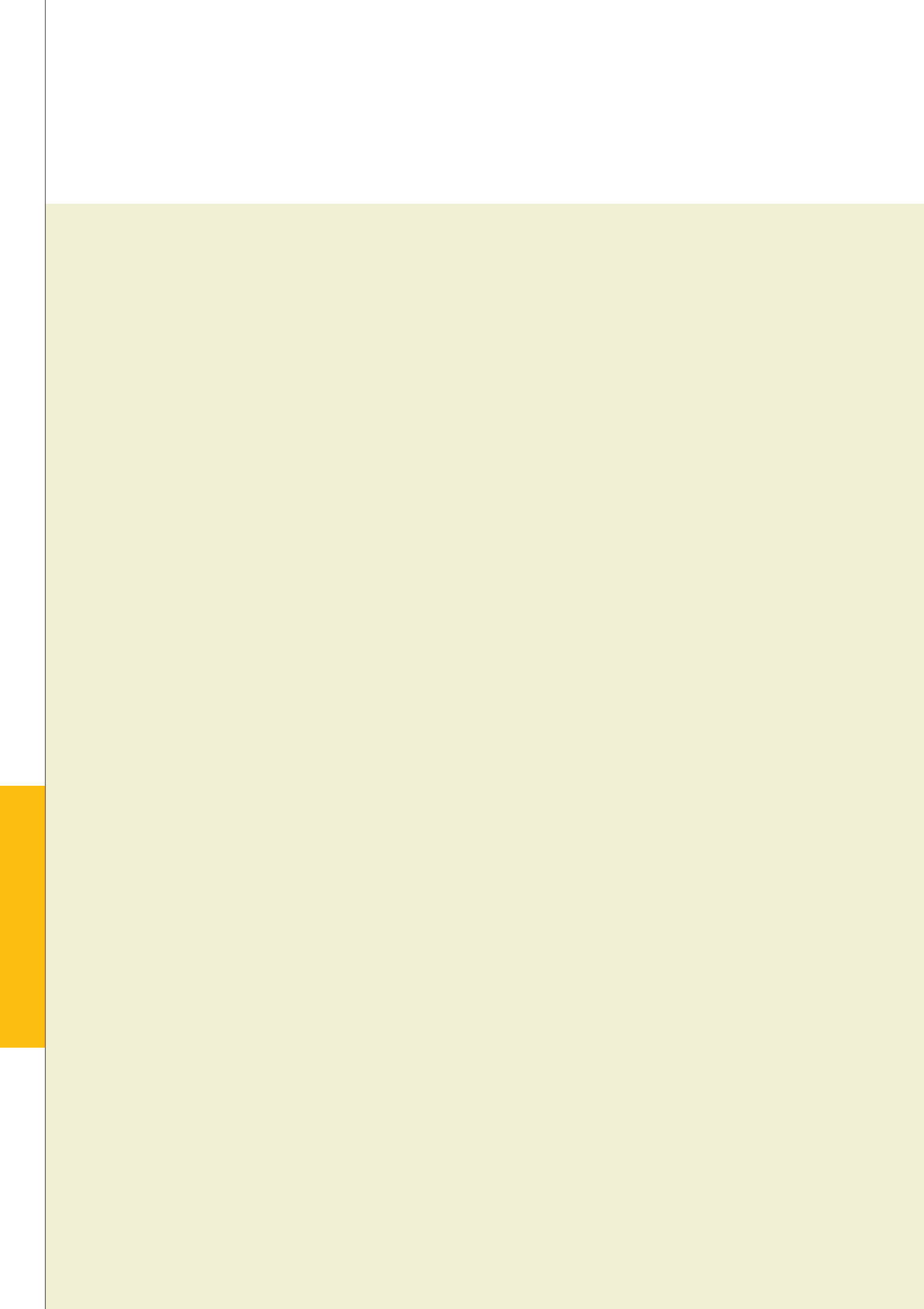


CHAPTER 3

Protecting Natural & Cultural Values: The Australian Framework

- 3.1 The Australian Federal System
 - 3.2 Environment and Heritage Legislation (Commonwealth)
 - 3.3 Aboriginal Land, Sacred Sites and Native Title Legislation
 - 3.4 Uranium Mining
 - 3.5 International Conventions and Agreements
- Conclusion



