Proposed determination of native title — Bardi Jawi

Sampi v Western Australia [2005] FCA 777

French J, 10 June 2005

Issue
The decision deals with a claimant application made on behalf of the Bardi and Jawi People. One of the key issues in making a determination that native title existed was whether those seeking the determination constituted one society acknowledging and observing one set of traditional laws and customs by which the members of that society have a connection to the area at the time sovereignty was asserted, i.e. in 1829.

Background— two trials
The original application in this matter was lodged on 1 September 1995 on behalf of the Bardi and Jawi People. The claim area consists of 5,500 sq km of land, reefs and waters in the North Dampier peninsula and King Sound regions of the Western Kimberley, covering Cape Leveque and the bays and the islands in the Buccaneer Archipelago.

The matter originally went to trial on 8 May 2001 before Justice Beaumont. Final submissions were adjourned to await the outcome of the High Court decision in *Western Australia v Ward* (2002) 213 CLR 1 (*Ward*, summarised in *Native Title Hot Spots* Issue 1).

The claimants then sought leave to reopen their case to take further evidence following the decisions in *Ward*, *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422 (*Yorta Yorta*) and *Commonwealth v Yarmirr* (2001) 208 CLR 1 on the basis that all three 'provided a more developed exposition of the matters to be proven in an application for a native title determination'. They submitted documents described as the 'substances of evidence' of the witnesses to be recalled. Beaumont J had difficulty with the generality of the arguments in support of the application to reopen and so made orders that evidence in the form of oral questions in chief, with cross examination, be taken on a preservation basis. He intended to hear submissions on what evidence, if any, should be allowed by way of reopening but illness forced him to retire before the evidence was taken.

A new trial was ordered by Justice French, to include (among other things) the adducing of the evidence set out in the 13 'substances of evidence', a court view of the area subject to the application. The evidence was also to include the transcript of the first trial—at [24].

The second trial commenced in Broome on 30 June 2003. The claimants sought to further amend their application by revising the native title rights and interests claimed and changing the description of the area claimed. Ultimately, a second native title application (Bardi Jawi No 2) was filed over as much of an area known as Brue Reef as had been inadvertently excluded from the first application. The two matters were heard together. An application to amend the Bardi Jawi No 1 claim group to include the Mayala People, who have an adjoining claimant application, was refused—at [26] to [36].

Oral evidence for the claimants

A total of 35 members of the native title claim group gave evidence in the first trial and a number gave further evidence in the second. It was given in relation to the traditional laws and customs of the Bardi and Jawi peoples, their islands, the waters subject of the claim and the Bardi lands on the northern Dampier Peninsula. There was oral evidence on, among other things, the traditional exploitation of the marine resources, initiation rites (including gender restricted evidence), sacred site identification and the establishment of the Sunday Island mission, on an island to the north of the Peninsula, in the 1930s.

The law concerning devolution of coastal family estates called *buru* (or *bur*), generally through paternal links and the use of the common lands called pindan or nimidiman areas for hunting and gathering by the Bardi/Jawi was explained in the testimony, as were various aspects of the laws acknowledged and customs observed in relation to hunting and sharing of marine resources, avoidance relationships and access to *burus*—at [48] to [631].

Historical evidence

Historical sources confirmed the presence of Aboriginal People on the Dampier Peninsula from the time of Abel Tasman in 1644. Further historical evidence on the colonisation of the area, including the advent of pearling, missions and pastoralism in the area, acknowledged the presence and activities of the Bardi and Jawi peoples.

French J made a summary of findings of fact based on the historical evidence that confirmed a pre-sovereignty presence, and a strong association, with the traditional lands that continued into the twentieth century (as indicated by the history of Sunday Island and the Sunday Island mission). The present day strong association to the traditional lands was seen to continue with the activities of two organisations known as the Bardi Council and Bardi Association—at [642] to [717] and [718].

The historical evidence allowed for the inference that the people in occupation of the area at colonisation were, broadly speaking, the ancestors of the present occupiers. French J noted this conclusion allowed for the changing composition of the native title claim group through intermarriage but was careful to note that it did not extend to whether there were one or two societies in the claim area at sovereignty—at [718].

Linguistic evidence

Both the linguistic reports filed (one each by the claimants and the state) concluded that Bardi and Jawi languages were related but one inferred that Jawi traditionally had a dialect status to Bardi. It was not disputed that the languages reflected extensive knowledge of the tides, marine resources, tropical climate change, flora and the regional groupings of the claim group to their country. French J accepted that the linguistic evidence:

- was indicative of knowledge of the environment over a long period of time supporting a continuous connection of both Bardi and Jawi people with the claim area since before 1829;
- supported the importance of the immediate offshore marine environment to their country—at [760] to [782].

