

Labor Leader, Dr Geoff Gallop, has suggested a compromise to the Government's proposed native title legislation, which would involve setting up a committee to adjudicate on the extinguishment of native title over leasehold land. Under the plan, the Government would accept Labor amendments to legislation to validate around 9000 possibly invalid leases and extinguish native title on a further 2500 leases. The amendments would allow for the validation of more than 9000 leases, while the contentious leases over which the Government was to extinguish native title would be considered on a case by case basis, deciding where native title had been previously extinguished. Dr Gallop proposed that the committee include an Aboriginal representative. (WA, 8 Mar, p8)\*

The State Government has rejected Labor amendments to the Government's proposed legislation on native title. (WA, 10 Mar, p10)\*

The State Government has accepted Labor Party amendments to their native title legislation. Premier Richard Court told Parliament that the Government would allow passage of the validation bill, despite disagreeing with Opposition amendments. Mr Court said that the Labor amendments leave 1300 leaseholders exposed to possible native title litigation. He said the Government would try to introduce new legislation to protect those leaseholders. (Aus, 21 Apr, p6)\* Opposition leader, Dr Geoff Gallop, said the amended legislation was balanced, treating all property rights holders equally. The legislation will validate around 9000 leases that were issued between the enactment of the NTA in 1994 and the High Court's Wik decision in 1996. (FinR, 22 Apr, p4)\*

### **Northern Territory**

The Northern Territory has requested three section 43A determinations for future acts under Northern Territory mining, lands acquisition and petroleum legislation. This is the first State or Territory alternative to the 'right to negotiate' to be formally considered since the amendments to the Act commenced on 30 September 1998. The Commonwealth Attorney-General is required to notify, invite and consider any submissions made by the Representative Bodies concerned. Closing date for submissions is 6 April 1999. (Attorney-General Media Release, 2 Mar)

The Commonwealth Attorney-General, the Hon. Daryl Williams, has determined that the Northern Territory's alternative regimes to replace certain provisions of the NTA comply with the requirements of that Act. The Attorney-General made three determinations in respect of the Northern Territory mining, lands acquisition and petroleum legislation to apply on pastoral lease and reserve land, after considering the criteria in section 43A of the NTA and submissions provided by the Central Land Council and the Northern Land Council. (Attorney-General Media Release, 27 Apr)

## **GENERAL NATIVE TITLE ISSUES**

### **International**

Mr Michael Anderson, chair of the Euahlai native title claim group, addressed the German Greens Party National Conference on 7 March 1999. Mr Anderson addressed the delegates on issues relating to Indigenous rights, saying that the original NTA and the amendments to the NTA are seen by Aboriginal peoples as validating land titles for non-Indigenous people but Aboriginal peoples have never ceded any of their land and still hold sovereign title. He also told the conference that the amendments had given mining companies a 'statutory

guarantee of carte blanche access to mineral wealth on Aboriginal land'. (*Age*, 9 Mar, pA3), (*Media Release - Michael Anderson*)\*

#### United Nations Committee on the Elimination of Racial Discrimination

The ATSIC submission to the United Nations Committee on the Elimination of Racial Discrimination ('the Committee') will be presented to the Committee. ATSIC commissioners Colin Dillon and Geoff Clark will brief the Committee in an informal session. (*CM*, 11 Mar, p6) *The Aboriginal and Torres Strait Islander Peoples and Australia's Obligations under the United Nations Convention on the Elimination of all Forms of Racial Discrimination: a Report Submitted by the Aboriginal and Torres Strait Islander Commission to the United Nations Committee on the Elimination of Racial Discrimination*, can be found on ATSIC's website at: <http://www.atsic.gov.au/>

On 12 March 1999, the Deputy General Counsel from the Attorney-General's Department, Mr Robert Orr, will appear before the Committee in response to their request for information about changes to the NTA, the role of the Aboriginal and Torres Strait Islander Social Justice Commissioner, and changes to land rights policy, in August 1998. (*Media Release, Attorney-General*, 11 Mar, p1)\*