CHAPTER THREE: PROTECTING NATURAL AND CULTURAL VALUES: THE AUSTRALIAN FRAMEWORK To assess whether the values and attributes of the World Heritage property are under threat, it is necessary to consider the framework of environmental and heritage legislation that applies to the region. This chapter describes the Australian Federal system, outlines the extensive framework of environmental and heritage legislation, discusses the applicable Aboriginal land and cultural heritage legislation, examines the impact of specific uranium mining control legislation and looks at Australia's participation in international conventions and agreements.

The proposed mine site is not and never has been part of the World Heritage property or the Kakadu National Park and as a pre-existing property right was specifically excluded from the World Heritage property at the time of nomination. However, the project was subjected to the most stringent legal framework and EIS process because of its location and the Government's priority emphasis on ensuring that the values of Kakadu National Park were not damaged.

3.1 THE AUSTRALIAN FEDERAL SYSTEM

Australia has a federal system of government in which the legislative, executive and judicial powers are shared or distributed between the Federal, State and Territory Governments. There are six State Governments and three self-governing Territories, including the Northern Territory, where the Kakadu National Park is located.

Under the Australian Constitution the Federal Parliament has a list of enumerated legislative powers. The Federal Parliament does not have a comprehensive legislative power in relation to environmental matters. However, it has passed a range of laws in that area by relying on existing heads of powers under the Australian Constitution. These include the powers allowing the Commonwealth to pass legislation dealing with external affairs, Australia's Territories, corporations and trade and commerce.

The Australian States and Territories, under their own constitutions or self-government legislation, each have a general legislative power. In relation to a number of subject matters, the legislative powers of the Federal, State and Territory legislatures are concurrent. However, if there is an inconsistency between a State or Territory law and a valid law of the Federal Parliament, then the federal law will prevail.

Through the Territories power, the Federal Parliament retains the ability to legislate comprehensively with respect to the Territories, including the Northern Territory. However, given the self-governing status of the Northern Territory, there have been few occasions on which the Federal Parliament has exercised that power in a manner that would result in the Northern Territory being treated differently to an Australian State.

Pursuant to the powers mentioned above, the Federal Parliament and the Northern Territory Legislative Assembly have each passed laws relevant to the protection of the natural and cultural values of the Kakadu World Heritage property (see Chapters 3.2 to 3.4). A combination of these laws enables Australia to give effect to its obligations under the World Heritage Convention with respect to the Kakadu World Heritage property. This use of both Federal and Territory laws to give effect to those obligations is consistent with the position agreed between the Federal, State and Territory Governments that where Australia's treaty obligations impact on the States and Territories, they should be given effect in a cooperative manner.

Australia has three levels of government:

- federal
- state/territory
- local

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3.2 ENVIRONMENT AND HERITAGE LEGISLATION (COMMONWEALTH)

(a) *Environment Protection (Impact of Proposals) Act 1974*

The *Environment Protection (Impact of Proposals) Act 1974* (EPIP Act) is the Commonwealth's environmental impact assessment legislation. Both the Ranger and Jabiluka mining proposals were assessed under this Act (see Chapter 5.1 in relation to Jabiluka). The object of the EPIP Act is to ensure that, to the greatest extent practicable, matters affecting the environment to a significant extent are fully examined and taken into account in and in relation to actions by the Commonwealth Government.

Relevant Australian Environment and Heritage Legislation

Environment Protection (Impact of Proposals) Act 1974

National Parks and Wildlife Conservation Act 1975

Australian Heritage Commission Act 1975

World Heritage Properties Conservation Act 1983

Environment Protection and Biodiversity Conservation Bill (No 2) 1998

Commonwealth action is defined broadly by the Act. It includes:

- formulation of proposals;
- carrying out of works and other projects;
- negotiation, operation and enforcement of agreements and arrangements;
- making, or the participation in the making of, decisions and recommendations; and,
- incurring of expenditure

by, or on behalf of, the Australian Government and Australian Government authorities, either alone or in association with any other government, authority, body or person.

