title. Mail-out circulation of the series is high and the papers are also available online through the AIATSIS website (http://www.aiatsis.gov.au/rsrch/ntru/ntru_issuespprs.htm).

Previous issues papers include John Borrows' paper 'Practical Reconciliation, Practical Re-Colonisation?' which was also the Mabo lecture delivered at the Native Title Conference 2004.

Issues papers are peer reviewed and are between 8 and 12 pages in length. If you would like to submit a paper to the issues paper series, please contact Serica Mackay on serica.mackay@aiatsis.gov.au or 02 6246 1171. In particular, people who presented a paper at the Native Title Conference 2004 but have not yet forwarded a copy of their paper to the NTRU should do so.

FEATURES

Human Rights and Equal Opportunity Commission Native Title Report 2003

Summary by Serica Mackay

The Native Title Report ('the Report') and the Social Justice Report 2003, prepared by the Human Rights and Equal Opportunity Commission, were tabled in Parliament on 10 March 2004.

Whereas the 2002 Native Title Report dealt with the repercussions of four significant native title decisions, *Yarmirr, Wilson v Anderson, Miriuwung Gajerrong* and *Yorta Yorta*, and their implications for native title law, this year's Report evaluates native title as a framework for economic and social development.

The Report is separated into four chapters advocating this approach – native title and international standards on development and sustainability, native title policies and practices of governments throughout Australia, evaluating native title policies as a framework for economic and social development, and a comparative study of legal and policy frameworks in Canada and the United States of America.

Generally speaking, the Report notes that 'the failure in Australia to perceive native title and land rights as the basis on which to address Indigenous economic and social development has been evident at legal, policy and administrative levels' (p.167)

Chapter 1 uses the international law principles of sustainable development and the Right to Development to provide a human rights 'framework' for the economic and social development of Indigenous people. The Report points out that native title has so far had a disproportionate impact on Indigenous people through the sacrificing of land and community structures to make way for growth and development. It suggests that 'where the State is sincere about transforming the economic and social conditions in which Indigenous peoples live in Australia, native title can provide an opportunity to lay the foundations for development within the framework of traditional laws and customs and consistently with international human rights principles.' (p.10)

Chapter 2 looks at the State, Territory and Commonwealth governments' native title policies and practices in reference to two questions - whether these policies contribute to the economic and social development of the group in accordance with international human rights principles, and whether these policies were formulated with the effective participation of Indigenous people.

Chapter 3 evaluates State and Commonwealth native title policies by reference to whether they direct the native title negotiation process towards the sustainable economic and social development of the claimant group. The Report identifies seven specific issues - the willingness of the government to negotiate rather than litigate; the relationship between native title policy and Indigenous policy; the frame-

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