the Jabiluka water management system by increasing the height of exclusion bunds. This is an action that can be incorporated at the detailed design stage” (Exec.Sum. P5). In summary the report concludes “This detailed review has demonstrated that there were a number of weaknesses in the hydrological modelling presented by ERA in the Environmental Impact Statement (EIS) and the Public Environmental Review (PER)” (Exec.Sum. P13).

These conclusions raise the concern that, despite the extensive process of EIA and PER that has been pursued in designing the Jabiluka mine project, the review of areas of scientific uncertainty by the Supervising Scientist has both identified “areas for improvement in the hydrological model” and highlighted issues that need to be addressed in the “detailed design” of the water management system for Jabiluka. This underlines the limits of many EIA procedures and in IUCN’s view emphasises the importance of applying the Precautionary Principle when considering the impact of development activities upon World Heritage Sites in general, and in relation to Kakadu specifically.

2. Visual Encroachment.

Recommendation 3 states that *“Further visual encroachment on the integrity of Kakadu National Park through uranium mining and the associated incremental expansion of urban and infrastructure development in and associated with the town of Jabiru, located within the World Heritage property, should be prevented.”*

In the Response by the Government of Australia to the Unesco World Heritage Committee regarding Kakadu National Park, it is emphasised that “It is the Australian Government’s view that the evidence leading to this recommendation does not substantiate the case for visual encroachment as a significant issue or as a threat.” Further, the Response notes that “the Jabiluka mine is not visible from tourist access points within the World Heritage property. The mine will also not be visible from main access roads in Kakadu National Park. For the public, the mine site can only be viewed from the air. The Ranger mine, which occupies a substantially larger area than the Jabiluka mine when it will be in full production, has been visible from overflights since the property was first inscribed on the World Heritage List. To the knowledge of the Australian Government, no complaint has been made about the visual impact of Ranger from the air. The issue has never been raised by the World Heritage Committee or Bureau.” IUCN notes, however, that the Unesco Mission stressed that the Jabiluka mine site “is readily visible from the air from where visitors making overflights are especially well able to appreciate the sweeping landscapes for which Kakadu was inscribed on the World Heritage List and is famous”. The Mission Report also argued that “the visual impact of Jabiluka, 22 km north of Ranger and Jabiru, is a distinct and significant additional impact” and concluded that the visual impact of the Jabiluka mine constitutes “an ascertained danger for the natural World Heritage values of Kakadu in that it constitutes a deterioration of the natural beauty or scientific value of the property”. It is IUCN’s view that the Response by The Government of Australia does not fully address these concerns and that the original concerns of the Unesco Mission are still valid.

3. Threats to the Cultural Values.

Recommendation 4 states that *“The mission recommends that the Jabiluka Cultural Heritage Management Plan should be as thorough as possible. It should be prepared according to international best practice in cultural heritage management.”*

Recommendation 5 states that *“The Mission recommends, as an utmost priority, exhaustive cultural mapping of the Jabiluka Mineral Lease and the Boyweg site and its boundaries to ensure protection of*

these integral elements of the outstanding cultural landscape of Kakadu. This survey and cultural mapping work should be undertaken by senior anthropologists working with Aboriginal custodians.”.

Recommendation 6 states that *“The Mission recommends that the Australian Government take a leading and decisive role in overseeing the immediate and effective implementation of the KRSIS [Kakadu Regional Social Impact Study] recommendations. Implementation of the KRSIS recommendations should ensure that the structures are in place within 12 months to begin to ameliorate the negative regional socio-cultural impacts of development on Aboriginal people that are a potential danger to the cultural values recognised when Kakadu National Park was inscribed on the World Heritage List according to cultural criterion vi.”.*

Recommendation 7 states that *“The Mission notes the existence of the mining rights of Energy Resources Australia Ltd (ERA) in relation to the Jabiluka Mineral Lease. The Mission also recognises the customary rights (and responsibilities) of the senior traditional owner, Ms Yvonne Margurula, to oppose a development that she believes will irretrievably damage her country and her people. The mission is of the view that it is incumbent on the Australian Government to recognise the special relationship of the Mirrar to their land and their rights to participate in decisions affecting them. Therefore the mission is of the opinion that the Australian Government, along with the other signatories, should reconsider the status of the 1982 agreement and the 1991 transfer of ownership to ensure maintenance of the fundamental rights of the traditional owners.”.*

Recommendation 8 states that *“The Mission is of the opinion that the full extent of the outstanding cultural landscape of Kakadu should be recognised and protected. The mission recommends that the State Party be asked to propose to the World Heritage Committee further recognition of the outstanding living cultural traditions of the traditional owners of Kakadu through application of cultural heritage criterion (iii) and the World Heritage cultural landscape categories. The mission is of the opinion that the living traditions of the traditional owners and custodians of Kakadu, and their spiritual ties to the land form the basis of the integrity of the cultural landscape.”.*

In its Response to the report of the Mission the Australian Government concludes that “It is the Australian Government’s view that the evidence does not substantiate the case for ascertained or potential damage. A balanced weighing of the available evidence demonstrates that the natural and cultural values of Kakadu National Park are not threatened by the mine development, particularly when twenty years of experience at the similarly situated Ranger mine is taken into account.” As detailed in the analysis prepared by Professor Scudder (Annex 1), including comments received from the Northern Land Council and the Mirrar People, this assertion is debated. In particular, and in addition to the issues raised explicitly by the Unesco Mission, the development of Jabiluka has proved to be a divisive issue within the Aboriginal community and so threatens the living cultural heritage of the Aboriginal population. It thus threatens the integrity of the cultural values of the Park and their interaction with the natural values for which Kakadu is justifiably recognised internationally.

CONCLUSION

IUCN recognises that the Australian Government has put considerable resources into addressing the issues raised by the Unesco Mission in October 1998. However our assessment of the analyses provided is that many of the concerns identified by the Mission remain valid. In the opinion of IUCN, continuing uncertainties over the final design of the mine site and the weaknesses of previous design as recognised by the Supervising Scientist’s report, argue for application of the Precautionary Principle as recommended by the Mission. Jabiluka will constitute a significant additional impact on the visual integrity of the sweeping landscapes for which the Park is rightly recognised internationally. And there is strong evidence that Jabiluka is dividing the Aboriginal community and threatening the integrity of the cultural values of the Park. For these reasons IUCN believes that the conditions still exist for inscribing Kakadu National Park on the List of World Heritage Sites in Danger.

Annex 1

Independent Analysis by Professor Thayer Scudder, California Institute of Technology, May 1999

ASSESSMENT OF THE EFFECTS OF URANIUM MINING ON THE WORLD HERITAGE VALUES OF KAKADU NATIONAL PARK

I. INTRODUCTION

I was requested by IUCN to review the report of the UNESCO World Heritage Committee 's October 1998 Mission to Kakadu National Park and the April 1999 Government of Australia's Response to that Report. In particular I was asked to deal with concerns over the relationship of the proposed mining to the Park's World Heritage values as summarized in the Mission's first recommendation and on the Government of Australia's Response to that recommendation. I was asked to comment on the validity of those concerns. The IUCN and Government of Australia statements read as follows:

Unesco Mission Recommendation 1: Potential Impacts of the Jabiluka Mine

"The Mission has noted severe ascertained and potential dangers to the cultural and natural values of Kakadu National Park posed primarily by the proposal for uranium mining and milling at Jabiluka. The Mission therefore recommends that the proposal to mine and mill uranium at Jabiluka should not proceed."

Government of Australia Response

"It is the Australian Government's view that the evidence does not substantiate the case for ascertained or potential damage. A balanced weighing of the available evidence demonstrates that the natural and cultural values of Kakadu National Park are not threatened by the mine development, particularly when twenty years of experience at the similarly situated Ranger mine is taken into account."

II. CONCLUSION

Based on my reading of those two documents I reached the following conclusion:

Extension of uranium mining to the Jabiluka site, indeed any uranium mining including that at the Ranger site, does indeed pose severe dangers to the values of Kakadu National Park — a conclusion that applies especially to cultural values. Accordingly it is my recommendation that UNESCO inscribe Kakadu National Park in the List of World Heritage in Danger unless the proposal to mine and mill uranium at Jabiluka is canceled.

Subsequent to reaching this conclusion I received copies of the Northern Land Council's April 1999 Reply to the Australian Government Response as well as the Submission from the Mirrar People. Assessment of those documents further strengthens my conclusion that Kakadu should be declared a World Heritage in Danger should mining activities proceed at the Jabiluka site. In the discussion that follows, I first explain my conclusion based exclusively on my reading of the UNESCO Mission and Government reports. I then elaborate on that explanation based on material drawn from the Northern Land Council and Mirrar People reports.