Archaeological evidence

Archaeological reports and published works provided evidence of the existence of middens, fish traps, campsites on the coastal strip, tools and artefacts of stone and shell. French J accepted the archaeologists' conclusions that were based on direct observation and listed his findings of fact which included:

- that the archaeological record, when considered together with the oral testimony of the Bardi and Jawi, support the inference that the applicants have occupied the claim area since before colonisation;
- they have had a marine economy since prior to contact with Europeans;
- cultural continuity is reflected in the continuing use of the marine resources, artefacts and campsites—at [719] to [759].

Again, French J carefully noted that these findings did not enable any conclusions about whether the Bardi and Jawi were one or two societies at sovereignty.

Anthropological evidence

The objections to the admissibility of the applicants' experts' anthropological reports is discussed at [796] to [805]. French J outlined the content of the reports, leaving aside material that it had been argued was inadmissible and referred to ethnographic maps, literature and accounts of earlier researchers. One of the reports described, among other things, the extent of Bardi and Jawi country and their land and sea tenure system. It stated that, at the time of the report in 1999, the number of people who identified themselves as Bardi or Bard numbered 950, while there were 70 people who identified as Jawi.

The basic unit of organisation among both Bardi and Jawi was said to be exogamous patrifilial groups identified with mythologically inscribed estates called a *buru* (or *bur*), with each *buru* being associated with loose-knit regional grouping. It was said that individuals generally identified with their father's broader cultural identity as either Bardi or Jawi and, as there were close links to mothers' and spouses' estates, there were many individuals with rights in other estates. Genealogies were included to show a long history of intermarriage between Bardi and Jawi people, which (in turn) was used as the 'principal empirical basis for characterisation of the Bardi and Jawi as a single community of kin'—at [802] to [882] and [826].

French J reviewed the anthropological reports and made findings of fact where the anthropological evidence was supported by the applicants' oral evidence. Those findings included the following:

- a significant proportion of the northern Bardi population has strong personal attachment to the Jawi territory of Sunday Island;
- the symbolic arrangement of individuals and estate regions at initiation and other ceremonies is a powerful expression of connection to country;
- Bardi and Jawi country is the source and locus of personal spiritual identity;
- the people believe that the offspring of Bardi and Jawi men inhabit the phenomenal world as incarnations of *ray* or *raya*, that is pre-existent spirit beings who live in specific locations in Bardi or Jawi country;
- cultural emphasis upon the *raya* as estate-specific and paternally instantiated entities is conditioned by, and consistent with, the closely related patrifilial estate inheritance and patrilocal residence;
- country is conceived of as an active physical and metaphysical entity;
- identification with a particular *buru* places the individuals concerned (the estate affiliates) under an obligation to ensure their *buru* is not damaged, defiled or used in any way inconsistent with customary practice;
- rights in country differ in scope and distribution, e.g. estate affiliates enjoy the greatest rights in a *buru*, while persons related by means other than patrifiliation hold rights in accordance with their culturally defined relational proximity;
- there is ongoing responsibility for deceased estates or vacant *burus* by people in the neighbouring *buru* and particularly by law men in respect of law grounds;
- traditional resources include fish, shellfish, crustaceans, dugong, turtle, bush foods and medicines, ochres and clay, fresh water and woods for weapons and cultural artefacts;
- there is a comprehensive traditional knowledge and use of the currents and cultural geography in the waters around the islands north of the Dampier Peninsula, although the knowledge and use of the currents may have declined;
- the Bardi and Jawi consider the right to be asked about country is a fundamental attribute and expression of territorial ownership;
- the movement of Bardi people to Sunday Island was closely related to the development of the mission there;
- the *ilma* genre of songs, dances and designs constitute an important expression of cultural attachment to the sea;
- the central peninsula hinterland, where there are no *buru*, is a significant community resource that is regarded as an integral dimension of the Bardi territorial domain;
- however, the same proposition was not made out in respect of the deep sea—at [829] to [908].

French J dealt with the southern extent of the application area later in his determination, as discussed below. See [912] to [937] for additional anthropological evidence on this issue.

