

## INTERVERNANTS

### ■ Les MALEZER



#### Fondation pour la défense des droits des Aborigènes (Australie)

UNITED NATIONS - Everyone has heard of dumping toxic wastes in Indian country - ask the Skull Valley Goshute or the Western Shoshone. For those looking for something on a slightly bigger scale, now there's Australia.

**Les Malezer addressed the Permanent Forum on Indigenous Issues in New York** in May about an unprecedented offer. Days before, the Australian government had made a historic bid for Aboriginal land in South Australia where it intends to dispose of toxic wastes. Malezer, Human Rights Officer with the Foundation for Aboriginal and Islander Resource Action (FAIRA), spoke to the Forum about the price tendered: \$90,000 to each of three aboriginal groups for a plot of 2.5 square kilometers.

**"This is the first time that any form of compensation has ever been offered to Aboriginal peoples," says Malezer, "but it's still way beyond what we're prepared to even consider as reasonable in the situation. It would be hard to think of any amount that would be reasonable, but the fact that the government offered such a paltry amount for this land is shocking."**

FAIRA, a non-profit indigenous group based in Brisbane, was founded in 1977 to fight discrimination in Queensland state. Traditionally funded by churches, unions, and charity organizations, it now carries on work in land claims, repatriation of human remains, and international indigenous rights. Only peoples of Aboriginal and Torres Strait Islander descent are permitted to vote and serve in the organization, although others can claim honorary membership.

The land in question, Malezer says, is intended to store level one, low-grade waste, on the order of medical supplies like x-rays. But it's an area where people were exposed to high-level radioactivity after nuclear testing in the 1950s. People still talk about the "black mist," or radioactive cloud, that swept through the south after atomic weapons testing a half century ago.

In recent years the government has recognized Aboriginal title to these lands, located in the Woomera region. But the offer is "simply bringing a problem back in for the indigenous peoples," warns Malezer, who suspects the government has bigger plans in store.

With less than half the population density of Nevada, Australia is a prime candidate to store any waste. Britain has expressed interest in burying nuclear waste in South Australia and Western Australia. The government has already agreed to accept 100 tons of organic pollutants from Pacific islands for eventual destruction in the outback.

Given that the Woomera region has been subjected to atomic testing already, Malezer reasons, the gates are open for nuclear storage, too. Since "the country's paid well to take [waste], it'll go where indigenous peoples are living because of space."

Poor communities are often targeted to store high-tech refuse. And the poorest are usually rural, removed from health services and urban amenities, vulnerable to governments that stash hazardous materials in remote areas where votes are few and protests barely audible.

Aboriginal health is shaky as it is without having to worry about toxic dumping. Indigenous communities suffer from a high incidence of diabetes and heart-related problems. Infant mortality is high. Self-injury, domestic violence, and alcohol abuse are common.

Life expectancy is so low (55 years) that last year the head of the Australian Medical Association called the Aboriginal condition a "national disgrace."

Health problems, which began with smallpox in the colonial period, were aggravated by removal. Aboriginals who lived on the densely populated east coast were scattered far and wide under the reserve system in the early 20th century. Malezer, who lives in Brisbane, has great uncles and aunts separated by hundreds of miles to the north, south, and west, typical of the psychic cost exacted from Aboriginal families during their dispersal.

Reserve land was set-aside in trust in the remote interior. But the early belief that Aborigines were fast disappearing, and that native people wouldn't be there to hold the land for long, proved false. In the past 30 years, there's been a push to give lands in title to Aborigines, especially in secluded regions like Woomera.

"Very few areas have actually been recognized by the government or by the system as being Native-title held," says Malezer. "Even though people might hold title under common law, that title is not recognized until those people go through a court process and prove that title beyond all doubt" - which is not a happy process, he adds. "You could say no more than 15-20 percent of indigenous people in Australia have title to land."

Australia has no Aboriginal treaties. Recognition of Native rights has been a slow, contested process. Experiments with land have been limited to far-flung areas - much as they have, for example, in Canada, where Ottawa granted self-government to the Inuit of Nunavut in a place far removed from demographic and economic pressures.