III. DISCUSSION BASED EXCLUSIVELY ON THE GOVERNMENT RESPONSE

In assessing whether or not legitimate cause exists for declaring Kakadu National Park a World Heritage in Danger should mining at Jabiluka proceed, it is important to emphasize that the Park is one of the few

World Heritage sites that is listed for both cultural and natural values. Cultural values pertain to the Aboriginal population whose customary tenure extends over a 50, 000 year period. Those values are ongoing – that is, they apply as much to the sociocultural system of the contemporary Aboriginal population as they do to their ancestors. If it can be shown, beyond a reasonable doubt, that those values are placed in danger by current and future uranium mining, then Kakadu National Park is indeed a World Heritage in Danger.

Though the Government of Australia appears to be unaware of the very adverse implications for contemporary cultural values, their Response makes it very clear that mining has become a divisive issue among the Aboriginal population. Whereas traditional leaders are said to have agreed to uranium mining in a 1982 agreement, today the traditional leader with jurisdiction over the mining lease areas is against opening up the Jabiluka mine. While the Government Response often seems to imply that only one clan is involved, the report's text suggests otherwise; hence "Recently emerging politics of anti-uranium mining has exacerbated divisions and resentments between individuals, clan groups and organizations."

In the Government of Australia's own words, "the current traditional owners have indicated that they are at present unable to participate in any anthropological or archaeological surveys undertaken as part of the assessment process. The traditional owners supplied no information on these issues to the EIS process." In other words, "The decision of the Aboriginal community not to participate in either of the environmental assessments meant that the treatment of Aboriginal cultural issues in the final EIS and the PER [Public Environmental Review] was based on information drawn from discussions with relevant agencies and secondary sources rather than on new field based research with the appropriate Aboriginal people." So the Government according to its own response is planning to proceed with the mine without the effective involvement of the most relevant traditional leader and other concerned Aboriginal people. Such an approach clearly is at odds with the cultural values of Kakadu as a World Heritage site.

Though the Government Response makes much of Australia's legal mechanisms for the protection of Aboriginal rights, it also admits that more can be done for involving the Aboriginal population. Furthermore, Government's sense of involvement emphasizes a "consultation" approach rather than a broader participatory one, the word "consultation" being used throughout the Government Response. Government justification for proceeding with mining is based on the 1982 agreement and on the assumption that a majority of the 533 Aborigines currently favor mining. However, no evidence is presented to justify that assumption.

What is clear, however, is that the mining has become a major divisive issue and for that reason alone, my assessment is that the new mine should not start up simply because the mining issue has become a major threat to the living cultural heritage of the Aboriginal population, and that threat in turn threatens the cultural and natural integrity of the Park.

While the Government Response makes much of the fact that the Aboriginal community has received Australian \$145.8 million in payments since the late 1970s from the Ranger mine and will receive an anticipated \$231 million from Jabiluka, tucked away in their report is also the statement that "The Government accepts the finding of the KRSIS [Kakadu Regional Social Impact Study] that twenty years of development in the Kakadu region has not generally translated into the social and economic benefits for Aboriginal people that was originally expected."

That statement undercuts the impression that the Government Response attempts to give as to presumed benefits of mining for the Aboriginal people of the area.

IV. DISCUSSION BASED ON REVIEW OF DOCUMENTS RECEIVED AFTER I REACHED THE CONCLUSION PRESENTED AND DISCUSSED ABOVE.

A. The Inadequacy of the Government of Australia Response

The reports of the Northern Land Council and the Mirrar People provide ample evidence that the Government Response is, at best, full of erroneous information and interpretations or, at worst, is intentionally deceptive. Examples follow:

(1). Boywek-Almudj Sacred Site Complex

UNESCO Mission Recommendation 5: “The Mission recommends, as an utmost priority, exhaustive cultural mapping of the Jabiluka Mineral Lease and the Boyweg site and its boundaries to ensure protection of these integral elements of the outstanding cultural landscape of Kakadu. This survey and cultural mapping work should be undertaken by senior anthropologists working with Aboriginal custodians. The mission recommends that the Northern Territory's Aboriginal Areas Protection Authority (AAPA) undertake and document a full site identification survey that maps site boundaries. The anthropologists should report to a committee with representation from the Northern Territory's Aboriginal Area's Protection Authority (AAPA), the Australian Heritage Commission and the Gundjehmi Aboriginal Corporation and their work should be submitted to independent expert scrutiny via objective and impartial peer review.”

Government Response to Recommendation 5: “Research, including detailed cultural mapping, on the status and location of Boiwek over the last twenty years has been reviewed by the Aboriginal Areas Protection Authority of the Northern Territory. The Authority has declined to register the site due to the disagreements amongst custodians over the significance of the site and its boundaries. The Australian Government, through the Department of the Environment and Heritage, has carried out an audit of all previous work on the cultural mapping of the lease area. Every effort has been made to ensure the participation, negotiation and communication of traditional owners, custodians and managers, and to confirm that the information provided on sites and their boundaries in legally binding agreements in 1982 and 1991 is accurate and up to date.”

Northern Land Council Reply: “The Government response fails to address the urgent need for the recommended cultural mapping of the Boiwek-Almudj Complex of Sites. While noting that the Traditional Owners have declined participation in this processes the Government avoids stating why. The NLC understands that the Senior Traditional Owner has unequivocally advised the Government in person that Traditional Owners will not participate in the cultural mapping process whilst construction at Jabiluka is allowed to continue. Given Traditional Owners’ concerns about the effects of disturbing these sites, their position is understandable on the basis that they feel that their presence on the lease area whilst construction continues poses a real threat to their spiritual and physical safety.

In a similar vein the Government response states that the AAPA has decided not to register the Boiwek-Almudj Complex of Sites but fails to acknowledge the fact that the Authority also indicated that it is not denying that the complex area concerned may constitute a sacred site. In line with this position and based on remaining doubt the Authority has refused to issue ERA with a Work Certificate which is the necessary clearance for works within the complex”(pp. 13-14; author’s underlining).

“The Government’s audit of cultural mapping on the lease area is shallow and results in simplistic conclusions. The NLC has, subsequent to the UNESCO Mission’s report, undertaken its own investigation of the historical record of non-Aboriginal knowledge in relation to sites in the lease area. The NLC has access to substantial material not available to the Australian Government” (page 14).

And “The statement on page 68 [of the Government Response] that 250 holes were drilled in Mine Valley between 1971 and 1978 fails to acknowledge the fact that Traditional Owners had no rights in relation to their land during this period. The *Aboriginal Land Rights (Northern Territory) Act* was not passed until 1976 and the Jabiluka Land Trust area did not legally become Aboriginal land until 1982. With the experience of Ranger behind them, the current generation of traditional owners has grown up with a greater knowledge of the effects of mining and a greater understanding of rights available to them under Australian law.

The report also states at page 68 that the Boiweg-Almudj dreaming track ‘has no connection to the surrounding World Heritage area’. This comment fails to acknowledge the fact that the cultural values which constitute and contribute to the World Heritage status of Kakadu extend into the Jabiluka Mineral Lease. On the same page of their report the Government notes Chaloupka’s mapping of sites and dreaming tracks from as early as 1975 yet fails to acknowledge that the Jabiluka Mineral Lease is interlaced with dreaming tracks many of which cross from and into the World Heritage area” (pp. 14-15).

While the Jabiluka Mineral Lease was specifically excluded from the area nominated to and inscribed on the World Heritage list in 1981, the resultant ‘window’ in the World Heritage Area has no cultural relevance to the traditional owners and fails to reflect their views about the regional cultural landscape and their living cultural tradition. The cultural values for which the areas surrounding the lease were nominated and recognised as World Heritage in no way cease to be present once the Jabiluka Mineral Lease area is entered. That the lease area itself is as rich in Aboriginal artistic achievement and traditional significance as many other areas within Kakadu is demonstrable, as is the fact that traditional land use patterns, ceremonial beliefs dreaming tracks and sites all inextricably link the land within the lease boundary to that within the surrounding World Heritage Area...” (page 6 in the NLC’s written submission to the UNESCO Mission).

Mirrarr Peoples’ Reply: “The area in question is the Boyweg-Almudj Sacred Site Complex. It includes a number of sacred aspects in an interconnected spiritual and cultural landscape which include, but are not limited to,

- i) the Boyweg-Bagaloi soak,
- ii) the Boyweg-Almudj rock art site
- iii) the dreaming track between these two places
- iv) other places along or near the dreaming track associated with other ancestral beings.

Almudj is the Rainbow Serpent. Boyweg is the Rainbow Serpent in the form of a knob-tailed gecko” (page 23).

“The Boyweg-Almudj sites have been consistently recorded as traversing the Mine Valley area.” (see Appendix 1 for details). “This includes:

- a) Chaloupka, *Nomination for inclusion of the Djawumbu-Madjawarnja Site Complex on the Register of the National Estate*, 1976
- b) Chaloupka, *Djawumbu-Madjawarnja Site Complex Report*, 1978
- c) Keen, *NLC Report*, 1978
- d) Keen, *Alligators Rivers Stage Two Land Claim Book*
- e) Chaloupka, *NLC Report*, 1992
- f) Chaloupka, *NLC Report*, 1997

The information provided about Boyweg-Almudj sites in 1997 (the first time in Aboriginal language) is not in any way inconsistent with the outline previously provided in English. It is simply more detailed (as one would expect when a subject is first recorded in the interviewee's first language)" (page 30).