Members of the Committee have strongly criticised the Australian Government's native title legislation, noting that recent policies seemed to put Australia in breach of international conventions. The members said that the amendments to the NTA appeared to impair Indigenous peoples' claims to land. They suggested that the Government could be perpetuating inequality amongst Indigenous peoples and condemned the Government for what appeared to be lack of consultation with Indigenous peoples over key decisions. (*SMH*, 15 Mar, p2)\* Mr Heinz Schumann-Zeitel, from Amnesty International, expressed disappointment that Mr Robert Orr, the Attorney-General Department's deputy general counsel, had not tried to explain the NTA amendments in terms of Australia's responsibilities under the Convention on the Elimination of All Forms of Racial Discrimination and as such, was not speaking the 'language of the committee'. (*FinR*, 15 Mar, p5)\*

The Australian Government has denied that its native title legislation breached international treaty obligations. (*SMH*, 16 Mar, p3)\*

The 18-member Committee has handed down a finding that Australia's amended native title legislation is racially discriminatory. It raised serious concern that the creation of legal certainty for governments and third parties came at the expense of Indigenous title. The Committee also expressed concern over the Government's lack of consultation with Indigenous people over their amendments to the NTA. The committee recommended that the Government suspend the implementation of the legislation. (*CT*, 20 Mar, p3)\* The Committee has decided to keep the matter on their agenda under 'early warning and action' procedures. (*Aus*, 20 Mar, p3) A copy of the finding is printed on the following pages.

**AUSTRALIA**

**Decision**

1. Acting under its early warning procedures, the Committee adopted Decision 1(53) on Australia on 11 August 1998 (A/53/18, para. 22), requesting information from the State Party regarding three areas of concern: proposed changes to the 1993 Native Title Act; changes of policy as to Aboriginal land rights; and changes in the position or function of the Aboriginal and Torres Strait Islander Social Justice Commissioner. The Committee welcomes the full and thorough reply of the Commonwealth Government of Australia to this request for information (CERD/C/347). The Committee also appreciates the dialogue with the delegation from the State party at the Committee's 1323rd and 1324th meetings to respond to additional questions posed by the Committee in regard to the State Party's submission.
2. The Committee received similarly detailed and useful comments from the Acting Aboriginal and Torres and Strait Islander Social Justice Commissioner of the Australian Human Rights and Equal Opportunity Commission; the Aboriginal and Torres Strait Islander Commission; members of the Parliament and Senate of Australia.
3. The Committee recognizes that within the broad range of discriminatory practices that have long been directed against Australia's Aboriginal and Torres Strait Islander peoples, the effects of Australia's racially discriminatory land practices have endured as an acute impairment of the rights of Australia's indigenous communities.
4. The Committee recognizes further that the land rights of indigenous peoples are unique and encompass a traditional and cultural identification of the indigenous peoples with their land that has been generally recognized.
5. In its last Concluding Observations on the previous report of Australia, the Committee welcomed the attention paid by the Australian judiciary to the implementation of the Convention. (A/49/18, para. 540) The Committee also welcomed the decision of the High Court of Australia in the case of *Mabo v. Queensland*, noting that in recognizing the survival of indigenous title to land where such title had not otherwise been validly extinguished, the High Court case constituted a significant development in the recognition of Indigenous rights under the Convention. The Committee welcomed, further, the Native Title Act of 1993, which provided a framework for the continued recognition of indigenous land rights following the precedent established in the *Mabo* case.
6. The Committee, having considered a series of new amendments to the Native Title Act, as adopted in 1998, expresses concern over the compatibility of the Native Title Act, as currently amended, with the State Party's international obligations under the Convention.

While the original Native Title Act recognizes and seeks to protect indigenous title, provisions that extinguish or impair the exercise of indigenous title rights and interests pervade the amended Act. While the original 1993 Native Title Act was delicately balanced between the rights of indigenous and non-indigenous title holders, the amended Act appears to create legal certainty for governments and third parties at the expense of indigenous title.

7. The Committee notes, in particular, four specific provisions that discriminate against indigenous title-holders under the newly amended Act. These include: the Act's 'validation' provisions; the 'confirmation of extinguishment' provisions; the primary production upgrade provisions; and restrictions concerning the right of indigenous title holders to negotiate non-indigenous land uses.

8. These provisions raise concerns that the amended Act appears to wind back the protections of indigenous title offered in the Mabo decision of the High Court of Australia and the 1993 Native Title Act. As such, the amended Act cannot be considered to be a special measure within the meaning of Articles 1(4) and 2(2) of the Convention and raises concerns about the State Party's compliance with Articles 2 and 5 of the Convention.