The failing health of Native communities is also tied to cultural collapse. "The language for our group was banned from the turn of last century," recounts Malezer. Now about 3,000 strong, the group was scattered during removal across a couple thousand square miles, stretching an already fragile language across much of a continent.

"The biggest problem we have for the majority of Aboriginal people is the population of the language speaking group is not big enough to keep a language viable." His group language, Gubbi Gubbi, has been recorded and written down, but only two or three elderly fluent speakers remain.

The government not only created divisions in Aboriginal communities, it capitalized on them, too. "One of the problems we have in Australia," Malezer continues, "is that we have so much diversity in languages." Unlike the Maori in neighboring New Zealand, Aborigines lacked a common language, making resistance to conquest difficult. While as many as 260 distinct tongues existed in Australia before colonization, half have disappeared entirely. Only 10 to 20 remain as first languages.

Though not a Gubbi Gubbi speaker himself, he agrees that "language is one way in which people can actually gain pride and identity. With their language comes appreciation of cultural ties, of attachments, of relationship with land and other people." But he doubts that learning another native tongue, at this point, is even viable.

"[Aboriginals] would rather not learn another language than learn it for the sake of setting up a pan-indigenous identity," he contends. "You're really giving away your culture and your identity by learning somebody else's." Group ethnicity, he suggests, remains a powerful bond even when a language has disappeared.

Despite removal and fragmentation, Aboriginal communities persist. Three of them must now decide whether to sell their land in Woomera for toxic storage. Malezer, with some misgivings, says they just might do it.

"There's no concept for us that we can actually lose our land □ You can do things to make the land sick, and you can do things that are taboo that break laws," he explains, "but you can't change it. It's quite possible that indigenous groups will take money □ but at the same time not believe that they're giving up their relationship with the land."

The problem, as the FAIRA rep sees it, is much broader. "In dealing with these issues internationally, the states are still very keen - particularly in the Canada, Australia, New Zealand, U.S. experiences - to not deal collectively in relation to a common issue.

"But [they] deal individually, saying □ 'nobody's to interfere with the way the state deals with it.' And yet the experiences are common deliberately because policies were shared."

Malezer, his universal pitch wrapped in a broad Aussie accent, offers a caution: indigenous politics, even when tied to the land, have gone global.

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## Geneva v Canberra

March 28, 2005

The world is watching ... Les Malezer lobbied for Aboriginal rights at the UN in Geneva.

The UN has again attacked the Howard Government's record on race. But this time the politicians are shutting up and news of the verdict isn't getting out. David Marr reports.

Les Malezer, having spent years in Switzerland, was not surprised by the Arctic weather Geneva turned on for the Australian delegations a few weeks ago. The sky was flawlessly blue but the city lay under sheets of ice.

A Gubbi Gubbi man in his early 50s, Malezer knows his way around the town and, more to the point, the lakeside palaces where United Nations human rights committees do their work. "The key to being effective is being here," he says. "Nothing happens in Geneva unless you lobby it all the way through."

The former head of the Queensland Department of Aboriginal Affairs has been a familiar, bearded figure lobbying committees in Geneva for a decade, but these days his kind are looking like an endangered species. Malezer is just hanging on.

His job late last month was to guide around the frozen city half a dozen Australians flying in to lobby the UN's Committee on the Elimination of all Forms of Racial Discrimination. They came with briefs from more than 30 non-government organisations (NGOs): legal services, human rights groups, refugee advocates, disability groups and ethnic councils.

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AdvertisementThe Aboriginal and Torres Strait Islander Commission sent its own man to the hearings. It was to be ATSIC's last hurrah on the international stage before its abolition last week.

Australia was facing the committee's scrutiny for the first time in five years. The event went unreported back home and the verdict - handed down on March 12 - was the subject of only a few, scattered reports in the press. Australia was rebuked for its treatment of migrants, Muslims, asylum seekers, refugees and Aborigines. In the eyes of the Geneva committee, the list of this country's failures on the human rights front has

only grown longer since the Howard Government came to office.

