

Artwork 'Together' by Krystal Hurst

Aboriginal and Torres Strait Islander Cultural Rights (s 27(2))

Section 27(2) of the *Human Rights Act 2004* (ACT) says that:

- (2) Aboriginal and Torres Strait Islander peoples hold distinct cultural rights and must not be denied the right—
 - (a) to maintain, control, protect and develop their—
 - (i) cultural heritage and distinctive spiritual practices, observances, beliefs and teachings; and
 - (ii) languages and knowledge; and
 - (iii) kinship ties; and
 - (b) to have their material and economic relationships with the land and waters and other resources with which they have a connection under traditional laws and customs recognised and valued.
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Scope of the Right

This section focuses on the distinct rights of Aboriginal and Torres Strait Islander peoples in relation to their ancestral lands, cultural heritage, traditional languages and knowledge and natural resources. It reflects the necessary and long overdue understanding of the culture of Aboriginal and Torres Strait Islander peoples as essential to the distinctive character of Australia as a nation.

This section is based on Article 27 of the International Covenant on Civil and Political Rights (ICCPR), and Articles 25 and 31 of the UN Declaration on the Rights of Indigenous Peoples (UNDRIP). Australia is a party to the ICCPR, and has formally expressed its support for UNDRIP. This section also draws from section 19(2) of the *Charter of Human Rights and Responsibilities Act 2006* (VIC).

This new right is not intended to change current arrangements dealing with intellectual property or land rights, which will continue to be dealt with under existing laws. Rather, the enjoyment of these cultural rights may include, for example, a way of life associated with land, and the use of resources. This might include traditional activities such as hunting and fishing, or carrying out cultural practices on lands that are protected (for example in national parks).

These rights may be used by ACT Courts and Tribunals in interpreting laws, and where legislation is incompatible with s 27(2) (if it can't be interpreted to be consistent with the right), the ACT Supreme Court may issue a 'declaration of incompatibility'. The right also creates expectations and positive obligations for consideration of the cultural rights of Aboriginal and Torres Strait Islanders peoples by the Government and Legislative Assembly. In particular, ACT Government agencies and other public authorities must act and make decisions consistently with this right.

Case studies

As a new right, s 27(2) has not yet been considered by the ACT Courts and Tribunals, but similar cultural rights have been considered in other Australian jurisdictions, which may reveal how s 27(2) can be used:

- In *Parks Victoria*,¹ the similar provision in the Victorian Charter was used as justification to give preference to members of the Wurundjeri Tribe for field and office positions, which involved working on and caring for Wurundjeri country. The Court stressed that the purpose of the proposed conduct was to 'realise substantive equality for Indigenous applicants for the fields and office based positions, and more broadly for Indigenous people'. When this purpose was considered in the context of the cultural right, specifically in connection to culture and country, the objective was 'necessary, genuine, objective and justifiable'. Therefore, respecting the right to culture did not breach the right to equality; rather, it was helping to redress an unequal balance in the community.

We can gain a further idea of how s 27(2) might be applied by looking at relevant international cases about cultural rights of minority groups from regional human rights regimes, and the UN Human Rights Committee.

- The Endorois communities' right to culture was denied when they were removed from their ancestral lands in Kenya and no longer able to continue their pastoralist way of life.²
- The Mohawk right to culture was not unreasonably denied by Canada, as taxes, tariffs and other restrictions were 'reasonable limits' and not 'particularly discriminatory to a particular group'.³
- The traditional Aymara way of life and cultural rights were violated by the Peruvian government waterway diversions, due to lack of consultation and destruction of the community's means of survival.⁴
- The failure to recognise Maori culture in fishing industry regulation was not found to be a denial of the right to culture, as the New Zealand government had given the Maori population opportunities to contribute to the decision-making process.⁵

Examples of where this right could be relevant in practice in the ACT

The actions of public authorities can both promote and limit rights. Section 27(2) could be engaged by activities that:

- Limit or prohibit communication in an Indigenous language;
- Limit the sharing or teaching of information by Aboriginal and Torres Strait Islander people about their language, beliefs or culture;
- Limit the ability of Aboriginal and Torres Strait Islander people to take part in a cultural practice, or otherwise interfere with their distinct cultural practices;
- Fail to recognise the rights of Aboriginal and Torres Strait Islander children and young people to learn and be connected to their culture and to maintain kinship ties to the community;
- Fail to consult with Aboriginal or Torres Strait Islander peoples about decisions that affect them;
- Regulate the conduct of commercial activities on the traditional lands of Aboriginal people in the ACT; or
- Interfere with relationship of Aboriginal Torres Strait Islander people and land, water and resources.

This factsheet is not intended to be a substitute for legal advice.



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¹ *(Anti-discrimination Exemption)* [2011] VCAT 2238.

² *Center For Minority Rights Dev. V Kenya*, Comm. 276/2003, 27th ACHPR AAR Annex [Jun 2009-Nov 2009].

³ *Mitchell v Canada*, Case 12.435, inter-Am, C.H.R., Report No. 61/08, OEA/Ser.L/V/II.134, doc. 5 rev. 1 [2008].

⁴ *Poma v Peru*, CCPR/C/95/D/1457/2006.

⁵ *Apriana Mahuika et al. V. New Zealand*, CCPR/C/70/D/547/1993/2000.