9. The lack of effective participation by indigenous communities in the formulation of the amendments also raises concerns with respect to the State Party's compliance with its obligations under Article 5(c) of the Convention. Calling upon States Parties to 'recognise and protect the rights of indigenous peoples to own, develop, control and use their common lands, territories and resources,' the Committee, in its General Recommendation XXIII, stressed the importance of ensuring 'that members of indigenous peoples have equal rights in respect of effective participation in public life, and that no decisions directly relating to their rights and interests are taken without their informed consent.'

10. While welcoming the State Party's recognition of the important role that has been played by the Human Rights and Equal Opportunity Commission, the Committee also notes with concern the State Party's proposed changes to the overall structure of the Commission; abolishing the position of the Aboriginal and Torres Strait Islander Social Justice Commissioner and assigning those functions to a generalist Deputy President. The Committee strongly encourages the State Party to consider all possible effects of such a restructuring, including whether the new Deputy President would have sufficient opportunity to address in an adequate manner the full range of issues regarding indigenous peoples warranting attention. Consideration should be given to the additional benefits of an appropriately qualified specialist position to address these matters, given the continuing political, economic and social marginalisation of the indigenous community of Australia.

11. The Committee calls on the State Party to address these concerns as a matter of utmost urgency. Most importantly, in conformity with the Committee's General Recommendation XXIII concerning Indigenous Peoples, the Committee urges the State Party to suspend implementation of the 1998 amendments and re-open discussions with the representatives of the Aboriginal and Torres Strait Islander peoples with a view to finding solutions acceptable to the indigenous peoples and which would comply with Australia's obligations under the Convention.

12. In light of the urgency and fundamental importance of these matters, and taking into account the willingness expressed by the State Party to continue the dialogue with the Committee over these provisions, the Committee decides to keep this matter on its agenda under its early warning and urgent action procedures to be reviewed again at its fifty-fifth session.

The Commonwealth Attorney-General, Mr Daryl Williams, says the Government does not agree with the conclusions reached by the Committee on the Elimination of all Forms of Racial Discrimination. He says the Committee's comments are an insult to Australia and all Australians as they are unbalanced and do not refer to the submission made by Australia on the native title issue. He said that the comments by the Committee fail to understand Australia's system of democracy. Mr Williams expressed disappointment that the Committee has decided that the issue should remain on its agenda. (*Media Release – Attorney-General, 19 Mar*)\*

Shadow Attorney-General, Mr Robert McClelland, said the finding by the Committee is extremely embarrassing for all Australians. Mr McClelland called on the Government to sit down with all stake holders, in particular with Indigenous peoples, to come up with a response to native title that respects the rights of everyone with an interest in the land. (*Media Release – Shadow Attorney-General, 19 Mar*)\* Mr McClelland said that the Labor Party has given notice that it will seek to establish a Senate Inquiry into whether the Government's amendments to the NTA breach Australia's international legal obligations. (*Media Release, 24 Mar*)\* The inquiry would be undertaken by the Legal and Constitutional References Committee. (*Aus, 26 Mar, p6*)

The Government has refused to support Labor's motion to refer its amendments to the NTA to a Parliamentary Committee. (*Shadow Attorney-General Media Release, 29 Mar*)

### **National**

Queensland Land Tribunal Chairman Graeme Neate has been sworn in as the new President of the National Native Title Tribunal in a brief ceremony in Perth. Mr Neate, who has an extensive background in Aboriginal, constitutional and environmental law issues, succeeds Justice Robert French who has resumed full time duties as a Federal Court judge.

A part time Member of the Tribunal since 1995, Mr Neate's appointment was made possible following amendments to the Native Title Act in 1998 which allowed lawyers other than members of the judiciary, or retired Judges, to head the Tribunal. Speaking after his swearing in by Justice French, Mr Neate said he intended to build on the achievements of his predecessor who guided the Tribunal and the native title process through a period of highly charged public and political debate. He said he plans to pursue the Tribunal's primary aim of assisting parties to native title applications to reach voluntary agreements as an alternative to costly, time consuming and adversarial litigation.