"The Australian Government attacks the credibility of Traditional Owner beliefs by contending throughout the report that a single 'Boyweg' site has been 'extended' to cover the Mine Valley area. It seems that this is a reference to the Boyweg-Bagaloi soak.

The reality is that for more than 20 years Traditional Owners and Custodians have provided non-Aboriginal people with an outline of the Boyweg-Almudj Sacred Site Complex – that is:

- i) a place where a journey began (the Boyweg-Almudj rock art site)
- ii) an indication of the direction of a journey (the Dreaming Track)
- iii) and a place where Boyweg-Almudj sank down (the Boyweg-Bagaloi soak)

There is no single site called 'Boyweg'. There are various sites and tracks along a journey in which Boyweg-Almudj made Mine Valley and other landforms, including a soak on the western side of Mine Valley called Boyweg-Bagaloi" (page 24).

"The Australian Government devotes a substantial portion of its report to attacking the credibility of local Aboriginal people's belief in the sacred and dangerous nature of what has become known by non-Aboriginal people as the Boyweg-Almudj Sacred Site Complex.

This public attack is considered by the Mirrar to be highly unethical and deliberately malicious. It is most distressing for the Mirrar to see their cultural heritage dissected, falsely defined and summarily dismissed by people who have never lived on Mirrar land, practiced Mirrar culture or even allowed Mirrar an appropriate opportunity to explain the extent and significance of their sites in a cultural context. The Australian Government's decision to place information denigrating Aboriginal cultural beliefs on the internet is an extraordinarily improper act, hardly designed to promote the reconciliation process.

It should be noted that the Australian Government's attack is based on intentionally selective citations presented in the absence of any direct consultations with Traditional Owners and Custodians. The reports relied upon by the Government were written by non-Aboriginal people without translators" (page 22).

(2). Cultural Heritage Management Plan:

UNESCO Mission Recommendation 4: "The mission recommends that the Jabiluka Cultural Heritage Management Plan should be as thorough as possible. It should be prepared according to international best practice in cultural heritage management. ... The Mission recommends that every effort is made to ensure thorough participation, negotiation and communication with traditional owners, custodians and managers to ensure the compilation of an accurate cultural inventory that will ensure the conservation of the cultural sites located within the Jabiluka Mineral Lease."

Government of Australia Response to Recommendation 4: "The Australian Government, through the Department of Environment and Heritage, has invited participation in the further development of the Interim Cultural Management Plan from the organisations identified in the Mission recommendation. Every effort has been made to ensure the compilation of an accurate cultural inventory for the conservation of the cultural sites located within the Jabiluka Mineral Lease."

Northern Land Council Reply: "In reviewing the EIS, the Minister for the Environment, recommended that a Cultural Heritage Management Plan ("CHMP") be prepared prior to project construction commencing (Rec. 56) and further that studies were to be conducted into the dewatering effects at the Boiwek site (Rec. 57). Despite this, construction was allowed to commence without any form of Cultural

Heritage Management Plan in place and with only a desktop study of the recommended hydrogeological investigations relating to the possible dewatering effects of mining on the permanent soak or spring at Boiwek Bagolui.

Traditional Owners refused proposed drilling in Mine Valley to investigate the relationship between the aquifers in 1998 as the drilling itself was considered to be a threat to the broader Boiwek-Almudj Complex of Sites.

The Interim Cultural Heritage Management Plan was eventually supplied to the NLC some six months after construction had commenced. The traditional Aboriginal owners were offended by the inadequacies of this plan. In formulating the Interim Plan there was no consultation with the NLC or Traditional Owners and in an attempt to bypass the appropriate avenues of consultation, an approach was made to Djabulukgu Association to formulate the Interim Cultural Heritage Management Plan. Djabulukgu Association perceived the approach as divisive and inappropriate and refused to participate.

It was not until April 1999, some 12 months after construction at Jabiluka commenced, that the Government wrote to the NLC seeking input into the CHMP and into other studies concerning the impacts of dust and vibration from the project on cultural heritage values surrounding Jabiluka. This attempt to reconcile cultural heritage issues at Jabiluka has been made far too late to make any accurate baseline research involving Traditional Owners possible. Given their views that construction represents a real threat to their sites and therefore their physical and spiritual safety, it is not surprising that the owners of the cultural heritage in question are not willing to participate in the process.

The NLC is also concerned that the Government's response reflects what is typically associated with the 'cultural heritage paradigm' in Australia in which European structures give primacy to the physical manifestations of indigenous heritage (rock art and archaeology) over those aspects of indigenous culture which the Traditional Owners place most value upon (such as sacred sites). It is the integrity of sacred sites within the broader cultural landscape which Traditional Owners have raised with the NLC as their greatest concerns regarding the development, not the specifics of dust emissions and low frequency vibrations on rock art sites" (pp.11-12; author's underlining).

"The NLC therefore views the current attempt at developing the CHMP as an exercise demonstrative of the Government's indifference to the stated concerns of Mirrar about their cultural heritage. The NLC notes the pivotal role that this heritage plays in Kakadu's World Heritage status" (page 12).

Mirrar Peoples' Reply: "The Australian Government has attempted to justify the mining company's failure to conduct a Cultural Heritage Management Plan in the following terms:

'...the outcome provides for the protection of all sites in the lease area through a conservation management plan. Presently the traditional owners are not cooperating in the development of the plan.' (p. 58)

'The State Party has asked traditional owners to discuss the cultural mapping exercise recommended by the Mission. These requests have been rejected by traditional owners.' (p. 73)

'The Government remains committed to providing every opportunity for traditional owners in the Kakadu region to be fully involved in the development of measures to conserve cultural heritage.' (p. 83)

'Every effort has been made to ensure the participation, negotiation and communication of traditional owners, custodians and managers, and to confirm that the information provided on sites and their boundaries in legally binding agreements in 1982 and 1991 is accurate and up to date.' (p. 85)

‘The current traditional owners have indicated that they are at present unable to participate in any anthropological or archaeological surveys undertaken as part of the assessment process.’ (p. 112)

‘Traditional owners have indicated that they are unable at present to work with the mine’s owners or the Australian Government to facilitate processes to avoid any possible [cultural] impacts’ (p. 112)

All of these claims by the Australian Government are false and misleading. The Mirrar have clearly articulated that they are willing to participate in the development of a Cultural Heritage Management Plan if blasting and drilling at the Jabiluka minesite ceases during the assessment process. This reasonable and practical request has been rejected by the Australian Government and ERA despite the fact that the Mirrar have clearly expressed their concerns about the impact of ongoing construction activity on sites of significance and the Government admits to having inadequate knowledge in this area” (page 18).

(3). The Issue of Trust

UNESCO Mission Recommendation 11: “The mission considers that it is imperative that the breakdown in trust and communication that was perceived by, and articulated to, the mission be repaired. The mission is of the opinion that in accordance with the *Aboriginal Land Rights Act*, proper consultation with traditional owners must continue to be a requirement when considering any issues relating to the management of their lands. Furthermore the mission urges all indigenous and non-indigenous stakeholders with an interest in the Kakadu region to engage in a cross-cultural dialogue to ensure conservation of the outstanding heritage values of Kakadu for future generations.”

Government Response to Recommendation 11: “While the Australian Government does not accept a general breakdown in trust and communication, it remains committed to consultation on land management and cross-cultural dialogue on conservation issues.”

Northern Land Council Reply: “The UNESCO Mission Report accurately describes the fact that there has been a breakdown in trust and communication between the Aboriginal members of the Kakadu Board of Management and other Aboriginal traditional owners of lands within the Park with the Commonwealth Government. There has been no change of any substance to the circumstances prevailing at the time of the Mission’s visit, nor has the Commonwealth attempted to redress this situation. This is illustrated by the Commonwealth’s failure to provide the NLC and the Aboriginal community with detailed proposals for the implementation of the KRSIS recommendations (or, at least, the extent of the financial and other resources which will be made available for implementation) and, instead, to rely on the chair of the implementation committee to proceed by way of informal and ad hoc communication” (page 24).

Furthermore on the issue of consultation, “On page 115 of its response, the Commonwealth Government claims to have set in place a ‘consultation process [regarding nomination on cultural landscape criteria] with relevant stakeholders’. The Government has not approached the NLC in relation to the development of any consultations with traditional Aboriginal owners.

The NLC is has not been made aware of or been requested to advise the Government in relation to any consultation process. The issue has been taken over by the N.T World Heritage Properties Ministerial Council. So long as the issue is driven via this forum it is unlikely that traditional owners of either Kakadu or other Aboriginal lands will have interest in pursuing such an agenda.