Recognition

His Honour reviewed the statutory framework for the recognition of native title, noting (among other things) that:

- even allowing for extinguishment, the Preamble to the NTA 'stands as a continuing declaration of the moral foundation of the Act ... informs its construction [and] evidences an intention to recognise, support and protect native title, rather than to confine it within nicely parsed verbal bonds';
- the idea of recognition of native title operates in a realm of legal discourse and 'may be seen as a kind of translation of aspects of an indigenous society's relationship to land and waters into a set of rights and interests which exist under non-indigenous laws';
- the grant or refusal of recognition at common law or under the NTA does not affect or modify the traditional laws and customs or the rights and interests to which in their own terms they may give rise;
- the use of the term 'extinguishment' has nothing to say about the rights and interests that arise under traditional law and custom and is a potentially 'misleading metaphor';
- the distinction between the existence of native title under traditional law and custom and its recognition by the common law was made in *Fejo v Northern Territory* (1998) 195 CLR 96 at 128;
- those rights and interests that continue in spite of non-recognition by the common law may be taken into account in the definition of the connection with land and waters which Indigenous people may have by virtue of their traditional laws and customs;
- the historical reality of an Indigenous society in occupation of land at the time of colonisation is the starting point for present day claims for recognition of native title rights and interests;
- the common law and NTA establish the rules for determining whether native title exist—they are the rules of recognition;
- the relationship between Indigenous societies and their land and waters is holistic in character;
- the communal nature of native title is not to be lost sight of by an undue concentration on the fractal detail of intra-societal allocations of rights and interests or the modes of their enjoyment;
- the recognition of the rights and interests of a subgroup or an individual which are dependent on a communal native title is not prevented by the absence of a communal law determining a point in contest, e.g. as a matter of custom, such points may be settled by community consensus or in some other manner prescribed by custom;
- given that ss. 223(1)(a) and (b) were taken from *Mabo (No 2)*, they 'could hardly have been intended to undercut the fundamental principle' of the communal character of native title rights and interests;
- the continuity in law and custom and the exercise of rights and interests required for proof of native title 'is not some simplistic absolute' because neither change to nor adaptation of laws and customs or some interruption of enjoyment or exercise of native title rights are necessarily fatal;
- proving continuity in both traditional laws and customs and the society to which they relate 'involves consideration of the historical, archaeological, linguistic and

anthropological evidence in the light of the direct testimony of Aboriginal witnesses' and genealogies may be used to support an inference of continuity with the society that existed at the time of colonisation;
- a finding of fact as to whether there is a relevant 'society' of Aboriginal peoples today capable of being the subject of a determination of native title is 'evaluative in character'—at [942], [948] to [955], [964] and [970].

French J referred to the findings in *Yorta Yorta* [38] and [47] that:
- the rights and interests must derive 'from a body of norms or normative system—the body of norms or normative system that existed before sovereignty'; and
- the relevant normative system 'must have had a continuous existence and vitality since sovereignty'.

Therefore, according to his Honour, the s. 223(1) inquiry:

> [R]equires the consideration of the relationship between traditional laws and customs now acknowledged and observed and those which were acknowledged and observed before sovereignty. It must be shown that the society under whose laws and customs the native title rights and interests are said to be possessed has continued to exist from sovereignty to the present date ... as a body united by its acknowledgement and observance of the laws and customs'—at [963], quoting *Yorta Yorta* at [89].

Meaning of 'society'

Having noted that 'society' is not defined in the NTA, his Honour turned to the *Shorter Oxford English Dictionary* 95th ed., 2002 where 'society' is defined to mean 'a body of people forming a community or living under the same government'. It was noted that the High Court in *Yorta Yorta* used 'society' to designate a kind or group of Aboriginal peoples who observe a set of laws and customs under which the members of the group can be the subject of a determination that they hold, individually or in conjunction with others, rights compromising native title.

On the meaning of 'society' in a native title context, French J:
- warned against the use of taxonomies of 'societies' by reference to criteria other than those emerging from the terms of ss. 223 and 225 as they may import other criteria into the application of those sections which are not required by their terms or the common law which they incorporate by reference; to do so may restrict the beneficial application of the NTA 'to a field narrower than that defined by its words';
- noted that 'the identification of an Aboriginal society which can be said to have existed at the time of colonisation and which continues to exist today, united by traditional laws and customs, under which it and/or its members can be said to hold native title rights and interests is no easy matter';
- the use of the term 'society' imports a criterion of eligibility for the recognition implied from the NTA and the common law but 'must not become a Trojan horse for the introduction of elements or criteria foreign to the requirements of the Act and the common law for the recognition of native title';
- the term should be applied in accordance with its ordinary meaning, i.e. a body of people forming a community or living under the same government;

- the relevant community must be a community, which at the time of colonisation, observed a body of laws and customs that continue in existence today, subject to 'allowing for the evolution of both providing that the essential continuity is maintained'—at [969] and [1042].