Mr Neate said he plans to work closely with State and Territory governments as they establish their own native title regimes to take over part of the Tribunal's functions, or, as in the case of Western Australia, all of the Tribunal's role. (*NNTT Media Release, 2 Mar*)

Dr William Jonas has been appointed to the position of Aboriginal Social Justice Commissioner. Dr Jonas is an Aboriginal academic and the director of the National Museum of Australia. The position of Social Justice Commissioner has been vacant for the last 14 months. The former Social Justice Commissioner, Mr Mick Dodson, retired from the position in January 1998. The appointment comes as the United Nations Committee on the Elimination of Racial Discrimination is due to begin its hearing into Australia's record on Aboriginal rights. The committee was concerned about the position of the Social Justice Commissioner. (*SMH, 4 Mar, p3*)

ATSIC Chairperson, Mr Gatjil Djerrkura, has told the Parliamentary Joint Committee on Native Title that it should focus its efforts on examining the impact of the extinguishment of native title and the workability problems emerging from the amended NTA. He also suggested the Committee focus on the impairment of native title rights and the effect of the NTA on land management. Mr Djerrkura said that the question of whether the amended NTA is leading to greater involvement of Indigenous people in land management where native title still survives, should be examined. (*ATSIC Media Release, 12 Mar*) ATSIC's submission to the Section 206(D) Inquiry of the Parliamentary Joint Committee on Native Title and the Aboriginal and Torres Strait Islander Land Fund can be found on ATSIC's website at: <http://www.atsic.gov.au/>

The Prime Minister, Mr John Howard, has released his draft preamble to the Australian Constitution to the public. The draft states that 'since time immemorial, our land has been inhabited by Aborigines and Torres Strait Islanders, who are honoured for their ancient and continuing cultures'. Indigenous spokespeople have rejected the draft as it fails to acknowledge Indigenous Australians as the original owners of Australia. Neither does it acknowledge Indigenous rights to land as recognised in the High Court's *Mabo* and *Wik* decisions. (*Aus, 24 Mar, p5*)\*

The Australian Democrats say the preamble should acknowledge the status of Aboriginal and Torres Strait Islander peoples as the original owners and custodians of the land, and their continuing rights by virtue of that status. (*Media Release – Senator Stott Despoja, 23 Mar*)

The Labor Party says it is necessary for the preamble to recognise the custodianship of Indigenous peoples in some form. (*Aus, 24 Mar, p1*) Shadow Attorney-General, Mr Robert McClelland, said that the Constitutional Convention had unanimously endorsed the acknowledgement of the original Indigenous occupancy and custodianship of Australia in their debate on the preamble. (*Media Release, 24 Mar*)

The Government has not re-appointed Mr Michael McDaniel, an Aboriginal member of the NNTT, despite recommendations to do so from both the former NNTT President, Justice Robert French, and current President, Mr Graeme Neate. Mr McDaniel is an academic. The Government's decision has come under criticism from ATSIC Commissioner, Mr Geoff Clark, who is writing to the Attorney-General to ask for an explanation. The decision leaves the NNTT with just one Indigenous Member out of 16, with the Howard Government not having appointed any Indigenous Members. Mr Clark is particularly concerned that there be Indigenous participation in the decision-making of the Tribunal. He cites the amount of evidence that is oral history, saying Indigenous people have the skill to understand the weight of such evidence. (*SMH, 29 Mar, p4*)

A survey of public opinion on native title commissioned by the Western Australian, Queensland and Northern Territory Governments, cost more than \$160 000. The survey, conducted last year, was to determine community concerns about issues of native title, raised in response to the High Court's *Wik* decision. Western Australian Premier, Mr Richard Court, has agreed to table the information in Parliament. (WA, 31 Mar, p4)\* Findings from the survey indicated that, of those surveyed, more than three-quarters wanted to know more about native title, recommending that less emotive language be used to communicate issues arising from the *Wik* decision. (WA, 15 Apr, p34)

The Parliamentary Joint Committee on Native Title and the Aboriginal and Torres Strait Islander Land Fund will meet to decide on a course of action to use in gathering evidence from native title applicants in the remote Kimberley region of Western Australia. The Committee has been criticised for their decision to hold a session in Broome without taking evidence in remote areas of the Kimberley. In preference, the Committee has asked for written submissions or teleconferencing, refusing to pay for representatives of language groups to make the trip to Broome to give evidence in person. The Kimberley Land Council is concerned that conditions in which many representatives live will make responding to inquiries very difficult. Access to private telephone is difficult, with Bidyadanga having only 10 phones in 67 households. In addition, pay phones are often out of order. There is also concern that the Committee is yet to address the issue that many native title applicants in the area do not speak English or speak it as a second or third language. So far, the Kimberley Land Council's offer to provide an interpreter has been ignored. (CT, 12 Apr, p3)