The NLC is perplexed by the assertion on page 116 that ‘the Government is responding to those concerns at the highest level, including through direct Ministerial negotiations’. As discussed elsewhere in this response there are no negotiations and the Minister is at pains to ensure that his officers are aware that any discussion through the NLC of these issues should not be characterised as or referred to as negotiations. If the Government were responding at the highest level then their first action would need to be to inform the NLC of its desire to negotiate” (pp. 33-34).

(4). The 1982 Jabiluka Agreement, 1991 Transfer of Ownership, and subsequent Aboriginal involvement in decision-making

While controversy continues as to the extent to which the concerned Aboriginal people agreed to the 1982 Jabiluka Agreement, the replies of the Northern Land Council and the Mirrar People emphasize that Aboriginal involvement in reaching that decision was inadequate. Furthermore, the reply of the Mirrar People emphasize – contrary to the Government Response – that Sacred Site Custodians are unanimous today in their opposition to the Jabiluka Mine.

UNESCO Mission Recommendation 7: “The mission notes the existence of the mining rights of Energy Resources Australia Ltd (ERA) in relation to the Jabiluka Mineral Lease. The mission also recognises the customary rights (and responsibilities) of the senior traditional owner, Ms Yvonne Margurulu, to oppose a development that she believes will irretrievably damage her country and her people. The mission is of the view that it is incumbent on the Australian Government to recognise the special relationship of the Mirrar to their land and their rights to participate in decisions affecting them. Therefore the mission is of the opinion that the Australian Government, along with the other signatories, should reconsider the status of the 1982 agreement and the 1991 transfer of ownership to ensure maintenance of the fundamental rights of the traditional owners.”

Government Response to Recommendation 7: “The Australian Government does not support the course of action outlined in the Recommendation. Australian Law gives traditional owners a right to veto. In 1982 and 1991, traditional owners consented. Australian law recognises the Mirrar special relationship to their land and has enabled the Mirrar to participate in all decisions affecting them in statutory environmental assessment processes. Australia will report to the World Heritage committee on any future potential changes to the status of property rights within the excluded mining lease areas.”

Northern Land Council Reply: “The NLC will continue to honour the 1982 Agreement to which it is contractually bound. The NLC is satisfied that at the time of the 1982 Agreement the traditional Aboriginal owners (Mirrar/Gundjehmei) and sites custodians had given their informed approval for the project to proceed.

The NLC also recognises, however, that it is not surprising that a new generation of traditional owners should now hold a contrary view given their experience with Ranger. Nor is it necessarily surprising that more detailed information in relation to sacred sites in the immediate vicinity of the project is coming to light.

It is inevitable that public revelation of more detailed information in relation to sacred sites will result in speculation as to the veracity of such claims, that is, such revelation is vulnerable to accusation of ‘invention’ to prevent mining. It is the view of the NLC, however, that there is nothing necessarily inconsistent with current revelations and the historical record” (page 36).

Mirrar Peoples Reply: “The Australian Government refers to the 1982 Jabiluka Mining Agreement in the following terms:

‘The Mirrar gave consent to mining at Jabiluka in 1982. The agreement was signed after exhaustive consultation with traditional owners, as required under the Australian legislative regime, and has not been challenged under Australian law. (p. xiii)

The Aboriginal people of the Northern Territory have a right of veto over mining on their land under the *Aboriginal Land Rights (Northern Territory) Act 1976* that does not apply to land owned by non-Aboriginal Australians. The traditional owners of Jabiluka had the right to veto the

mine but instead chose to consent to the mine for the economic and other benefits they negotiated. (p. xiii)

The Traditional Owners have made no moves under Australian law to rescind the 1982 Agreement. (p. 72)

Traditional owners have consented to the Jabiluka mine. (p. 78)

The Australian Government considers, and all evidence provided indicates, that these agreements were reached through the informed consent and strong support of traditional owners at that time as required under the Act (p.87)' " (page 38).

According to the Mirrar Peoples' Response, "The 1982 Jabiluka Agreement is one of the most controversial contracts in Australia's history. In order to understand why Traditional Owners and other Aboriginal people in Kakadu reject its legitimacy, and why it stills stands, it is important to consider the following irrefutable facts omitted from the Australian Government's Report

- i) The Mirrar opposed the Ranger mine and it went ahead anyway.
- ii) The Mirrar were told that their Land Claim could be defeated if they did not agree to the Jabiluka mine. (Transcript, Meeting at Djarr Djarr Camp, 26-7 January, 1981)
- iii) All living Traditional Owners and acknowledged Custodians for the Jabiluka area, including a number of people who were present during the original negotiations maintain that important sacred sites information was either not revealed or suppressed in 1982. This existence of previously unrecorded sites of significance was confirmed by the Northern Land Council in 1997 and accepted by ERA in 1998.
- iv) The Australian Government amended the Aboriginal Land Rights (Northern Territory) Act in 1980 so that mining agreements would stand even if it could be proved that informed consent was not given.
- v) The Mirrar are not a party to the 1982 Jabiluka Agreement. The agreement is between the Northern Land Council and Energy Resources of Australia.
- vi) Both the current Senior Traditional Owner and the Senior Custodian for the Jabiluka land are adamant that the previous Senior Traditional Owner asked them to ensure that the Jabiluka Project did not ever proceed after it was stopped by Government policy in 1983" (pp. 38-39).

Discussion: In this instance there is a clear cut difference in interpretation between the Northern Land Council and the Mirrar People. The Northern Land Council states "In all the circumstances – including the uncertainties, which have arisen with respect to sacred site protection, the NLC is of the view that the 1982 Agreement provides that the mining can proceed" (page 36). As for the Mirrar People, they claim that while the Northern Land Council agreed with the 1982 Jabiluka Agreement, they did not (page 39). Be as that may, today, according to the Mirrar People reply, all the Sacred Site Custodians for the Jabiluka Land are unanimous in their opposition to the Jabiluka Mine: "At meetings held on April 7, 12, and 13 all the mutually acknowledged Traditional Owners and Custodians of the Jabiluka area agreed to the following statements with regard to the Boyweg-Almudj Sacred Site Complex:

- 1) The Boyweg-Almudj Sacred Site Complex (which includes the Boyweg- Almudj site, the Boyweg- Bagaloi site, the dreaming track between these two sites, and other sites of significance) is a sacred and dangerous area which should not be disturbed on the surface or underground.
- 2) The sacred sites within and associated with the Boyweg-Almudj sacred site complex have existed for untold generations and their integrity is essential to the survival of Aboriginal culture in present and future generations.
- 3) The access tunnel being constructed for the proposed Jabiluka uranium mine is now in the immediate vicinity of the Boyweg-Almudj Sacred Site

Complex, and must stop immediately in order to avoid desecration of sacred sites, with catastrophic consequences for local Aboriginal people.

- 4) Assertions made by the Northern Land Council in the 1982 mining agreement that there are no sacred sites in the area of the Jabiluka mine site are not correct.
- 5) Such assertions were made by the Northern Land Council without consulting with senior key custodians for the Jabiluka area.
- 6) In particular the Primary Custodian for the Jabiluka area has informed the Northern Land Council, mining companies, and other officials on many occasions that the sacred sites within the Boyweg-Almudj sacred site complex should not be disturbed.
- 7) That the Senior Traditional Owner, who 'consented' to the 1982 agreement did so under duress and later informed senior custodians that the area should not be disturbed because of dangers associated with sacred sites.
- 8) There are a number of burial sites in the area of the Jabiluka mine site, which remain unknown to non-Aboriginal people.
- 9) The Senior Custodians and traditional Owners who have attended and/or been identified at the meetings of Apr 7,12, and 13th are the only Aboriginal people who are permitted under Aboriginal law to speak about sacred sites on the Jabiluka land, and have spoken with one voice about the need to protect the Boyweg-Almudj sacred site complex.
- 10) The senior Traditional owners and custodians for the Jabiluka land call on local Aboriginal organisations, the Northern Land Council, the Australian Government and all other concerned citizens and organisations to support our urgent demand to protect sacred sites within and associated with the Boyweg-Almudj sacred site complex.

At the time of writing the Jabiluka mine tunnel is only a few weeks away from the boundary of the Boyweg-Almudj Sacred Site Complex as identified by Mr Chaloupka. The Traditional Owners and Custodians believe that sacred sites in the area are already being affected by mining activities.

The Mirrar are now preparing domestic legal action to protect the Boyweg-Almudj Sacred Site Complex, but are most concerned that the Australian Government and the mining company will use their considerable resources to publicly ridicule Mirrar spiritual beliefs if this issue is played out in a public forum.

It is for this reason that the Mirrar have turned to the World Heritage Committee, the world's pre-eminent cultural protection body, to recognise the dangers to cultural values, including sacred sites, posed by the Jabiluka mine" (pp. 28-29).

