work in which negotiations occur, specifically, whether it is a legal or policy framework and land management framework; the relationship between native title and existing Indigenous land regimes; Indigenous participation in policy formation; and finally, the Commonwealth's participation in the native title process.

The final chapter of the Report compares native title in Australia with developments in the United States and Canada. Although the Report notes that there is a tendency within Australia to discount the experiences of other countries as not being sufficiently relevant, such comparisons are nonetheless of value in providing perspective (p.169). In particular, the positive developments in Canada where government responses to land claims integrate economic and social development into the cultural values of the group are in stark contrast to the 'ongoing social disadvantage and distress of Indigenous communities, the continuing string of judgment negative to native title rights in the Australian courts, and the at times hostile and obstructionist behaviour of federal and some state governments.' (p.187)

The 'curious difference' between developments in the United States and Australia is the interpretation of the acquisition of sovereignty by their respective courts and its implications (p.205). Whereas the implications flowing from the US decision in *Johnson v McIntosh* included Indigenous rights to land sovereignty, Australian courts have adopted the recognition of the Indigenous rights to possess and use the land decided by the Marshall Court but 'without the concomitant residual sovereignty which both logically and in fact goes with it.' (p.206) The Report notes that the 'recognition of a continuing Indian sovereignty in the United States has not seen the collapse of the American legal system or the dismemberment of the nation.' (p.206)

The Native Title Report provides an important opportunity to reflect on native title developments within a human rights framework. In exploring the idea of native title as a vehicle for social justice, the Report recognises the relationship between Indigenous economic and social sustainable development and attainment of native title rights, however it does also acknowledge that there are inherent limitations in a system that operates within the constraints of a legal framework and requires the full cooperation of State and Commonwealth governments to succeed.

***Lardil Peoples v State of Queensland* [2004] FCA 298 (23 March 2004)**

Summary by Serica Mackay

The decision in *Lardil Peoples v State of Queensland* was handed down on 23 March 2004 by Justice Cooper in the Federal Court. The decision recognises the non-exclusive native title rights of the Lardil, Yangkaal, Kaiadilt and Gangalidda Peoples' over land and waters in the Wellesley Island region, although *Lardil* is primarily a sea claim.

The decision in *Lardil* is not a significant development in native title law. However, following the decision in *Yarmirr* and *Ward*, the decision in *Lardil* does confirm that, even where shown as a matter of customary law, control of access to the land and waters of the inter-tidal zone and the territorial seas with the right of exclusion will not be recognised by the common law of Australia [at 164]. The Court reasoned that such a right would be inconsistent with the beneficial right of the Crown, the common law public rights to fish and navigate and the international right to freedom of passage [at 188]. This means it is likely that only non-exclusive native title rights and interests over the seas will be recognised by Australian courts.

However, rights that were recognised by the Court in *Lardil* include the right to access land and water seaward of the high water mark in accordance with traditional laws and customs; the right to fish, hunt and gather, including the right to hunt and take turtle and dugong in accordance with traditional laws and customs; the right to construct, repair and maintain rock fish traps in the inter-tidal zone and to take fish.

Contrary to the decision in *Yorta Yorta*, Justice Cooper's acknowledgement that the majority of the applicant group do not 'live on the

Country to which they belong, and do not live a traditional lifestyle anywhere approaching that which existed at the time of sovereignty' did not prevent him from concluding that 'none of the groups lost their identity or existence as a society' [199] and [200] respectively. Justice Cooper further acknowledged that European contact was largely responsible for the physical dislocation and removal from traditional lands.

The second respondents submitted that the Court should substantially discount the weight given to the written affidavits of the Aboriginal witnesses (approximately 59 affidavits were submitted). The second respondents argued that the written statements were prepared by the solicitors with the assistance of the anthropologists, the language was not that of the deponent, the statements were on occasions prepared in the presence of and with the 'assistance' of other members of the applicant group, and, the Indigenous witnesses were present in large numbers in the Court during the hearing and heard the evidence of their constituent groups. Justice Cooper took an intermediate approach, relying on the oral evidence as the primary source of evidence where written statements were challenged or overtaken by oral evidence because a 'substantial body of oral evidence' had developed as a result of extensive cross examination and could overcome the objections to form and admissibility.

The decision in *Lardil* examines the Indigenous concept of ownership, Justice Cooper noting that it is not based on common law concepts of property but rather it is 'born out of the spiritual connection of the peoples to each of the elements through their spirituality' [147]. After examining the witness evidence, Justice Cooper found that the right 'to be asked' is central to the applicants' concept of ownership and emphasises that the right claimed is, in practice, the right to control access and conduct. However these rights of ownership were not recognised in *Lardil* because of the decision in *Yarmirr*.

The decision in *Lardil* also recognises the succession of land from one group to another provided the transfer occurs under the traditional laws and customs at the time of sovereignty. This was the case with the Gangalidda People who claimed to have succeeded the land of the Mingginda Peoples, who did not survive European contact, under the traditional laws and customs observed by the Gangalidda Peoples at the time of sovereignty. The Court held that the interests of the Gangalidda peoples in respect of those lands and waters will be recognised and protected under the *Native Title Act* [at 131].

Further information on the *Lardil* decision, in particular the deficiencies of the legal recognition of Indigenous sea cultures and the inability of the Court to translate the spiritual into the legal, is available from a paper delivered by Jason Behrendt at the Native Title Conference 2004. This paper will be available through the Conference website shortly (http://www.aiatsis.gov.au/rsrch/ntru/conf2004/home.html)

Capacity of Anthropologists in Native Title Practice: Report to the National Native Title Tribunal by David F Martin (Anthropos Consulting Services, April 2004)

Summary by Lara Wiseman

Based on a survey of fifty-five anthropologists who identified themselves as native title practitioners, this report provides an overview of the diverse roles played by anthropologists engaged in native title practice and suggests that anthropological practice will need to adapt to changes in the native title environment.

The report presents age, gender and qualification profiles of anthropologists currently working in native title, distinguishing between those employed by Native Title Representative Bodies (NTRBs), consultants and academic anthropologists. This reveals that native title anthropology is dominated by older (over 40) and well-qualified practitioners, most of whom are consultant or academic anthropologists. Less than a third of respondents were aged under 40, suggesting that there is a need to attract a new generation of anthropologists into native title practice. Martin notes that a substantial number of new