The Commonwealth Minister or authority responsible for taking the relevant Commonwealth action (which in the case of the Jabiluka mine proposal was the Minister for Resources and Energy) must determine whether the action is a matter affecting the environment to a significant extent.

Action will be environmentally significant if it will, or is likely to:

- affect the environment to a significant extent or result in such an effect; or
- permit or cause an action that is otherwise unlikely to happen and that will, or is likely to, affect the environment to a significant extent or result in such an effect; or

- promote or facilitate action that will, or is likely to affect the environment to a significant extent or result in such an effect.

If the Minister or authority responsible for the Commonwealth action so determines, the proposal is referred to the Minister for the Environment who determines the appropriate level of environmental impact assessment. The EPIP Act and administrative procedures approved under the Act provide for four possible levels of environmental assessment and the requirements for assessment (which include public consultation). The four levels are: examination by a Commission of Inquiry; assessment following the preparation and public review of an Environmental Impact Statement; assessment following the preparation and public review of a Public Environment Report; and, assessment without the preparation of an Environmental Impact Statement or a Public Environment Report.

The Act and administrative procedures authorise the Minister for the Environment to make such comments, suggestions or recommendations to the Minister or authority responsible for the Commonwealth action that the Minister for the Environment thinks necessary or desirable for the protection of the environment. This may include suggestions or recommendations concerning conditions to which the action should be subject. The Minister or authority responsible for the action must ensure that the suggestions or recommendations made by the Minister for the Environment (any Environmental Impact Statement or Public Environment Report) are taken into account in relation to the action.

(b) *National Parks and Wildlife Conservation Act 1975*

The *National Parks and Wildlife Conservation Act 1975* (the NPWC Act) provides for:

- the establishment of parks and reserves in Commonwealth areas;
- the management of those parks and reserves by the Director of National Parks and Wildlife; and
- joint management between the Director and Aboriginal people where parks and reserves are wholly or partly within Aboriginal owned land.

The Act commenced in 1977 and since that time 16 parks and reserves, of which Kakadu National Park is one, have been established under it.

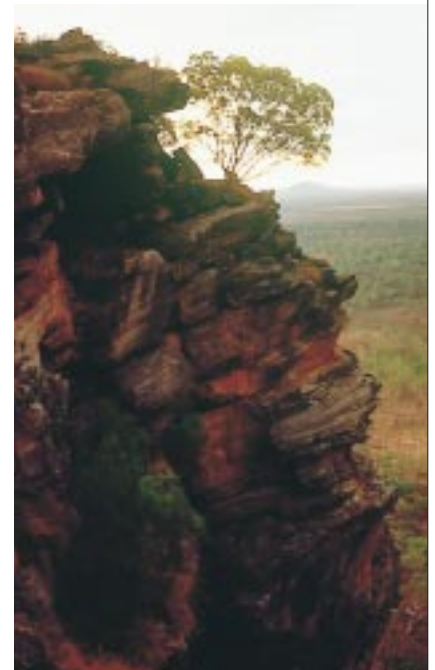
Three of the parks: Kakadu, Uluru-Kata Tjuta and Booderee are on Aboriginal owned land, which is leased to the Director of National Parks and Wildlife. The NPWC Act provides for these parks to be managed by the Director in conjunction with a Board of Management, of which the Aboriginal owners of the land choose a majority of members. The Act also preserves the right of Aboriginals to use the land for hunting or food gathering and for ceremonial and religious purposes.

Parks and reserves must be managed in accordance with a plan of management. The Director and Boards of Management prepare a plan with input from the public. In preparing a plan regard must be had to a number of specific objects, including:

- the encouragement and regulation of the appropriate use, appreciation and enjoyment of the park by the public;
- the interests of the traditional Aboriginal owners of land in Kakadu, Uluru-Kata Tjuta and Booderee National Parks;
- the preservation of the park or reserve in its natural condition and the protection of its special features, including objects and sites of biological, historical, palaeontological, archaeological, geological and geographical interest;
- the protection, conservation and management of wildlife within the park or reserve; and
- the protection of the park or reserve against damage.