B. The deteriorating legal and planning framework in Australia since 1996 for the protection of indigenous rights.

(1). **The situation according to the April 1999 Report of the Northern Land Council:** "The Australian Government lists the *Aboriginal Land Rights (NT) Act 1976 (Cth)*, *Heritage Act 1984 (Cth)*, *Native Title Act 1993 (Cth)*, the *Northern Territory Sacred Sites Act 1989 (NT)* and *Aboriginal Land Act 1980 (NT)* to prove its contention that 'there is an extensive framework of environmental and heritage

legislation' which protects the natural and cultural values of Kakadu (at p. 33). However, all the legislation listed in relation to the recognition and protection of Indigenous rights is, as a result of Commonwealth or Northern Territory Government existing or proposed reforms, under threat or is already inadequate to protect the rights of Aboriginal people to manage and control their traditional lands. The maze of legislation – and the uncertainty which accompanies it, illustrates the Commonwealth Government's ambivalence to providing justice and equity to Australia's indigenous peoples.

It is also relevant to note that the Commonwealth is currently proposing major changes to its environmental legislation. These changes would, in addition to the specific matters affecting Indigenous management of National Parks in the NT ..., divest the Commonwealth of much of its current role in environment protection, leaving such responsibility to the States and Territories, who are not bound by international conventions or treaties" (page 29).

Furthermore in regard to the Aboriginal Land Rights (NT) Act of 1976, "As the Australian Government submission notes, the Land Rights Act recognises and protects traditional Indigenous rights to some land. However, as the Australian Government also comments, the Act has recently been reviewed (the Reeves Review) and proposals for extensive and damaging amendments are currently under consideration by a parliamentary committee. Various Ministers in the Australian Government have publicly supported the recommendations of the Reeves Review"(page 29) under which "the rights of traditional owners would be significantly diminished. The Reeves Review has been extensively criticised by leading anthropologists, lawyers, economists and public policy analysts" (page 29). Those recommendations "not only fail to recognise Aboriginal law but are unconstitutional and offend Australian statutory law" (page 30).

And "The Native Title Act 1993 was amended in 1998 to extinguish or impair native title on vast areas of land, including a huge number of mining tenements granted between 1993 and 1996. The amendments overturn the High Court decisions of *Mabo v Queensland (No. 2)* and *Wik Peoples v Queensland* in 1996. It also virtually extinguishes the native title rights of Aboriginal people on pastoral leases (despite the High Court's finding in the *Wik* case that native title rights co-exist with pastoralists' rights)... Again, similar to the Heritage Act, the Native Title Act amendments push back authority for implementing the native title regime to the states which allows for differences between different jurisdictions; frees the states to implement procedures which are not consistent with international obligations; and abrogates the domestic and international responsibility of the Commonwealth for this area.

The United Nations Committee on the Elimination of all Forms of Racial Discrimination found recently that the Native Title Act amendments are in breach of the Convention on the Elimination of All Forms of Racial Discrimination, to which Australia is a signatory" (pp. 30-31).

(2). **Discussion:** At the very time that other OECD countries are improving policies relating to indigenous people, the Government of Australia appears to be moving in the opposite direction. While emphasizing where further progress is needed, in his 1998 report on minorities in the United States, the United Nation's Special Rapporteur on Religious Intolerance wrote of Native Americans that "In recent years a policy in favour of these indigenous peoples has been set in motion, particularly under the presidency of Mr. Clinton." In Canada, regional autonomy has recently been provided to the indigenous Inuit people, while in Quebec – after years of ignoring the rights of the indigenous Cree - a major government parastatal (HydroQuebec) stated in its 1998 five year plan that approval from local indigenous communities, along with economic viability and environmental acceptability, would be required for any new development projects.

It is, of course, the prerogative of the Government of Australia to make its own policies and laws, including those that "set aside" the Aboriginal position as was the recommendation in the second report (1977) of the Ranger Mine environmental enquiry. Current intentions to apply such policies to Kakadu National Park, however, justify UNESCO declaring Kakadu's World Heritage values to be in Danger.

C. Natural Values

Natural values pertain to the natural features of the Park including its sweeping landscapes and important populations of plants and animals. The UNESCO Mission Report cites scientific uncertainties constituting a potential threat to these values and the visual impact of the mining constituting an ascertained danger. As the scientific uncertainties are addressed in a separate report by the Office of the Supervising Scientist, and are being reviewed by ICSU, I do not address these in my report.

In addressing the visual impact of mining, the Report of the Australian Government expresses the view that the evidence leading to the UNESCO Mission's recommendation "does not substantiate the case for visual encroachment as a significant issue or as a threat," noting that "the project at Jabiluka is not visible from the World Heritage property, except from the air." Impact is recognized, however, though perceived by the Government to be minor in comparison to the existing Ranger Mine. A definitive resolution of this difference in judgement between the UNESCO Mission and the Government would require a site visit. Expression of serious concern by an experienced international team underlines, however, the seriousness of this threat.

D. Incompatibilities between Mining and National Park Status

Generally speaking mining is an incompatible form of land and water use in the context of national parks (IUCN, 1994). That should especially be the case where the park in question is also a World Heritage site based not just on natural values but cultural values as well. In the Kakadu case the situation is further complicated by the intentional excision from within the park of the mining area and the administrative center for that area.

In their response to the UNESCO Mission, the Government of Australia argues (1) that the small size of the two mines and the relatively small size of the administrative center and (2) the economic and financial benefits from those mines for the Aboriginal population justify an exception being made. Neither argument is convincing. In regard to economic and financial benefits the government quotes impressive figures based on royalties and leasing fees. However their Response also states that "The Government accepts the finding of the KRSIS [Kakadu Regional Social Impact Study] that twenty years of development in the Kakadu region has not generally translated into the social and economic benefits for Aboriginal people that was originally expected." The responses of the Northern Land Council and the Mirrar People emphasize the same point so that I conclude that, as is so often the case with projects for mining natural resources, benefits are over-estimated by project advocates and costs – in this case sociocultural costs in particular -- are underestimated.

As for the Government belief that the increase in the Aboriginal population within the current park area from 139 people in 1979 to 533 by 1996 is due to development activities, the Mirrar People attribute that increase to the passage of the Aboriginal Land Rights (NT) Act of 1976 which, in the case of the Jabiluka Land Trust area, only became legally Aboriginal land in 1982. Even if both explanations have validity, in no portion of their Response does the Government relate those development activities to mining. On the contrary, under development activities that interest the Aboriginal population the emphasis in the Government report is on tourism. Hence in 1988 Gagudju Crocodile Hotel opened under "Traditional Owners...and since then a caravan park with lodge accommodation and other facilities for park visitors have been developed". Moreover, "The traditional owners particularly desire to receive more benefit from the use of their land for tourism, and they have requested that prime tourism resources or activities are reserved for their benefit."

The logical place for such facilities is in the mining and park administration center of Jabiru. Yet, in spite of the fact that township lies within the government- acknowledged customary area of the Mirrar People, neither they nor any other Kakadu Aboriginal people have representation on the Township's Board of Management! This is just one more example of the extent to which Aboriginal populations are excluded from participation in issues of direct relevance to their wellbeing. According to the Northern Land Council

the appropriate procedure would be to make Jabiru “Aboriginal land so that the local Aboriginal community can have a proper, real and meaningful involvement in the management of Jabiru – and thus the nature and scope of its substantial and various impacts upon the Aboriginal community” (page 26). Furthermore “Jabiru township lies within the traditional estate of the Mirrar Gundjeihmi clan. Mirrar have lodged a Native Title claim over Jabiru, which, if successful, would have the effect of increasing the role that traditional owners play in the control and development of Jabiru” (page 27). And “In the context of negotiations with the Government and ERA over a new mining agreement for the Ranger mine the NLC has pushed for the scheduling of Jabiru as Aboriginal Land under the *Aboriginal Land Rights (Northern Territory) Act 1976*. This is an option that would greatly enhance Aboriginal control over Jabiru, but it has been rejected by the Government during negotiations. The NLC, on behalf of Traditional Owners, has also lodged a land claim pursuant to the *Aboriginal Land Rights (Northern Territory) Act 1976* over land surrounding Jabiru. Granting of this claim would ensure that the Traditional Owners would have real controls over any expansion of the township into these surrounding areas” (page 27).

Thayer Scudder is Professor of Anthropology at the California Institute of Technology and frequent consultant to such international and national agencies as the World Bank and the Governments of China and Laos. For the past 42 years his research activities have concentrated on the impact of development projects on local populations, including indigenous people, in Africa, Asia, the Middle East and the United States. He has undertaken extensive comparative research on such projects, and received awards from professional societies for his work on the policy implications of such research. Those awards are the Kimball and Lehman Awards of the American Anthropological Association, the Malinowski Award of the Society for Applied Anthropology, and the Lucy Mair Medal of the Royal Anthropological Institute of the United Kingdom and Ireland.

Appendix 1

Sacred Site Recording on the Jabiluka Project Area excerpted from pp. 24 – 28 in the Mirrar Peoples' Report.

“Most of the recording of sacred sites in the Jabiluka Project Area has been carried out by Mr George Chaloupka, a non-Aboriginal person. Mr Chaloupka is a world famous rock art expert. Mr Chaloupka is acknowledged as having close relationships with local Aboriginal people over a long period of time and a good understanding of Aboriginal cultural beliefs.