His Honour noted that cases that predated *Yorta Yorta* involving single claims brought by multiple groups 'under one umbrella' were of little assistance in addressing the societal continuity question *Yorta Yorta* required the court to address—at [971] to [975].

One society or two?
In determining whether there was 'society' for the purposes of s. 223(1) in this case, French J identified two questions:
- whether there is society of the requisite kind in existence today; and
- whether that society can be said to have existed since sovereignty—at [968].

The applicant's submissions relied upon their belief that the Bardi and Jawi are one society united by law, intermarriage and culture and have been so since creative beings introduced their law ceremonies.

The state and the Commonwealth denied the existence of one traditional Bardi/Jawi society, raising the change in position of the claimants in the course of the extended trial process. Reference was made to the opening remarks made on behalf of the applicant that:
- identified Bardi and Jawi as 'two distinct yet closely related Aboriginal groups'; and
- stated that the land and waters in the claim area which were traditionally occupied by the Jawi people as the area north-east of Hadley Passage and Juwarnan and Murrudulun islands and that the Bardi people had a connection with the area south-west of Hadley Passage—at [978] to [987].

The Western Australian Fishing Industry Council (WAFIC) submitted there was evidence that two distinct societies had merged into one, supporting their argument with the testimony of some of the applicant's witnesses. On the basis of the *Yorta Yorta* decision, WAFIC submitted that it was arguable that the claim should fail as the Bardi/Jawi was a 'new' composite society—at [988] to [994].

French J reviewed the applicant's testimony at each trial and found evidence that the intermingling of Bardi and Jawi, as seen on Sunday Island, could be regarded as a process of historical change leading two distinct societies into becoming one—at [996] to [1016].

His Honour went on to note that:

> [I]t did seem to me at the hearing [post *Yorta Yorta*] ... that the Aboriginal witnesses placed great emphasis upon the unity of the Bardi and Jawi people as one society and the one law ... . By that time ... it was clear that the question whether there had been from the time of annexation, one society or two...was a matter of some importance ... . Their

> evidence ... supports the view that the Bardi and Jawi people today see themselves essentially as one people united by common laws and customs ... . So, emphatic as it was, and to some degree formulaic and argumentative, I am satisfied that it represented the true state of mind of the witnesses ... and that generally the Bardi and Jawi people who have responsibility today for maintaining and communicating traditional laws and customs regard themselves as one people, united by one law—at [1017].

This left open the 'critical' questions:

- on the facts, could the court conclude there has been 'one such society which can be traced back to the time of colonisation', or
- were there two societies that have become one via absorption of the Jawi people into Bardi society, or
- were they two societies with one (the Jawi) being now considerably diminished?—at [1017].

Two societies at sovereignty

From the historical, archaeological, linguistic and anthropological evidence, French J concluded there were limited inferences that could be drawn about the characterisation of the Bardi and Jawi communities at sovereignty. And the oral evidence did not enable him to make the necessary inference that there was one society at sovereignty and today—at [1017] to [1046].

His Honour was prepared to accept that:

- intermarriage between the Bardi and the Jawi was extensive and dated back to the time of sovereignty;
- there were similar cosmologies and similar laws and customs defining the rights and responsibilities of clans and families with respect to particular *burus*;
- there were similar patterns of exploitation of marine resources, although Jawi relied more than Bardi on resources beyond the intertidal and reef zones and used rafts to a much greater extent for that purpose;
- there were common ceremonies in relation to initiations;
- the contemporary practice of initiation ceremonies relies upon a common creation cosmology for both Bardi and Jawi which is reflected, inter alia, in the seating arrangements of those being initiated—at [1043] to [1044].

However, it was held that:

- at all material times there were two distinct but closely related groups, the members of which identified either as Bardi or Jawi;
- Bardi and Jawi were for the most part different territories, the Bardi mainland and the Jawi archipelagic;
- the Bardi went to Sunday Island in post-sovereignty times but there was no real indication of any historical perception of Sunday Island as part of the country of a single society;
- the inference could not be made that there was a unified Bardi/Jawi society occupying the claim area at sovereignty united by a single set of traditional laws and customs acknowledged and observed by that society today—at [1043] to [1046].