(c) *Australian Heritage Commission Act 1975*

The *Australian Heritage Commission Act 1975* (the AHC Act) establishes the Australian Heritage Commission to keep the Register of the National Estate and advise the Commonwealth government in relation to the national estate.



*Mt Cahill from
Nourlangie Rock
(Michael Preece)*

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The national estate consists of places that are part of the natural or cultural environment of Australia that have aesthetic, historic, scientific or social significance or other special value. A place may form part of the National Estate even if its conservation, improvement or presentation is dealt with by another Commonwealth Act.

The Alligator Rivers Region, which includes most of Kakadu National Park, was included in the Register in 1980. The southeastern corner of the Park, which lies outside the Region, was included in 1989.

The AHC Act requires the Commonwealth government not to take any action that will adversely affect the National Estate values of a place that is in the Register unless there is no feasible and prudent alternative; and, all measures that can reasonably be taken to minimise the adverse effect will be taken.

Before the government takes any action that might affect to a significant extent the National Estate values of a place that is in the Register it must inform the Australian Heritage Commission of the proposed action and give the Commission a reasonable opportunity to consider and comment on it.

The Jabiluka Mineral Lease contains approximately 230 art, archaeological and sacred sites. The vast majority are within the Djawumbu-Madjawarna site complex, which is listed on the Register of the National Estate under the AHC Act and protected within two designated Australian Heritage Commission (AHC) exclusion areas. This includes Malakunanja II, currently the oldest dated archaeological site in Australia (50,000-60,000 years). The sites within the AHC exclusion areas have been mapped and are subject to stringent access prohibitions and protection measures. As required under the AHC Act, advice from the AHC was taken into account by the Minister for the Environment when making his recommendations under the EPIP Act on the Jabiluka mine proposal.

(d) *World Heritage Properties Conservation Act 1983*

The *World Heritage Properties Conservation Act 1983* (the WHPC Act) provides for the protection and conservation of properties in Australia that are of outstanding universal natural or cultural value. Such properties include those inscribed or nominated for inscription on the World Heritage List, such as Kakadu.

The WHPC Act enables the Commonwealth Government to specify activities, which will be prohibited in relation to a World Heritage property which is being or is likely to be damaged or destroyed. The WHPC Act also makes specific provision for the protection or conservation of sites, which are of particular significance to Aboriginal people within properties to which the WHPC Act applies.

The WHPC Act is not the only legislation relevant to the protection of World Heritage within Australia. There is a wide range of Federal, State and Territory legislation used to protect World Heritage properties within Australia, much of which is mentioned in this response. However, the WHPC Act enables the Commonwealth to take action where a World Heritage property is likely to be damaged or destroyed. On occasions, the Commonwealth has intervened under the WHPC Act.

The Commonwealth has not found it necessary to use its powers under the WHPC Act in relation to Kakadu National Park, because the stringent 3 year EIS process specifically addressed the protection of World Heritage values, and laid down conditions which assure this.

(e) *Environment Protection and Biodiversity Conservation Bill (No 2) 1998*

The *Environment Protection and Biodiversity Conservation Bill (No 2) 1998* (the EPBC Bill), which is currently before the Commonwealth Parliament, if passed, will replace the EPIP Act, NPWC Act, WHPC Act, *Endangered Species Protection Act 1992* and the *Whale Protection Act 1980*.

In relation to environmental protection, the EPBC Bill will apply to any action that has, will have, or is likely to have a significant impact on a matter of "national environmental significance". The EPBC Bill expressly provides that World Heritage is one of several matters of national environmental significance. The EPBC

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Bill is intended to simplify existing legislation and remove duplication between Commonwealth and State legislation, while providing greater protection to the matters of national environmental significance.