The Government these days deeply resents this scrutiny, but is locked into it by treaty. The committee's verdict last time round, in 2000, produced one of the great dummy spits of the Howard years, with the Foreign Minister, Alexander Downer, roaring: "We won't cop it any longer. We are a democratically elected government in one of the most liberal and democratic countries you will find on Earth. And if a United Nations committee wants to play domestic politics here in Australia, then it will end up with a bloody nose."

Ministers called the committee's work insulting, unbalanced, tendentious, ill prepared, poorly argued, blatantly political and partisan. In late 2000 they demanded the committee change its ways - to give, in particular, less weight in future to criticism by NGOs and pay more attention to "the considered reports submitted by the Government".

The UN was unimpressed - and that's the Geneva problem in a nutshell: what works in Canberra doesn't work in in this town. The Howard Government message carries no particular clout. The power of jobs and patronage, so persuasive back home, has no impact in Geneva. Only diplomacy has a chance and it hadn't worked miracles.

The Australian bureaucrats flying into Geneva knew that five years of lobbying had left the ground rules essentially unchanged. That meant the NGOs would lobby committee members in the days leading up to the official hearings in the first couple of days of March. There was a lot of ground to cover. This was Australia's first appearance before the committee since Tampa, the "Pacific solution", the growth of the mandatory detention system, the "mainstreaming" of services to Aborigines, cutbacks to the Human Rights and Equal Opportunity Commission, the dismantling of ATSIC, new security laws affecting Australian Muslims, the invention of temporary protection visas and - despite some improvements - the continuing intractable problems of Aboriginal Australia.

There are still vivid memories in Geneva of the performance before the committee in 2000 of the former immigration minister Philip Ruddock. This time the Australian team at the official hearings in

the Palais Wilson was led by the ambassador to the UN, Mike Smith - and his brief was not conciliatory.

After an upbeat recital of initiatives to combat racism in Australia, he turned on the 18 committee members, describing their work last time as "cursory" and "unreasonable". He accused them of largely ignoring the progress being made in Australia while displaying "an unquestioning acceptance" of the Government's critics.

Perhaps anticipating another unhappy outcome, Australia had decided to put in the boot. It was not a good omen. The room was tense. Regis de Gouttes of France, headphones clamped to his ears, declared the ambassador "exceptionally rude" and Jose Lindgren Alves of Brazil told Smith: "As a veteran diplomat, this statement, with its language describing programs and attacks on NGOs, reminds me of the sort of statement from communist bloc countries and Latin American dictatorships that Australia used to condemn."

Where things went wrong

Australia's troubles began when the first American was elected to the UN committee in 1998. Gay McDougall grew up in segregated Georgia, graduated from Yale Law School and served as an independent electoral commissioner in the first post-apartheid elections in South Africa. On a then rather dozy committee, McDougall was smart. Australia made the mistake of lobbying - successfully - for her to become the

designated expert - or "country rapporteur" - for Australia.

She arrived as the fight to save native title switched from Canberra to Geneva. With John Howard's post-Wik rollback now law, advocates for native title were looking for leverage in the many human rights conventions Australia had signed over the years. At this point ATSIC began to fund a program of international advocacy. Malezer was ATSIC's very active man in Geneva.

McDougall had an ace up her sleeve. At an Aspen Institute seminar one summer, she had met Ron Castan, QC, senior counsel in the Mabo case and a key adviser on the original Native Title Act. Few knew that complex legislation better or were more committed to saving it than Castan. McDougall told the Herald: "I got the idea that I should ring him up to help me understand in more detail what had happened to the law. He and other members of his law firm were very helpful."

In August 1998, the committee issued Australia with an "urgent action" notice - the first issued to a Western nation. Formal hearings in Geneva the following March found a risk of "acute impairment" to native title rights. The committee declared Australia in breach of its obligations under the

Convention on the Elimination of All Forms of Racial Discrimination. This was another first: the first breach finding made against a Western nation.

