and the resources which they are dependent on. I am talking about agreements that will allow traditional owners to be directly involved in managing their sea country, protecting areas of particular importance and allowing them to participate in the commercial fishing industry.

National agreements

Our leaders could negotiate directly with Commonwealth and state and territory governments to seek an enforceable and long-lasting agreement. The kind of agreement I would envisage is one that gives recognition to our customs, rights and aspirations, similar perhaps to those negotiated in Canada and New Zealand by the Indigenous groups in those nations. The structure of this type of agreement could vary and may form part of a TREATY that would ensure legal recognition of our inherent sea rights.

International forums

Another alternative would be for a delegation of our people to present our case to the United Nations Human Rights Committee. We have a right, recognised in international legal principles, to use our marine resources on a sustainable basis and to protect those resources for future generations by being involved in management regimes, by exercising our right to negotiate over proposed marine developments and by participating in the implementation of agreements with other stakeholders.

The native title Act has been a great disappointment to my people. I believe we should be looking ahead positively, past reconciliation and towards TREATY. It is in TREATY that we may achieve recognition of our sea rights.

A Human Rights Approach to Native Title Agreements

Paper presented at The Past and Future of Land Rights and Native Title Conference Townsville, 28-30 August 2001 by
Margaret Donaldson

I wish to pay my respects to the traditional owners and thank them for permitting me to speak on their land.

This conference has confirmed that native title agreements are emerging as an important tool in defining the rights of native title holders over their land.

As suggested by David Bennett QC and others in the course of this conference, agreements are not negotiated in a vacuum but are taking place against a background of rather confused and uncertain legal principles contained primarily in the Native Title Act (NTA). Indeed some would suggest that it is because of the uncertainty of these principles that so many native title agreements are taking place at this time

The concern from a human rights perspective is that the legal principles contained in the NTA which currently form the benchmark for agreements making are inconsistent with Australia's international human rights obligations.

Last year the NTA was considered by three international human rights committees. The UN human rights committees oversee the performance of signatory States under the treaty and consider the periodic reports submitted by States regarding their obligations under the treaty. The periodic reports are considered by the committee at a meeting in Geneva where states attend to put oral submissions. NGO's and national human rights institutions like HREOC do not have speaking rights at this meeting but attend as observers and can provide information to the committee informally.

Most people will be aware of the decision of the Committee on the Elimination of Racial Discrimination in March 1999 which found significant sections of the amended NTA to be discriminatory, in particular the validation, confirmation and primary production upgrade provisions as well as the winding back of the right to negotiate.

This same Committee met 12 months later in March 2000 to consider Australia's periodic report for the six preceding years. In their Concluding Observations the Committee stated:

> Concern is expressed at the unsatisfactory response to decisions 2 (54) (March 1999) and 2 (55) (August 1999) of the Committee and at the continuing risk of further impairment of the rights of Australia's indigenous communities. The Committee reaffirms all aspects of its decisions 2 (54) and 2 (55) and reiterates its recommendation that the State party should ensure effective participation by indigenous communities in decisions affecting their land rights, as required under article 5 (c) of the Convention and General Recommendation XXIII of the Committee, which stresses the importance of securing the 'informed consent' of indigenous peoples. The Committee recommends to the State party to provide full information on this issue in the next periodic report.

The CERD Committee reiterated the finding that the amended NTA is discriminatory:

> The Committee notes that, after its renewed examination in August 1999 of the provisions of the NTA as amended in 1998, the devolution of power to legislate on the 'future acts' regime has resulted in the drafting of state and territory legislation to establish detailed 'future acts' regimes which contain provisions further reducing the protection of the rights of native title claimants that is available under Commonwealth legislation. Noting that the Commonwealth Senate on 31 August 1999 rejected one such regime, the Committee recommends that similarly close scrutiny continue to be given to any other proposed state and territory legislation to ensure that protection of the rights of indigenous peoples will not be reduced further.

Four months later in July 2000 Australia's performance under the International Covenant on Civil and Political Rights was considered by the Human Rights Committee which said:

> The State party should take the necessary steps in order to secure for the indigenous inhabitants a stronger role in decision-making over their traditional lands and natural resources (art. 1, para. 2).
>
> The Committee is concerned, despite positive developments towards recognizing the land rights of the Aboriginals and Torres Strait Islanders through judicial decisions (*Mabo*, 1992; *Wik*, 1996) and enactment of the Native Title Act of 1993, as well as actual demarcation of considerable areas of land, that in many areas native title rights and interests remain unresolved and that the Native Title Amendments of 1998 in some respects limit the rights of indigenous persons and communities, in particular in the field of effective participation in all matters affecting land ownership and use, and affects their interests in native title lands, particularly pastoral lands.

One month later, in September 2000, the Committee on Economic Social and Cultural Rights, considering Australia's performance under that Covenant also commented on the Native Title Act:

> The Committee notes with regret that the amendments to the 1993 Native Title Act have affected the reconciliation process between the State party and the indigenous populations, who view these amendments as regressive.

In the past two years all three UN Committees that monitor the major human rights treaties have expressed their concern that the amended NTA does not meet Australia's obligations at international law.

While the Federal government has not acted upon the recommendations of these UN Committees by amending the NTA, the international dialogue around native title has produced some significant developments.

It is now accepted by the Federal Government that the standard of equality at international law is a substantive one. That is, that the recognition and protection of cultural identity by differential treatment is permitted and, at times, required by the notion of equality at international law. It is certainly not an act of discrimination. This can be contrasted to a formal equality approach in which any differential treatment, no matter what its purpose, is discriminatory and requires everyone be treated the same.