In early 1975, George Chaloupka documented the first sites of significance in written evidence to the Fox Inquiry. ... Mr Chaloupka's evidence, based on discussions conducted with the then Mirrar Senior Traditional Owner, recorded only one sacred site in the entire Jabiluka Project Area. Mr Chaloupka attributes this lack of information release to the fact that the Fox Inquiry was focusing on the Ranger uranium mine which threatened sites in the southern part of the Mirrar estate. The Jabiluka Project Area is in the northern part of the Mirrar estate ...

In 1976, Mr Chaloupka had established from his ongoing research that there was a wealth of Aboriginal places of religious significance in the Jabiluka Project Area and nominated the Djawumbu-Madjawarnja Sites Complex for listing on the register of the National Estate.

Work on the nomination included further cultural mapping with two custodians who identified the Boyweg Bagaloi soak and the Boyweg-Almudj rock art site as sacred and dangerous places and referred the dreaming track between. Mr Chaloupka did not ask the custodians to consider that status of the dreaming track or the areas of restriction nor the detail of associated mythologies.

As a result Mr Chaloupka included the area now referred to as the Boyweg-Almudj Sacred Site Complex in his nomination for listing of the Djawumbu-Madjawarna sites complex on the Register of the National Estate. ... The Australian Heritage Commission placed the Djawumbu-Madjawarna sites complex on the interim Register of the National Estate in 1980 but after representations from the mining company excised the extent of Jabiluka mining activity from the area to be protected. The Mirrar were not provided with an explanation as to why one of their most important sacred site areas was excluded from the listing.

In 1978 Pancontinental Mining Ltd (the original Jabiluka lease holder) produced an Environmental Impact Statement for a proposed highway which was to run along the eastern margins of the Djawumbu-Madjawarna massif. The mining company's EIS stated there were no known sacred sites in the area of the proposed road.

Mr Chaloupka made submissions to the Government that the mining company's claim was incorrect. The Government sent an investigator who was accompanied by Dr Ian Keen, a Northern Land Council representative. Dr Keen reported to the NLC that custodians had recorded a number a sacred sites along the proposed highway route, including the Boyweg-Almudj rock art site..

In August 1980 Dr Keen prepared the 'Claim Book' for the Alligator Rivers Stage Two Land Claim. He recorded the Boyweg-Bagaloi soak, the Boyweg-Almudj rock art site and referred to the dreaming track between them based on the evidence collected by Chaloupka in 1976-8 and his own recording of Boywek-Almudj rock art site in 1978. ...

In early 1981 Mirrar Traditional Owners were advised by the Northern Land Council to enter into discussions with Pancontinental Mining Ltd about the Jabiluka mine or risk losing their land claim. (*Transcript, Meeting at Djarr Djarr Camp, 26-7 January, 1981*) These discussions quickly developed into the drafting of the 1982 Jabiluka mining agreement.

The Mirrar do not recollect, nor are there any records to indicate, any project-specific field anthropological work being carried out during this process. The Senior Custodian, Mr Wogwog claims he was not consulted about sacred sites in the minesite or Mine Valley area.

There are however records which suggest that despite the lack of anthropological investigation, the mining company was aware of the Boyweg-Almudj Sacred Site Complex. In early 1982 a well-known anthropologist wrote to Pan Continental warning the mining company that there were serious concerns within the Aboriginal community that appropriate custodians had not been consulted about sacred sites in the Jabiluka area; that sacred sites underground could be disturbed by mining activities with 'severe' consequences; that important dreaming tracks, including that associated with Boyweg, had not been detailed; and that as a result local Aboriginal people may not regard any concluded Jabiluka agreement as binding. ...The letter has never been made public and has only recently been supplied to the Mirrar. The letter confirms the recollections of many Senior Aboriginal people that there was a general reluctance to provide information to non-Aboriginal people about sacred sites during the 1982 Agreement process and that the "right" people had not been consulted about sacred sites... Such reluctance to reveal esoteric information is in accordance with Aboriginal values systems from throughout Australia....

There was no consultation carried out about sacred sites during the 1991 Deed of Transfer process.

The next recording of the sites in the Jabiluka minesite area was carried out in 1992 pursuant to a request from ERA to carry out drilling in the Mine Valley area. Mr Chaloupka again carried out the work for the NLC, this time with the Senior Custodian Mr Jimmy Wogwog. Representatives from ERA accompanied Mr Wogwog and Mr Chaloupka during the site visit. Mr Wogwog informed all those present that the Mine Valley area was a dangerous proximity; that the Mirrar Senior Traditional Owner who had 'consented' to the 1982 Agreement had directed him not to allow the place to be disturbed; and that serious consequences would result from such disturbance.

In 1993 the drilling was carried out regardless.

In 1996 ERA released their Draft Environmental Impact Statement for the current Jabiluka proposal. ERA's proposal brought mine activities much closer to the path of Boyweg-Almudj. The Senior Traditional Owner requested the NLC to protect all sites on the Jabiluka lease by registering them with the Northern Territory Aboriginal Areas Protection Authority.

In 1997 the NLC carried out site surveys with five Senior Custodians and another person who is not considered a Custodian of the Jabiluka land. Mr Chaloupka once again carried out these consultations. (Chaloupka, G, 1997, *Sacred Sites in the Jabiluka Project Area*, Report to the Northern Land Council, Darwin)

Most importantly, Mr Chaloupka's 1997 site surveys were the first to be carried out in Aboriginal language with an accredited interpreter. As a result, far more information was supplied than the previous recordings conducted in English which had previously recorded only an outline of the Boyweg-Almudj sites.

This information included confirmation of the Boyweg-Almudj Dreaming Track as a sacred and dangerous area and the identification as sacred and dangerous of places linked with other ancestral beings associated with Boyweg-Almudj. As a result Mr Chaloupka recommended that land between the Boyweg-Bagaloi site and the Boyweg-Almudj site, including the Mine Valley area, be registered for non-disturbance by the AAPA. He called this area the Boyweg-Almudj Sacred Site Complex.

Unfortunately the Northern Territory Government's AAPA declined to register the site largely because of evidence provided by a person not considered to be a custodian for the Jabiluka land contradicted that of the five Senior Custodians identified in Mr Chaloupka's report. The AAPA also declined permission for an authority to be granted to ERA to work in the Mine Valley area. In effect, the AAPA decided to make no decision at all. ...

In June 1998 construction of the Jabiluka tunnel began in the absence of a Cultural Heritage Management Plan and with the status of the Boyweg-Almudj Sacred Site Complex unresolved. This was despite the Senior Traditional Owner, Yvonne Margarula, bringing legal action against the Northern Territory Minister for Resources and Energy challenging his decision to authorise the commencement of construction under the *Uranium Mining (Environmental Control) Act (NT)*. Ms Margarula informed the NT Supreme Court of Mirrar concerns about destruction of sacred sites by the Jabiluka tunnel and argued that this had not been taken into account by the Minister in his decision to grant ERA a UM(EC) Authority. Unfortunately the Court was persuaded that the potential economic detriment to ERA of granting an injunction outweighed Mirrar cultural concerns and refused to prevent construction commencing. Ms Margarula's application was subsequently dismissed.

In October 1998, the World Heritage Committee sent a Mission to Kakadu. The Mirrar informed them about the Boyweg-Almudj sites and associated ancestral beings. In November 1998 the World Heritage Committee passed a resolution calling for construction at Jabiluka to stop while the Australian Government collected more information about the impact of the Jabiluka mine on cultural values. This resolution was rejected by the Australian Government.

Since the World Heritage Committee decision, the Mirrar have written to and visited the Australian Government's Minister for Environment & Heritage on a number of occasions asking for blasting and drilling to stop at the Jabiluka minesite so that further cultural mapping can take place in the minesite area. The Australian Government has rejected the Mirrar requests. “

INTERNATIONAL COUNCIL ON MONUMENTS AND SITES (ICOMOS)

Comments on *Australia's Kakadu***(Response by the Government of Australia to the World Heritage Committee)****1 Background**

At the 22nd Session of the World Heritage Committee, held in Kyoto (Japan) on 30 November to 5 December 1998, the Australian authorities were requested “to provide a detailed report on their efforts to prevent further damage and to mitigate all the threats identified in the World Heritage mission report [hereafter referred to as *MR*], to the World Heritage cultural and natural values of Kakadu National Park, Australia.” The resolution of the Committee went on to specify that this report would be submitted to the Advisory Bodies, who would provide “a written independent review concerning the mitigation of threats posing ascertained and potential dangers to Kakadu National Park by the Jabiluka mine.”

