

REFERENCE: CERD/EWUAP/112th session/2024/CS/cs/ks

26 April 2024

Excellency,

I write to you in relation to the Committee's letter of 29 August 2022 and to inform you that it has considered additional information received under its early warning and urgent action procedure relating to developments on aboriginal cultural heritage legislation in Western Australia and its impact on the human rights of Aboriginal peoples.

The Committee welcomes the repeal of Western Australian Aboriginal Cultural Heritage Act of 2021 on 15 November 2023. However, according to the information before the Committee, the Western Australian Government took the decision to reinstate, with some amendments, the former Aboriginal Heritage Act of 1972, without consultation with, or consent by, Aboriginal Peoples.

According to the information received:

- Landowners can again apply under section 18 of the Act of 1972 for consent to use the land for a purpose that is likely to damage or alter Aboriginal cultural heritage, and that such consent is ultimately being assessed and granted by the Minister for Aboriginal Affairs who has full discretion to decide whether to allow the detrimental impact of significant cultural heritage;
- Since the commencement of the amended 1972 Act on 15 November 2023, 13 landowners have been given consent with conditions under section 18 to use the land for a purpose that is likely to damage or alter Aboriginal cultural heritage, one of those landowners being Rio Tinto, the company that destroyed 46,000-year-old heritage sites at Juukan Gorge;
- Another mining company, Equinox Resources, has also applied for a section 18 consent for the Hamersley Iron Ore Project without first consulting with Traditional Owners, who are concerned it will impact two significant heritage sites;

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- There is a new obligation on landholders with a section 18 consent to notify the Minister for Aboriginal Affairs of any ‘new information about an Aboriginal site on the land the subject of the consent’, and in the event of new information being provided, the Minister may confirm, amend, or revoke and re-issue the consent, having regard to the ‘general interest of the community’;
- There is a right for both landowners and a native title party to apply to the State Administrative Tribunal for review of decisions made under section 18. However, the amended 1972 Act gives the Premier rights to intervene and ‘call in’ an application which is considered to raise issues of ‘State or regional importance’, i.e. the Premier will determine the application, removing the right to be heard by the Tribunal. The Premier has a broad discretion in making a decision to approve applications that might damage and destruct Aboriginal cultural heritage sites under this new provision;
- A section 18 consent is taken to have been given to the owner of lands within the Marandoo area, thereby reinstating the effect of the Aboriginal Heritage (Marandoo) Act 1992 which was repealed in 2023. As a result, the landowner, Rio Tinto, is again given permission to damage and destroy Aboriginal cultural heritage within the Marandoo area, which is of high concern given allegations that Rio Tinto allowed hundreds of Aboriginal cultural artefacts from the area to be thrown away at a rubbish dump in the 1990s, which the Traditional Owners were not informed about for decades;
- In the past, the Act of 1972 did not prevent the damage and destruction of sacred sites and other cultural heritage of Aboriginal peoples, such as the Juukan Gorge rock shelters;
- None of the 463 mining-related applications made since 2010 under the Act of 1972 were rejected.

The Committee is deeply concerned about the allegations of lack of consultation and the failure to seek free, prior and informed consent of Aboriginal peoples for the restoration on 15 November 2023 of the Aboriginal Heritage Act of 1972 and that the current legislative framework in Western Australia does not adequately protect the cultural heritage of Aboriginal peoples.

Therefore, the Committee is concerned that the allegations received may amount to a breach of the State party’s obligations enshrined in the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) and in this regard recalls its previous concluding observations in which it recommended the State party to ensure that the principle of free, prior and informed consent is incorporated into pertinent legislation and fully implemented in practice as well as to respect and apply the principles enshrined in the United Nations Declaration on the Rights of Indigenous Peoples ([CERD/C/AUS/CO/18-20](#), para. 22).

The Committee further recalls its General Recommendation No. 23 (1997) on the rights of indigenous peoples, in which it calls upon States parties to ensure that no decisions directly relating to the rights and interests of Indigenous Peoples are taken without their informed consent.

On that basis the Committee insists that the landowners cease and desist all operations that have negative implications for the cultural heritage rights of Indigenous peoples as indicated in this and previous communications from the Committee on this issue and that all consents to landowners given under the post 15 November 2023 legislative framework are duly reviewed or revoked in light of the State party's obligations under ICERD and other international human rights obligations and standards.

Recalling also its previous letter of 29 August 2022, the Committee encourages the State party to consider engaging with the United Nations Expert Mechanism on the Rights of Indigenous Peoples, which is mandated by the Human Rights Council (resolution [A/HRC/RES/33/25](#), paragraph 2) to provide States with technical advice regarding the development of domestic legislation and policies relating to the rights of indigenous peoples and to facilitate dialogue between States and indigenous peoples.

Finally, the Committee requests the State party to submit as a matter of urgency its 21st to 22nd combined periodic report overdue since 30 October 2020 and to include information on the measures adopted to review the legislative framework and to adequately protect the rights and cultural heritage of Aboriginal peoples.

Allow me, Excellency, to reiterate the wish of the Committee to continue to engage in a constructive dialogue with the Government of Australia, with a view to ensuring the effective implementation of the Convention.

Yours sincerely,



Michal Balcerzak
Chair

Committee on the Elimination of Racial Discrimination