The parts of the EPBC Bill relating to World Heritage provide improved protection for the World Heritage values of World Heritage properties. In particular the EPBC Bill:

- prohibits any action that has, will have or is likely to have a significant impact on the World Heritage values of a World Heritage property unless:
 - (a) the action has been approved by the Minister for the Environment; or
 - (b) no approval is required because the proposal has been considered under an approval process accredited by the Commonwealth.
- creates an improved environmental impact assessment process for proposals that may have a significant impact on World Heritage values (a proposal that requires approval from the Minister must be subject to this process in order to obtain approval); and
- provides a wider and more effective range of enforcement options for the protection of World Heritage properties, including penalties of up to \$5.5 million.

The EPBC Bill also sets out requirements for creating and managing Commonwealth reserves (including existing reserves such as Kakadu National Park). These include requirements for the preparation of management plans and the joint management of Commonwealth reserves on Aboriginal land. There will be no diminution of powers over the environment.

The EPBC Bill has been referred to a committee of the Commonwealth Parliament which has conducted an inquiry (including public hearings and submissions). The Committee is expected to report to the Parliament on 27 April 1999. The Minister for the Environment has also recently had discussions with the Aboriginal traditional owners of Kakadu and Uluru-Kata Tjuta National Parks in relation to the provisions of the EPBC Bill dealing with joint management.

3.3 ABORIGINAL LAND, SACRED SITES AND NATIVE TITLE LEGISLATION

(a) *Aboriginal Land Rights (Northern Territory) Act 1976* (Commonwealth)

The main purpose of the *Aboriginal Land Rights (Northern Territory) Act 1976* (the Land Rights Act) is to grant traditional Aboriginal land in the Northern Territory to, and for the benefit of, Aboriginals. Other purposes of the Land Rights Act include: recognition of traditional Aboriginal interests in, and relationships to, land; and, to provide Aboriginal people with effective control over activities on the land granted under the Land Rights Act.

The Land Rights Act recognises the special status of indigenous Australians and gives them rights not available to other Australians, especially the right to claim land, and to reject certain uses of their land, including mining.

The title to land that is granted under the Land Rights Act is held by a Land Trust. It is held for the benefit of Aboriginals entitled by Aboriginal tradition to the use or occupation of the land. The land cannot be sold or transferred (except that it can be transferred to another Land Trust or surrendered to the government). In certain circumstances a Land Trust can grant an estate or interest in the land, for example a lease to a third party.

Since the Land Rights Act commenced in 1977 approximately 42% of the land in the Northern Territory has been granted to Aboriginal Land Trusts under the Land Rights Act. This includes about 50% of the land in Kakadu National Park, and the entirety of the Jabiluka Mineral Lease.

Aboriginal Land and Cultural Legislation

Aboriginal Land Rights
(Northern Territory)
Act 1976

Northern Territory
Aboriginal Sacred Sites
Act 1989

Aboriginal Land Act
(Northern Territory)

Aboriginal and Torres
Strait Islander Heritage
Protection Act 1984

Native Title Act 1993

The Land Rights Act provides for the establishment of Aboriginal Land Councils. The functions of a Land Council are broadly:

- to find out and express what Aboriginal people think about how Aboriginal land should be managed;
- to protect the interests of traditional owners of land;
- to consult the traditional owners about proposals for use of their land;
- to negotiate on behalf of the traditional owners; and,
- to assist Aboriginal people seeking a grant of land under the Land Rights Act.

Kakadu and the Jabiluka Mineral Lease are areas within the responsibility of the Northern Land Council, an Aboriginal Land Council established under this Land Rights Act.

Exploration for minerals cannot be carried out and mining rights cannot be granted in relation to Aboriginal land unless an agreement has been entered into between the intending miner and the relevant Land Council. The agreement sets out the terms and conditions on which exploration will be allowed or that the mining interest will be subject to. The Commonwealth Minister responsible

for the Land Rights Act must also give his or her consent. The Northern Land Council entered into such an agreement in relation to the Jabiluka Mineral Lease in 1982.