Only Bardi society had continuity

It was further held that:

- there was at sovereignty a society of Bardi people which, under its traditional laws and customs, was able to receive into its membership (at least by a process of intermarriage) people from the Jawi community and that process was probably in place at sovereignty;
- the area covered by a determination of native title cannot extend beyond the lands and waters of the Bardi people at sovereignty;
- there were no rules of succession identified in the evidence allowing the court to consider the incorporation of Jawi traditional territories into Bardi territory;
- having regard to the way in which the applicant's case has been put and the evidence led in support of it, a present day Jawi society could not be identified;
- as a consequence, the Jawi people were subsumed into Bardi society at some time since sovereignty—at [1046] to [1048].

Of significance was his Honour's statement that:

> Absent further argument or agreement, I am not prepared to make a separate determination in favour of the surviving Jawi people in relation to Sunday Island or other islands within the claim area said to have comprised the traditional territory of the Jawi—at [1047].

Therefore, French J appears to have left it open to the parties to reach agreement on the existence of a Jawi society based on the evidence and any other material that the parties have that would satisfy them that such an agreement should be made.

His Honour was prepared to make a determination in favour of Bardi/Jawi people. The inclusion of the Jawi people in the Bardi society had not destroyed that society's continuity with the original Bardi society. Further, on the basis of the evidence, his Honour was satisfied that there was a body of laws acknowledged and customs observed by the Bardi society which have existed, substantially uninterrupted, since the time of sovereignty—at [1048] and [1051].

Rights and interests possessed under traditional law and custom and connection by those laws and customs

French J was of the view that:

- based on the evidence, native title subsists in the Bardi people in respect of the whole of their country, i.e. is not limited to the families associated with particular estates;
- *buru*-by-*buru* mapping of native title rights and interests would involve a descent into fractal detail not supported by the policy of the legislation and the process of recognition it seeks to advance and, in any case, was at odds with the evidence—at [1069].

French J concluded that the evidence supported the inference that the Bardi people have, under their traditional laws and customs, rights of possession and occupation of the land as against the whole world. Having found that the reference to 'use and

enjoy' in the concept of exclusive possession was too broad and may encompass rights not supported by traditional law and custom, his Honour identified the rights supported by the evidence as the right to:

- live on the land;
- access, move about on and use the land;
- hunt and gather on the land;
- engage in spiritual and cultural activities on the land;
- access, use and take any of the resources of the land (including ochre) for food, shelter, medicine, fishing and trapping fish and weapons for hunting and otherwise for ceremonial cultural and artistic purposes;
- refuse, regulate and control the use and enjoyment by others of the land and its resources;
- have access to and use the water of the land for personal, domestic, social, cultural, religious, spiritual, ceremonial and communal purposes—at [1073].

In relation to intertidal and offshore areas the claimants conceded that the native title rights are non-exclusive. The native title rights held in respect of those areas that were supported by the evidence were the right to:

- access, move about in and on and use and enjoy the zone, the reefs and the associated waters;
- hunt and gather including for dugong and turtle;
- access, use and take any of the resources thereof (including the water of the intertidal zone) for food, trapping fish, religious, spiritual, cultural, ceremonial and communal purposes—at [1074].

The court rejected the claimed right to care for, maintain and protect the land as it did not define 'with any useful precision' the nature of the entitlement which it confers. In any case, his Honour's comments in relation to Alarm Shoals indicate that, even if the right 'to care for and protect' was sufficiently precise, it would be inappropriate to recognise it in relation to areas for which only non-exclusive native title rights and interests can be recognised because the right was really directed at a need to exclude people from the relevant area—at [1073] and [1112].

In relation to s. 223(1)(b), French J found that the Bardi community had the necessary connection at the communal level, noting the required connection involves the continuing internal and external assertion by the group of its traditional relationship to the country defined by its laws and customs and which may be expressed by its physical presence there or otherwise—at [1079].

Land to be included in the determination

Having found that the Jawi people have been integrated into Bardi society, a society with no apparent succession laws for incorporation of Jawi traditional territories, French J concluded that none of the islands to the east of Hadley Passage could be included in the determination. This left the mainland area and the islands to the west of Hadley Passage—at [1082].

The court noted that the evidence as to whether Bardi territory extended south of Pender Bay was ambivalent. His Honour indicted the appropriate southern boundary was defined by a line joining a particular site on Pender Bay in the west and Cunningham Point in the east but was prepared to take further submissions on the point—at [1083] and [1110].