Following receipt of the Australian report, entitled *Australia's Kakadu* (hereafter referred to as *AK*), ICOMOS began a review procedure, involving its officers, its Australian National Committee, and independent experts. The following report is based on those discussions: it concentrates on the threats to the cultural values of Kakadu National Park and is confined to scientific and professional aspects of the subject. ICOMOS has studied, in addition to *AK*, the very extensive documentation provided by official and non-governmental organizations. It has chosen, however, to produce a relatively short paper that attempts to summarize its position on what it considers to be the main issues relating to the cultural heritage.

The ICOMOS position was clearly and unambiguously presented to the World Heritage Committee in Kyoto in the form of a joint statement with IUCN (Annex VI.2 to the report of the Kyoto meeting). This supported the inscription of Kakadu on the List of World Heritage in Danger. It warned that “failure to recognize the dangers identified in the report of the Review mission and to implement its recommendations will diminish [the] standards [for which the

World Heritage Convention enjoys such high international prestige] and risks prejudicing that prestige.”

This response will focus on the arguments put forward in *Australia’s Kakadu* on three specific issues relating to the cultural heritage of the World Heritage site:

- a The physical and symbolic impact of mining operations on the cultural heritage;
- b The relationship of the mining enclave to the cultural heritage of the World Heritage site;
- c The rights of the Aboriginal Traditional Owners (the Mirrar).

2 The physical and symbolic impact of mining operations on the cultural heritage

The Australian authorities do not contest the fact that the mining enclave within the designated World Heritage site contains sites that are sacred to the Aboriginal people of the region. However, in *AK* the physical impact of underground mining on a sacred site is understated.

The spiritual significance of the Boiwek-Almudj (Dreaming Serpent) sacred sites and associated dreaming tracks have been recognized for many years. In *AK* (p64) the Boiwek site is identified as “a small, discrete soakage or swamp on the edge of the wetlands located to the west of the Jabiluka mine valley.” In 1997 claims were made about a possible extension of the protected site, possibly covering the whole of Mine Valley, together with upgrading from a sacred site (*djang*) to a sacred and dangerous site (*djang andjamun*). According to *AK* the Aboriginal Areas Protection Authority (AAPA) declined to register the extended site. ICOMOS is given to understand that this is in fact not the case: AAPA has requested further information before taking a decision. This is a complex procedure, since knowledge of sacred sites and dreaming tracks is not the common property of an entire Aboriginal community. Esoteric “stories” are owned by individual elders, who will only divulge them in cases of dire necessity. It was doubtless the Jabiluka mining project which led to the claim for recognition as a *djang andjamun* in 1997, this information having been withheld up to that point.

It is relevant to add that definition of the extent of a sacred site on the ground is difficult, if not impossible. Aboriginal elders may, if compelled to do so in order to establish their traditional ownership, indicate the central locus of a sacred site, but definition of the extent of the site would be meaningless in their terms. The same incomprehension would apply if they were asked to define the breadth of a dreaming track.

It is reported in *AK* that mining operations have been taking place in the Mine Valley area between 1971 and 1978 without objections on the part of the Traditional Owners. However, these operations consisted of drilling exploratory holes, a discontinuous and limited activity that does not stand comparison with fully continuous mining operations. Full-scale underground mining will inevitably involve vibration and dust generation from extraction and removal operations that will have a profound effect on the ambient qualities of the sacred sites. It is worthy of mention that the original Pancontinental project envisaged mining from a different direction from the current ERA decline. It would have been a shorter and more shallow tunnel, entering from the south or south-east and having a less severe impact on the sacred sites.

The symbolic impact on these sites will be even more distressing to the Mirrar, the Aboriginal group to whom they are sacred. It is axiomatic in heritage protection and conservation throughout the world that any form of disturbance to the values that distinguished them is unacceptable and to be avoided. It is instructive to compare the elaborate measures being taken, at considerable expense, by the United Kingdom Government to reduce the visual and aural impact of the upgrading of a major road some 500m from the stone circle at Stonehenge (a World Heritage site) with the proposal for mining at Jabiluka. The comparison becomes even more striking when considering that Stonehenge is an enclosure sacred to peoples who lived several thousand years ago, whereas the Boiwek-Almudj complex plays an active role in the spiritual life of a living society.

Many heritage legislations provide for the provision of a buffer zone round protected sites (as does the World Heritage Convention). These are usually defined in two dimensions only, but there can be little doubt that they would be extended into the third dimension if continuous subterranean disturbance were threatened. The outcry from believers if a road underpass were to be proposed which passed beneath Notre-Dame-de-Paris may easily be imagined.

ICOMOS believes that mining operations beneath what is without dispute an area of great spiritual significance to the indigenous Mirrar people would cause irremediable damage, both tangible and intangible, to its qualities, in contravention of the generally accepted principles of heritage conservation and the World Heritage Convention in particular.

3. The relationship of the mining enclave to the cultural heritage of the World Heritage site

Throughout *AK* reference is made to the exclusion of the mining enclave from the National Park and the World Heritage site. It should be borne in mind that the first part of the existing inscription was made in 1981, at the 5th Session of the World Heritage Committee. At that time the implementation of the Convention was in its formative years and existing procedures and definitions had not yet been evolved. There was no obligation at that time for all sites to have a buffer zone around (or, in this case, within) them, though this would be essential at the present time. There can be little doubt that, were this area to be nominated now, the Advisory Bodies would recommend, and the Committee would require, that an undertaking be given by the State Party that there would be no extension of the existing mining operations at the Ranger Mine.

The exclusion of the mining enclave was in all probability accepted in 1981 as inevitable, given that Ranger had already been operating for a number of years. So far as the cultural content of the Kakadu National Park is concerned, that was seen at that time as consisting solely of rock art, treated as archaeological material. No mention was made in the nomination dossier of the unbroken cultural continuity between those responsible for the rock art and the current Traditional Owners.

Whilst in administrative terms it is possible to draw a line on a map in order to exclude the mining enclave from a National Park or a World Heritage site, this distinction is meaningless in cultural terms. The sacred sites within the enclave form part of a much larger network of sacred sites and dreaming tracks that spread over the entire region. They must therefore be viewed against that background.

Reference is made in *AK* to the very small proportion of the total area represented by the mining enclave. In terms of land surface this is incontrovertible. However, in cultural terms it is highly misleading. The enclave contains a very large section of the escarpment, which is one of the most culturally sensitive components of the region. The Djwumbu-Madjawarnja site complex, which is within the enclave, on the escarpment, was a base camp for the Mirrar and other peoples during the Wet Season during the pre-colonial and colonial periods, from which foraging parties went out long the base of the escarpment. The great antiquity of this practice is demonstrated by archaeological investigations of the Malakananja II site. The cultural links between the enclave

and the Mirrar lands within the World Heritage site cannot be challenged: they form a single cultural unit.

It is instructive to observe that in 1981 and 1987, when the first two sections of the Kakadu National Park were inscribed on the World Heritage List, it was treated as a mixed site, and evaluated according to the two sets of criteria, cultural and natural. The cultural elements identified were solely rock-art sites, and they were inscribed using, *inter alia*, cultural criterion iii as it was worded at that time: "... bearing unique or at least exceptional testimony to a civilization that has disappeared"; this criterion was therefore applied exclusively to archaeological sites. However, when the third section was inscribed in 1992, ICOMOS recommended the use of only criteria i and vi, adding that criterion iii should be removed from the overall inscription, since it was acknowledged that the rock art formed part of a living cultural and spiritual tradition. This criterion was revised in 1995, on the recommendation of the Global Strategy Expert Group. It now reads "... a unique or at least exceptional testimony to a cultural tradition or to a civilization which is living or which has disappeared." With the introduction of the category of cultural landscape into the terminology of the Convention, there would be a strong case for considering Kakadu as a continuing organic landscape (in the same way as Uluru-Kata Tjuta) because of the millennial use of land-management techniques such as selective burning in the region.

Significant degradation of the Jabiluka sacred sites, whether physically or symbolically in the eyes of the Mirrar people, must therefore be seen as inimical to the integrity of the entire cultural landscape of Kakadu, inside and outside the World Heritage site.

4 The rights of the Aboriginal Traditional Owners (the Mirrar)

The legal background is set out in section 3.3 (Aboriginal land, sacred sites and native title legislation) of AK. In the opinion of ICOMOS, this factual recapitulation fails to illustrate fully the evolution of this legislation and its implementation.

Native Title was first recognized in the 1976 Aboriginal Land Rights (Northern Territory) Act. Significantly for the Jabiluka case, this gave "Traditional Owners" the power to apply for Crown land grants, as a result of which they would be able to exercise a veto in respect of applications for mining concessions. The historic *Mabo* judgement in the High Court of Australia in 1992 brought the concept of *terra nullius* to an end, recognizing that the power to grant title was not a

prerogative of the Crown but that Aborigines and Torres Strait Islanders had an inherent right to land. This judgement was given legal force with the passage in 1993 of the Native Title (Commonwealth) Act 1993.

Reference is made to a Bill currently before the Commonwealth Parliament to replace the Aboriginal and Torres Strait Islander Heritage Protection Act 1984. Whilst this is presented in AK as a reforming and updating measure, it (not unnaturally) makes no reference to a judicial enquiry into the 1984 Act which referred to the new Bill as “an abdication of the national responsibility to protect Aboriginal heritage.”