The Land Rights Act also includes provisions restricting the ability of non-Aboriginal people to access sacred sites and Aboriginal land.

The Commonwealth government has commissioned a review of the operation of the Land Rights Act. The report of that review has been referred to a committee of the Commonwealth Parliament. The committee is now seeking the views of interested people on the report.

(b) *Northern Territory Aboriginal Sacred Sites Act 1989*

The *Northern Territory Aboriginal Sacred Sites Act 1989* (the NTASS Act) establishes the Aboriginal Areas Protection Authority. The Authority is comprised of 12 members. Ten of the members are Aboriginal custodians of sacred sites who are appointed from a panel nominated by the Land Councils. The AAPA establishes and maintains a register of sacred sites, issues certificates allowing work to be done on sacred sites and facilitates discussions between custodians of sacred sites and persons performing or proposing to perform work in the vicinity of a sacred site.

This Act makes it an offence to enter or remain on a sacred site, to carry out work on or use a sacred site, or to desecrate a sacred site unless authorised to do so under the NTASS Act.

(c) *Aboriginal Land Act (Northern Territory)*

The *Aboriginal Land Act (Northern Territory)* makes it an offence for persons other than Aboriginals entitled by tradition, to enter or remain on Aboriginal land. It provides however for permits to enter and remain on Aboriginal land to be issued by the relevant Land Council or the traditional owners of the land. The Northern Territory Government may also issue permits to government employees who need to enter Aboriginal land in the course of their employment.

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(d) *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Commonwealth)

The purposes of this Act are the preservation and protection from injury or desecration of areas and objects that are of particular significance to Aboriginals in accordance with Aboriginal tradition.

The Act enables the Commonwealth government to make declarations in relation to significant areas and objects that are under threat of injury or desecration and makes it an offence to contravene such a declaration. The Act also makes provision in relation to the discovery of Aboriginal remains including: reporting; consultation with relevant Aboriginals; and, the return and disposal of Aboriginal remains.

The *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* protects Aboriginal significant sites for the benefit of all Australian's. The *Aboriginal and Torres Strait Islander Heritage Protection Bill* (the ATSIHP Bill) is presently before the Commonwealth Parliament. If passed, it will replace the 1984 Act.

As in the 1984 Act, the ATSIHP Bill provides for the Commonwealth to protect areas and objects of particular significance to Aboriginal peoples and Torres Strait Islanders. The ATSIHP Bill reforms the processes for dealing with applications for protection under the Act. It also seeks to engage the States and Territories in protecting indigenous heritage.

The ATSIHP Bill includes provision for the accreditation of State and Territory heritage protection regimes; heritage protection issues to be resolved by negotiation and/or mediation; significance to be assessed according to indigenous traditions, observances, customs and beliefs and that primacy be given to the views of indigenous people in making assessments of significance.

(e) *Native Title Act 1993* (Commonwealth)

The *Native Title Act 1993* recognises and protects Aboriginal and Torres Strait Islander peoples' native title rights and interests. The Act provides ways to determine native title and protect the existing rights of Governments, industry and the general public. It also provides ways to negotiate future public works and business activity on land or waters where indigenous people may have native title rights and interests.

The township of Jabiru and some adjoining areas in Kakadu National Park have been claimed under the Native Title Act. The claim has yet to be determined.

3.4 URANIUM MINING

(a) Policy and Legislation Framework

In 1975, the Commonwealth Government established the Ranger Uranium Environmental Inquiry under the Environment Protection (Impact of Proposals) Act to determine whether uranium mining should be permitted to proceed in the Alligator Rivers Region of the Northern Territory, and if so, under what conditions. The inquiry estimated the environmental impacts expected to occur as a result of mining in the Region, and recommended ways to minimise those impacts. It concluded 'The hazards of mining and milling uranium, if those activities are properly regulated and controlled, are not such as to justify a decision not to develop Australian uranium mines'. It recommended the establishment of Kakadu National Park, and the creation of the position of Supervising Scientist for the Alligator Rivers Region to oversee the environmental aspects of mining operations in the Alligator Rivers Region.

