The session was prompted by an earlier proposal by Noel Pearson calling for discussion on this issue. Michael Dodson who is associated with both institutions took the initiative together with Professor Garth Nettheim from UNSW and Lisa Strelein from the Institute.

The session was deliberately structured to promote discussion about the concept of native title and to elicit some of the key issues that the group considered important in the development of native title to date. The session began with an introduction by Lisa Strelein, outlining some of the concerns about the development of the concept of native title and some of the suggestions that had been raised by commentators for a re-examination of native title.

Papers were presented by Mick Dodson, Jocelyn Grace and Peter Sutton. Unfortunately Noel Pearson was overseas at the time of the Conference and could not attend. Mick Dodson impressed the importance of maintaining the distinction between common law native title and the Indigenous rights and laws that are recognised in native title to avoid native title being constrained by Western legal notions. The tendency within the law to do so has made native title an ever more elusive concept. Jocelyn Grace, from the Goldfield Land Council pursued the issues of groups identification and the requirements of the registration test, particularly where the requirements of the registrar are at odds with the realities of Indigenous peoples' social organisations and their conception of native title. Peter Sutton pointed to the perils of setting up a false dichotomy between the inside and outside worlds of the native title group as is suggested by a possessory understanding of native title in particular when considering the differentiated rights of groups over the same land.

An open forum followed which provided participants with an opportunity to comment on the papers and raise other issues of concern, particularly to anthropologists. The registration test and the problems of group definition were a focus of concern as was the need for anthropologists to share their ideas with each other as well as the legal community to ensure a different perspective is taken into account in the development of native title.

CURRENT ISSUES

The Native Title Research Unit is supporting the Australian Linguistic Society's workshop entitled Linguistic Issues in Native Title Claims, on 2 October 1999 at the University of Western Australia. The workshop will be held as part of the 1999 Conference of the Australian Linguistic Society but is open to non-members.

Registration fee to be paid in advance: $40, student/unwaged $20 (free to those registered for the main Australian Linguistic Society conference). The preferred method of registration is using the web form at the workshop website: http://www.arts.uwa.edu.au/LingWWW/als99/ntitle.html
or contact: John Henderson
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CERD Committee update

This month the CERD committee extended its' monitoring of Australian native title laws to March 2000. In her report to the Committee Ms G McDougall, the country rapporteur, reiterated a series of problems manifest in the Native Title Act. She highlighted four specific provisions of particular concern;

- Validation of past acts,
- Confirmation of extinguishment,
- The primary production upgrade provisions, and
- The changes to the right to negotiate.

While the original Act had its shortcomings it was seen as a product of negotiations between the government and Indigenous and other interest groups. It represented a negotiated agreement in which Indigenous parties made substantial compromises. The NTA also set in place a framework to enable the determination of native title through negotiation and, as an interim measure, procedural rights in respect of future acts. Unfortunately since the NTA became operative, State governments in particular have sought to politicise native title by casting the issue as one which would (among other perils) prevent access to land and destroy the nation's economic base. In taking this approach an important opportunity to finally reconcile Indigenous and non-Indigenous Australians is being lost.

The amendments to the NTA in July 1998 represented the high point in the political campaign against native title by the State governments. Importantly the amendments added to the extinguishment of native title by confirming extinguishment of native title over acts deemed to be *previous exclusive possession acts* and *previous non-exclusive possession acts*, and validating acts by State governments in deliberate breach of the future act provisions of the NTA after 1993 (in Division 2B). There are other provisions of the NTA, like the primary production upgrades that deem native title to be a lesser right

subservient to other titles, this provision can also lead to extinguishment by stealth. The question in my mind is why is it that non-Indigenous property rights can be determined with no reference to the law – that is, at the whim of government - while Indigenous people are forced to undergo an arduous and offensive 'inquisition' before gaining recognition of rights we already hold? The *Mabo* decision settled the question of terra nullius; the determination process should now be one that starts on the premise of recognition of native title and then be a process of facilitating that recognition within the social, political and economic framework of the nation state. This is possible through mediation but not through the courts.

A further issue highlighted by Ms McDougall is the fact that the common law, despite the attempt to cast it in a new light with *Mabo*, is still racist in its treatment of Indigenous rights. The principle that native title is vulnerable and susceptible to extinguishment by the sovereign powers of the Crown is clearly a throw back to Darwinian arguments and has no real basis in merit.

The approach to native title is always a contentious political issue but we should never lose sight of the fact that it is an issue at the very heart of our nation. Native title strikes at real issues of reconciliation, human rights and equity that simply can not be brushed aside for political convenience. I recommend that readers visit the FAIRA website, which has a lot of detail on the CERD deliberations. It can be accessed at <http://www.faira.org.au>.

This month the NTRU has published an Issues Paper looking at the CERD developments. We are also in the initial stages of planning a workshop to debate some of the issues surrounding the operation of the NTA, such as race, international human rights law and the development of native title law in Australia. The workshop is planned for mid November.

Kado Muir

Visiting Research Fellow/Manager

Native Title Research Unit, AIATSIS

NATIVE TITLE IN THE NEWS - JULY AND AUGUST 1999

International

ATSIC chairman, Mr Gatjil Djerrkura criticised the Federal Government's performance in relation to Australia's Indigenous people in ATSIC's report to the UN Working Group on Indigenous Peoples. Mr Djerrkura stated that he had to defend the rights of Aboriginal and Torres Strait Islander people and that the common law rights of Indigenous people had been substantially diminished through the changes to the *Native Title Act. (Ad, 28 July, p6)*