In a letter to the Editor, the Chairperson of the Parliamentary Joint Committee on Native Title, Senator Jeannie Ferris, said that the Canberra Times article of 12 April erroneously implied that, without payment to cover their expenses, the views of some witnesses from the Kimberley would not be heard. Senator Ferris also said that the Committee has addressed concerns about the delivery of oral evidence in Indigenous languages. The Committee passed a resolution on 9 December 1998 'That all oral evidence is to be provided in English, or translated in the course of delivery. That where contemporaneous translation is not possible at a hearing, witnesses may advise the committee and request alternative arrangement'. (CT, 25 Apr, p6)

A meeting of representatives of Scouts Australia, the Council for Aboriginal Reconciliation, the Australian Sports Commission, ATSIC and Indigenous leaders has discussed the development and implementation of a Scouting in Indigenous Communities Program. The program will emphasise strong Indigenous ownership, marked by the intersection of Indigenous social and cultural life and mainstream Scouting activities. (CAR Media Release, 14 Apr)\*

A submission to the Parliamentary Joint Committee on Native Title and the Aboriginal and Torres Strait Islander Land Fund says that the Government has failed to fix the registration test of the NTA. The Kimberley Land Council's submission says that the test infringes on the rights of native title owners, is unnecessarily complex, unworkable and eurocentric. KLC Executive Director, Mr Peter Yu, is concerned that the onerous administrative procedures were stopping genuine claims being registered. He said that Aboriginal people are being asked to express the relationships connecting them to country in a way which is at odds with the way many Aboriginal people defined their relationships. (CM, 21 Apr, p4)

The Labor Party, the Democrats and the Greens have agreed to promote an alternative draft preamble that recognises Indigenous Australians as the 'original occupants and custodians of our land'. The three parties are calling for comment on the draft. Democrat Senator, Ms Stott Despoja, said that the Democrats would support amending the draft to acknowledge Indigenous ownership. (*SMH, 29 Apr, p5*)\*

### **Queensland**

Members of the Queensland National Party have voted to oppose the draft preamble. They fear that recognition of Indigenous Australians in any form could boost claims to native title. (*Mer, 29 Mar, p4*)\*

The Queensland Mining Council says it will support miners asking for compensation from the Queensland Government over costs to the industry caused by disputes over native title processes. The Queensland Government, in an effort to clear the bottleneck in mining lease applications, is initiating a process to give lease applicants in the same districts the right to negotiate as one entity with native title applicants. (*CM, 30 Mar, p2*)

Goolburri Land Council members have voted to substantially re-elect the previous members of their board. The new board has voted unanimously to reject proposed changes to their Land Council boundaries. ATSIC Commissioner for the south-west region of Queensland, Mr Ray Robinson, said that the proposed changes to Queensland Native Title Representative Body boundaries, which were put forward by the Minister for Aboriginal and Torres Strait Islander Affairs, Senator Herron, were becoming increasingly untenable. (*Western Sun, 31 Mar, p5*)\*

ATSIC has called on the Queensland Government's new Council for Women to focus on action and solutions to issues of concern to Indigenous women. Issues named include native title and family violence. ATSIC Regional Council Chairwomen from Councils in Townsville, Cairns and south-east Queensland, have invited the Women's Council to consult with the Regional Councils and with Queensland's representative on the ATSIC Women's Advisory Committee. (*Torres News, 9 Apr, p12*)

### **South Australia**

Rural Landholders for Coexistence is holding a workshop about negotiated native title agreements. The workshop, *Talking Common Ground (SA)*, is devoted to case studies of negotiated agreements in South Australia and elsewhere. The organisers hope to attract South Australian leaseholders, Aboriginal people and others with a stake in the future of rural communities. The workshop aims to bring together the people who are most affected by native title to explore workable, negotiated solutions. (*Media Release – RLC, 11 Mar, p1, 2*)\*

Community groups will meet to discuss the South Australian Government's native title plans. The coalition of community organisations, which gathered to form Australians for Native Title and Reconciliation, will hold a public meeting called 'Sharing the Land'. The meeting will increase public awareness about the State Government's plans. (*Ad, 26 Apr, p13*)