(b) *Environment Protection (Alligator Rivers Region) Act 1978*

The Environment Protection (Alligator Rivers Region) Act 1978 establishes the position of Supervising Scientist whose functions include:

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- to devise, develop, coordinate the implementation of, and assess programs for research into the environmental effects of uranium mining in the Alligator Rivers Region;
- to devise, develop and promote standards and practices in relation to uranium mining operations and rehabilitation in the Alligator Rivers Region;
- to coordinate and supervise the implementation of requirements, under any prescribed instrument, associated with environmental aspects of uranium mining in the Alligator Rivers Region; and
- to advise the Minister for the Environment on environmental matters within and beyond the Alligator Rivers Region.

The *Environment Protection (Alligator Rivers Region) Act 1978* also establishes:

- an Alligator Rivers Region Research Institute (ERISS) to undertake research into the environmental effects of uranium mining in the Alligator Rivers Region, and into other environmental issues elsewhere as appropriate;
- an Advisory Committee as a formal forum for consultation on matters relating to the environmental effects of uranium mining in the Alligator Rivers Region; and
- a Technical Committee to consider programs for research into, and programs for, the collection and assessment of information relating to, the effects on the environment in the Alligator Rivers Region of mining operations in the Region.

Australia is a signatory to many international conventions:

- protecting the environment
- protecting and valuing heritage
- respecting indigenous rights
- ensuring human rights

Australia a world leader developing international environmental regimes

3.5 INTERNATIONAL CONVENTIONS AND AGREEMENTS

Australia recognises the importance of international cooperation for environment, heritage and biodiversity management. This is evidenced by its early ratification of major conventions and the active, and often leading, role it has played in the development of international environmental regimes. Australia is a party to a number of international agreements relating to protection and conservation of the environment and biodiversity that have particular relevance to Kakadu. These include-

- The Convention for the Protection of the World's Cultural and Natural Heritage 1972 (the World Heritage Convention). Thirteen Australian properties, including Kakadu National Park, have been inscribed on the World Heritage List under the Convention.
- Convention on Wetlands of International Importance especially as Waterfowl Habitat 1971 (the Ramsar Convention). The entire Kakadu National Park is listed under the Convention.
- Convention on International Trade in Endangered Species of Wild Fauna and Flora 1973 (CITES).
- Convention on the Conservation of Migratory Species of Wild Animals 1979 (the Bonn Convention).
- Convention on Biological Diversity adopted at Rio de Janeiro on 5 June 1992 and which entered into force generally and for Australia on 29 December 1993.

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Australia is party to a number of international conventions and agreements on human rights and indigenous peoples rights. These agreements include-

- The International Convention on the Elimination of all forms of Racial Discrimination (CERD).
- The International Covenant on Economic, Cultural and Social Rights (ICESCR).
- The International Covenant on Civil and Political Rights.
- The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT).
- The Convention on the Rights of the Child.

CONCLUSION

Australia's environment and heritage protection legislation is stringent and comprehensive. In conjunction *with specific legislation relating to the mining and processing of uranium, it provides a high level of control and management ensuring that the values and attributes of Kakadu National Park are protected.*

In relation to the Jabiluka mine proposal, Australia has applied its environment protection, heritage protection and Aboriginal land rights legislation methodically and in an open and transparent manner. The Australian government has met every obligation required under its own legislation and can guarantee to the World Heritage Committee that the values and attributes of Kakadu National Park have been protected and will continue to be protected.

Under the framework of legislation outlined in this Chapter, the proposed new mine at Jabiluka has been subject to three years of rigorous public environmental impact assessment, which has been independently monitored and evaluated. This included careful examination of any effect on World Heritage values. The mine operator has met all of the very exacting environmental conditions imposed during the assessment process. The company must meet more than seventy stringent conditions. In exercising its right as a State Party to the World Heritage Convention to decide on how the World Heritage values of its properties should be protected, Australia has subjected the Jabiluka mine proposal to the strictest scrutiny.