The former human rights commissioner Mick Dodson remarked sourly: "We're in the same company as Bosnia, Uganda and Ecuador."

Canberra took Geneva's verdict very badly. Within 24 hours, the finding was denounced by Howard, Downer and the then attorney-general Daryl Williams, who declared the result "an insult to Australia and all Australians".

McDougall had planned to lead a team of three committee members to Australia "to get a better feel for the issues we were discussing". The Government refused to issue the necessary invitation. McDougall said: "It was a surprise to us all."

The UN is not used to countries behaving like this. "We expect states to be diplomatic, polite, understanding and willing to explain," McDougall told the Herald. "They do not show the level of annoyance and seeming insult that we got from the Australians. We were all taken aback."

More than once, she heard Australians argue that her committee was treating their country as if it were a backward nation not a democratic state. "But we all expected Western democratic states to be the most co-operative and welcoming, the most supportive of the committee system. And that was not the case."

More than political outrage and hurt pride lay behind Canberra's response. The US and Western Europe have constitutions that explicitly protect human rights. Such absolutes shape the politics of most Western nations. But not Australia. Here, politics decide just about everything. The sort of rights Geneva talks about - and Australia signed up to under Labor governments - are just part of the political mix back home. They're not decisive. Howard put it this way: "Australian laws are made by Australian parliaments elected by the Australian people, not by UN committees."

The forlorn hope of persuading McDougall and her colleagues to this pragmatic Australian point of view seems to have impelled Ruddock - as minister for multicultural affairs and reconciliation - to lead the delegation to Geneva in 2000. Extraordinary efforts were made to woo the committee members. Lobbying was intense and respectful. But then came Ruddock's performance at the Palais Wilson hearings - the stuff of legends.

Witnesses talk of him draped over the table, bantering with the committee, joking, giving patronising answers to complex questions. Malezer found it embarrassing. The Herald

correspondent Simon Mann reported "audible groans" from the public gallery. McDougall told the Herald she had not seen the like of Ruddock's performance in Geneva before or since. "I think he underestimated the committee," she said. "He learnt some things, I think."

Ruddock's big pitch was that Canberra should not be held responsible for racially discriminatory policies of the states and territories - policies such as mandatory sentencing. It's an argument that's never appealed to the committee. McDougall reminded him states' rights were a big issue where she comes from: "We fought a bloody civil war ... over whether states were free to engage in the abhorrent practice of slavery." Ruddock interjected: "I think I would have fought for that, too." McDougall said she hoped the Australian minister "would have been on the same side as me".

The committee's "concluding observations" were pithy and cold. Diplomatic niceties were absent. Praise was scant. The committee found fault with Australia for having no constitutional protection against racial discrimination; for failing to restore native title rights; for the faltering reconciliation process; for the survival of mandatory sentencing in Western Australia and the Northern Territory; for the failure to compensate and apologise to the stolen generation; for proposals that might have an "adverse effect" on ATSIC and the Human Rights and Equal Opportunity Commission; for the high rate of imprisonment of indigenous Australians; and for the detention of asylum seekers.

The committee acknowledged "the efforts being made to increase spending on health, housing, employment and education programs for indigenous Australians" but remained "seriously concerned about the extent of the dramatic inequality still experienced by an indigenous population that represents only 2.1 per cent of the total population of a highly developed industrialised state".

It was a big story for a time, driven by Canberra's rage. Geneva delivered little for indigenous Australians, but a lot of people heard about that committee. "We were not ignored," McDougall said. "We got an active response from Australian NGOs, the media, the Parliament and from the Government. The Government response spoke of a sensitivity to the question of whether they were doing right, and to the sting of international scrutiny."

The 2005 round

By the time Australia found itself facing the committee again this year, changes in Geneva were playing to its advantage. For a start, McDougall was gone. She had not been renominated by the Bush Administration when her

four-year term expired in 2002. McDougall is now executive director of the Washington advocacy group Global Rights.