In view of the fact that the legal protection afforded to Traditional Owners and their title to land is in the process of radical and, in the opinion of ICOMOS, undesirable change, the Jabiluka project constitutes a danger not only to the cultural heritage within the mining enclave, but also elsewhere in the World Heritage site, where concessions for uranium mining survive from the period before inscription on the World Heritage List.

There are several references in AK to the fact that the Mirrar have rights over only 2% of the Kakadu area. Whilst this may well be correct, it is undeniable that this is the crucial 2% so far as the current Jabiluka project is concerned, and so geographical holdings are irrelevant in judging the merits of the project. Much is also made of the fact that the Mirrar are only one Aboriginal group among many, and that they are in a minority in not supporting mining. Again, this ignores the special relationship of each group with its own territory, which is well established in Aboriginal traditional practices.

5 Conclusion

Having studied *Australia's Kakadu*, the response of the State Party to the report of the World Heritage Mission that visited the site in 1998, ICOMOS does not believe that a case has been made for the rejection of the recommendations of that report. It maintains its view that the site should be placed on the World Heritage List in Danger and that all operations relating to the proposed Jabiluka mine (including the digging of the decline) should cease, to permit a detailed cultural impact study to be carried out by independent Australian and international experts and with the full agreement and involvement of the Mirrar people. This should be used as the basis

for a revised proposal from the State Party, to be presented as soon as possible, and in any event before the 24th Meeting of the World Heritage Committee in December 2000.

ICOMOS
Paris

14 May 1999

ICCROM analysis of Australian Government Report - *Australia's Kakadu - Protecting World Heritage*

Report to WORLD HERITAGE CENTRE, 21 May 1999

At the February 1999 meeting of UNESCO's World Heritage Centre and the advisory bodies in Gland, it was agreed that ICCROM would submit its response to the Australian Government's report on the Kakadu National Park World Heritage Area to ICOMOS for synthesis within a single cultural heritage perspective. ICCROM provided its comments to ICOMOS for their use within the time-frame foreseen. ICCROM also believes that the comments provided within its report have value in their own right in guiding decisions during the forthcoming meeting of the World Heritage Bureau, and accordingly have provided the document to the World Heritage Centre for use in preparing for the meeting.

The following comments, prepared initially for ICOMOS, highlight key points, are necessarily brief and relate to questions of process and substance, rather than to the detail set out in the report. The report, as always within ICCROM's work, reflects a collegial process, bringing together the views of a range of competent and knowledgeable individuals within and beyond its staff.

1. Scientific certainty in the Australian Government report

The Government of Australia refuted claims made in earlier ICOMOS and IUCN reports and in the UNESCO mission report prepared by Prof. Francioni, and criticised their conclusions as lacking in scientific objectivity. It promised to provide in its response the necessary scientific basis to establish that the proposed mining operations, and the construction now underway, will not endanger the natural and cultural values for which Kakadu National Park was inscribed on the World Heritage List.

The Report "*Australia's Kakadu - Protecting World Heritage*", promises "objective evidence" that "the values of the property are not endangered" (p.vii). It cannot, however, be judged to have met that goal. Since many statements are, rightly or wrongly, contested by other experts and stakeholders, and are unsupported by specific textual references, footnotes or endnotes, they cannot readily be verified or denied without reference to other material. It should be noted that the Office of the Supervising Scientist, acknowledged as author of one scientific attachment, is speaking on behalf of the Australian government, rather than as an external independent body.)

Responses to the report - such as the "Submission from the Mirrar People" prepared by the Gundjehmi Aboriginal Corporation; the Northern Land Council Report and the Friends of the Earth Report - demonstrate the continuing discrepancy between statements of concern that the mine-works threaten world heritage cultural values and the government report. Many responses cite specific studies, reports and publications, and suggest at least the existence of cogent arguments opposing those within the Australian Government report.

Accordingly, the Australian Government report cannot be judged to have established the scientific certainty of its views.

2. Scientific basis for defining cultural values and impacts on world heritage cultural values of mining operations

The Australian Government report argues that the claims made by the Aboriginal peoples concerning the extent and importance of sacred places are exaggerated, and manufactured only very recently. (The report hints that these claims are advanced only for purposes of hindering mining operations.) Those arguments are based on the claim that earlier descriptions of sacred places, alleged to have been provided by the Mirrar people, did not correspond to the extent and importance of claims now made. This is tantamount to suggesting that Aboriginal heritage must be fully “declared” in conformity with contemporary western heritage conservation mechanisms (formal inventory and related descriptive listing system) to be recognized as heritage. This assertion runs contrary to contemporary understandings prevalent in the conservation field. There are many global examples of cultural groups who desire to maintain information on cultural properties as private, and whose desire to do so, does not diminish the cultural values of the property.

It is also inappropriate to suggest that evaluations made 20 or more years ago should conform precisely to those made today. The last 30 years constitute a period when conceptions of heritage have broadened enormously, during which the scale of recognized heritage appearing on inventories has broadened dramatically. Contemporary conservation systems recognize that perceptions over heritage values will inevitably shift with time.

This part of the debate also questions the degree to which assessments of cultural value can be arrived at in a scientific/objective manner. Cultural values are not intrinsically present in cultural heritage but are attributed by people according to the sense of cultural importance they attach to a place. The only objective measure of the significance of the attributed values is the degree to which they are acknowledged within a community.

The only question, to ascertain the importance and extent of the sacred places (as a separate issue from outstanding archaeological or rock art sites), is the degree to which the Aboriginal community responsible for and linked to them can find consensus on these values and their importance. In this case, all relevant traditional owners and custodians have recognised the identified spiritual/cultural values, and all associated Aboriginal communities have acknowledged that identification. It is their Mirrar people's responsibility to identify these values, not that of the Australian Government. The Australian report challenges that right.

3. Uncertainty concerning legislative protection

While the Australian Government report goes to great effort to establish the legal basis for protection of the site, and to record the commendable complementary initiatives governing decision-making affecting the site, the report also notes that significant changes are now being proposed. The report (p. 36) notes that the *Environment Protection and Biodiversity Conservation Bill (No. 2) 1998* is currently before the Commonwealth Parliament, and if passed, will replace 5 of the Acts cited in the report. As well, it is noted that an *Aboriginal and Torres Strait Islander Heritage Protection Bill (1998)* is before the Commonwealth Parliament, intended to replace the existing *Aboriginal and Torres Strait Islander Heritage Protection Act (1984)*. Many significant challenges to the Bill put in doubt the degree to which consensus exists around its provisions, and therefore its future. Whatever the nature of the provisions in the two new Bills, it is clear that the body of national legislation protecting cultural and natural heritage is in a period of significant change, and that the particular protection to be afforded Kakadu in the near future can not be fully predicted, or its implications definitively ascertained.

4. Objectivity and expertise of the Advisory Bodies

Senator Hill's letters to the Chairman of the World Heritage Committee put in doubt the credibility of the judgements to be expected of the Advisory Bodies in reviewing the Australian Government report. Their past assessments that mining operations might endanger the cited outstanding universal values of the Kakadu National Park World Heritage Area were held to jeopardize the likelihood of future objective assessments of data supplied in the Australian Government report. These contentions have been refuted by the Chairman of the Committee in writing. The expert advisory bodies review the material presented to them, in a professional manner and strictly within the terms set out for them in the Operational Guidelines to the 1972 Convention.

5. Impact of mining operation on cultural values for which Kakadu was inscribed on the World Heritage List

The Operational Guidelines provide for inscription of a site on the World Heritage List in Danger in the event of "potential danger", where threats "could have deleterious effects on its inherent characteristics" such as "threatening effects of regional planning projects". While the Australian Government report does not present evidence that resolves the debate about the impacts of the mining operation, it is clear that the Mirrar people strongly believe that the operation endangers significant heritage values, their traditional belief system and their way of life. ICCROM believes, using the precautionary principle, that the continuing scientific uncertainty concerning the claims of the Australian Government re the impacts of the mining operations, uncertainty concerning future legislative protection and the weight of the testimony of the Mirrar people constitute evidence of "potential danger" of sufficient importance to warrant inscription at this stage of Kakadu on the World Heritage List in Danger.

6. Moving Forward

The contrasting arguments of the various parties suggests an approach for bringing more objective analysis to the various views presented within the UNESCO mission report recommendations and the Australian Government report. The Australian Government report is selective. The responses to it demonstrate the existence of contrary opinion. Resolution of the debate is not possible on the basis of a simple comparison of the two, as no criteria were established in advance for that purpose. Whatever the outcome of the World Heritage Committee's deliberations, in order to go forward, some form of mediation is necessary to assist the parties in dispute to examine together the options still available to them. This approach requires both sides to work together in good faith. ICCROM would strongly endorse use of such an approach, and would be pleased to assist in efforts to bring about such mediation.