While the Aboriginal and Torres Strait Islander Social Justice Commissioner has some concerns about the type of differential treatment that the government's definition of substantive equality permits, he welcomes

the move away from the idea that racial equality is no more than identical treatment.[1]

I would suggest that a major factor in the Federal government's acceptance that the international law standard of equality is a substantive one is that the subject of the dialogue concerning equality is native title. It is hard to maintain a formal equality approach to native title. Native title is a unique interest that only Aboriginal people can enjoy. A formal equality approach would find that the recognition and protection of an interest that can only be enjoyed by one race would itself be discriminatory.

Nor can native title be classified a special measure; an act of beneficence extended for a limited period of time by the government to Indigenous people to overcome their historical disadvantage. Native title is a right *inherent* to the culture Indigenous people.

It can be seen from what Sarah Pritchard and Bret Walker QC said earlier in this Conference that international law has been and should be influential in developing the domestic law on native title. What I am suggesting is that Indigenous people, by taking their struggle to an international forum, have been significant in shaping that international law, especially the concepts of equality and self-determination.

In view of the current international dialogue around native title and human rights and the acceptance of the obligation to recognise and protect Indigenous culture, native title agreement making should occur in the context of the following human rights principles:

- *Non-extinguishment principle*. Native title parties should not be required to give up native title in order to access or enjoy the benefits that arise from negotiation.
- *Effective participation*. International human rights principles recognise that Indigenous people have a right to effective participation in decisions affecting their traditional lands. In relation to the negotiation of native title agreements this right should lead to:
  - recognition of native title parties as owners or joint owners and managers of the land, and
  - recognition of Indigenous governance on native title land.
- *Native title is a group right*. Under the principle of self-identification (see General Recommendation VIII of CERD Committee) the group itself should determine its own membership. Compensation should also be based on the inter-generational nature of the right.

How then can native title agreements be framed by these principles?

First, the NTA should, after negotiation with Indigenous people and with their informed consent, be amended consistently with Australia's international human rights obligations. The *Lardil* decision, discussed here by Andrew Chalk, has raised an area of the NTA where amendment is desperately needed.

Second, the Social Justice Commissioner has advocated in his submission to the Inquiry into Agreements by the Parliamentary Joint Committee on Native Title, that state and territory government, together with peak industry bodies, enter into negotiations (not consultations) with native title holders to agree upon frameworks on either a regional or state-wide level which establish a human rights basis for site specific or project specific agreements.

These framework agreements should:

- apply the non-extinguishment principle,
- protect native title to the same extent as non-indigenous interests,
- encourage and allow continued observance of Indigenous law and culture, and
- recognise Indigenous governance on traditional lands

If native title agreements are framed by these principles they will form a stable and enduring basis for the long-term co-existence of interests on country.

If, on the other hand, native title agreements are based on legal principles that are discriminatory, then they will always be contin-

[1] The Aboriginal and Torres Strait Islander Social Justice Commissioner's concerns are explained in his *Native Title Report 2000*, chapter one.

gent upon the eradication of these principles.

NATIVE TITLE IN THE NEWS

National

The Yorta Yorta People have been granted special leave to appear before the High Court of Australia in a long running native title claim for Crown land and water in the Goulburn Valley and Southern Riverina, from Euroa to Jeriderie and from Cohuna to Corowra. The process gives access to the High Court to demonstrate that their case is of national importance. This comes ten months after the full bench of the Federal Court dismissed the Yorta Yorta People's appeal of the 1998 decision rejecting the claim. (*Riverine Herald* 17 December 2001)

New South Wales

A native title claim in area of 14,490 sq km by the Nucoorilma Clan of the Gamilaaroy Aboriginal People has prompted the Bingara Shire Council to become a registered party to the claim. The Council will also make an application to the federal government for legal cost involved in participating. (*Bingara Advocate* 30 October 2001)

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Two hundred ha of Wellington Common in the state's central west has been handed over to Wiradjuri families, resolving one of the nation's oldest native title claims. Principal claimant Rose Chown, who two years ago moved into the century old tin house on the land where her grandmother Matilda Bell lived, said she does not know why the claim took so long to come to a conclusion. Mrs. Chown shares the Common with her husband and is planing to ask ATSIC to help build about 25 houses for claimant's families. (*SMH* 8 November 2001)

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A native title claim in the New England region prompted the NSW Farmers Association to warn lease and license holders that the deadline to become a party was 7 November. The application was lodged by the Gumbangirri People and involves many interests in the region, particularly regarding water and grazing licenses. Registering with the Federal Court ensures that interested parties have a say in the native title process. (*Guyra Argus* 8 November 2001)

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The Darug Tribal Aboriginal Corporation lodged an application covering three sites in the Woollahra area, including historic Strickland House. The application covers parcels of unallocated Crown land in an area running from South Head through to Wiseman's Ferry, Katoomba and Campbelltown. (*Wentworth Courier* 21 November 2001)

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The construction of a defence wharf and naval ammunition facility has been given the go ahead in Eden after an ILUA was signed in an historic move that acknowledged Indigenous ownership of the site. The Twofold Bay native title group, representatives from the Defence Department and government officials met at the facilities location to finalise the land management documents. Following a traditional Aboriginal welcoming ceremony, Merv Penrith and Neville Thomas signed the agreement on behalf of the Twofold Bay native title group and Monaro-Yuin nations. (*Eden-Imlay Magnet* 22 November 2001)

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The Aboriginal Community in Condobolin have started action to save the sacred Dreamtime Lake at the Lake Cowal Gold Project site near West Wylong. Despite claims by project owners Homestake Mining Company that the native title process has not been breached, the local Aboriginal group claims they have conducted exploratory drilling in the heartland of Wiradjuri country. (*Daily Advertiser* 6 December 2001)