Les Malezer was still standing, but the apparatus of Australian indigenous lobbying to the UN built up since the late 1970s was falling apart around him. The resources put into Geneva have always been controversial in the internecine world of black politics. Geoff Clark's ATSIC funded these efforts generously. For several years there was a permanent office in Geneva - "humble but effective", says Malezer - but this closed at the end of 2003 as the money began to dry up.

By this month, all four indigenous organisations with official accreditation to the UN were in deep trouble. ATSIC was weeks away from abolition; the NSW Aboriginal Lands Council was under administration; the NAILSS (the National Aboriginal and Torres Strait Islanders Legal Services Secretariat) was broke and Malezer's FAIRA (the Foundation for Aboriginal and Islander Research Action) was virtually an empty shell. Malezer won't say how he's surviving financially in Geneva. Colleagues speculate he's drawing on his own savings.

Also absent from the hearings in 2005 was the Human Rights and Equal Opportunity Commission. The Government has slashed its funding. Legislation curtailing its freedom of action is expected back in Parliament after July. Tom Calma's bad back kept the social justice commissioner from making the flight over, but it seems also the commission thought this was no time to be taking the Government to task for its failings - in public - in the world capital of human rights.

The committee that assembled this month was also much changed. The old timers had all but disappeared since Australia was last examined. The communists are down to one: China. This was a committee of mostly new faces - a younger, reinvigorated collection of human rights experts from Europe, North and South America, the Middle East and Asia.

On March 12 they again gave Australia the thumbs-down. Their language was far more diplomatic this time. Half a dozen positive findings were followed by a list of 19 "concerns and recommendations". Many had been raised before, in 2000. ATSIC, native title, the stolen generation, reconciliation, constitutional protection from racial discrimination, mandatory sentencing, the over-representation of Aborigines in prisons and the fate of HREOC may be dead issues in politics back home, but they're still alive in Geneva.

The list of fresh concerns raised by the committee in 2005 include the impact of temporary protection visas, the plight of stateless long-term detainees, the treatment of asylum seekers by the media, the

shortcomings of the Racial Discrimination Act, the impact of counter-terrorism legislation that "may have an indirect discriminatory effect against Arab and Muslim Australians".

#### Dead silence

Canberra has learnt one lesson superbly. Instead of raging and complaining about Geneva's intrusion into Australia's domestic affairs, it's much better to shut up. The effort ministers put into denigrating the committee system the last time round only gave the issue more oxygen. After the latest verdict a little more than a fortnight ago, there was no thunder from Howard, Downer or Ruddock. Not even a press release. Silence effectively killed the story.

After some prodding, the offices of Downer and Ruddock told the Herald that the committee's findings were being carefully considered. The Attorney-General's spokeswoman said Ruddock welcomed the committee's "new constructive dialogue" and placed "particular importance in the fact that the committee has not found Australia in breach" of its obligations. The committee's concerns would "not be rejected without careful assessment".

A spokesman for the Foreign Minister said: "These UN committees need to work in a more effective and credible way. We have been pushing

very hard for reform of the committee system. We're pleased with the momentum that has built up for reform and will continue to push for reform."

The strange silence surrounding the latest verdict - it didn't help that ATSIC was no longer about to co-ordinate the press campaign - means there's little political downside for a government choosing to ignore Geneva.

Yet the race discrimination convention Australia signed up to in 1966 and turned into domestic law in 1975, is still the benchmark for all Australians arguing human rights. It's at the heart of all the rhetoric. The shame of seeing our own failings exposed by the committee was supposed to drive change. It's not working out that way. These days Australia's perceived shortcomings are causing more angst in Geneva than they do back home.

"They're glass on the floor," one official told the Herald. "You tip-toe down the corridors knowing you're being watched." And activists such as Les Malezer are walking the same corridors, spreading the word that the Australian Government "is an oppressor of rights. Other governments see this and I make sure they see it."

The full text of the committee's observations is at <http://www.ohchr.org/english/bodies/cerd/docs/CE RD.C.AUS.CO.14.pdf>