Islands and offshore areas

His Honour found that the evidence did not support the view that the islands north of the mainland were Bardi country at sovereignty. In offshore areas, the court indicated native title would be recognised over the intertidal area and adjacent reefs, noting that evidence of the Bardi use of the sea was limited to the low water mark and the adjacent reefs but asked the parties to help better define these areas—at [6], [1104] and [1108].

Restricted evidence was led regarding the spiritual connection to Alarm Shoals and the right under Bardi traditional law and custom to care for and protect the reefs from unauthorised access. As indicated above, French J held that the rights being asserted were essentially a right to exclude people from the area. This type of right, in respect of offshore areas, could not be recognised at common law—at [1111].

In regard to Brue Reef, included in the Bardi Jawi No 2 application, French J held that the existence of a mythological story did not establish traditional laws and customs of either Bardi or Jawi people in respect of the area. French J found there was no basis disclosed on the evidence of native title rights in Brue Reef and hence the Bardi/Jawi No 2. claim would be dismissed—at [1116].

Extinguishment and ss. 47A and 47B—occupation of the inter-tidal zone

The state accepted that one or more members of the native title claim group occupied the claim area at the date that the application was made, as required under ss. 47A and 47B and the court was satisfied that those sections applied the areas identified by the state—at [1117] to [1118] [1130] to 1131] and [1134].

In relation to 'occupation' of the inter-tidal zone, French J found that the nature of the native title rights that can be recognised in the intertidal zone does not determine whether occupancy of the intertidal zone was possible 'in the relevant sense', noting that:

> [F]rom the point of view of the Bardi people the intertidal zone is part of their country and perhaps the most important part of it because of the sustenance it has always provided to them...[and] occupation of the intertidal zone can occur if occupation is understood in the broad sense relevant to the kind of uses that indigenous people make of their land—at [1136].

Aquaculture and pearling interests impact on native title rights and interests

WAFIC raised several arguments about the extinguishing effect of various tenures, including pearl oyster farm leases granted prior to 23 December 1996, arguing these were commercial leases within the meaning of s. 23B and, therefore, previous

exclusive possession acts (PEPAs) for the purposes of the Titles (Validation) and *Native Title (Effect of Past Acts) Act 1995* (WA) (TVA).

French J found that:

- the definition of PEPAs did not extend to commercial leases that were agricultural leases;
- the definition of agricultural lease in s. 247(2) expressly includes leases permitting the use of land or waters primarily for aquaculture;
- the expression 'aquaculture' should be read widely and construed beneficially, rather than in a way that would 'maximize extinguishment';
- the extensive infrastructure for aquaculture and the protection from intruders were unaffected by any absence of permanent extinguishment of native title rights and interests—at [1138] and [1139].

Without categorising the pearl farm leases, French J held they were not PEPAs and did not attract extinguishment under the TVA—at [1139].

However, what he did not consider was whether the leases conferred a right of exclusive possession over the land and waters concerned—see s. 23B(2)(viii) of the NTA. Presumably they did not.

Where expired special leases for pearling covered areas including the intertidal zone, French J confirmed his earlier finding that ss. 47A and 47B applied where the land had reverted to unallocated Crown land. It was noted that:

- pearl oyster farm leases granted after 23 December 1996 were found to prevail over any native title rights and interests to the extent of any inconsistency as provided by s.44H (on this section, see *De Rose (No 2)* summarised in *Native Title Hot Spots* Issue 15);
- aquaculture licences granted under the *Fish Resource Management Act 1994* (Cwlth) will also prevail over any native title rights and interests to the extent of any inconsistency—at [1141] to [1142] and [1144].

WAFIC submitted:

- expired pearling licences under the *Pearling Act 1912* were akin to leasehold rights and, therefore, they extinguished native title to the extent of any inconsistency, including commercial or subsistence rights to take oyster shells;
- there had been 'global' extinguishment of any native title right to take pearl oysters or pearl shell for subsistence or ceremonial purposes (largely relying on the Western Australian Pearling Acts of 1912 and 1990).

French J rejected both submissions because:

- in relation to the first, the licences did not evince an intention to extinguish native title; and
- in relation to second, this was a 'draconian' interpretation—the legislation did not create an absolute prohibition but rather a licensing regime not intended to exclude the ceremonial usage by the Bardi people. It was noted that s. 211 NTA

would apply to preserve such rights in the context of contemporary legislation—at [1143] to [1147].

Conclusion

His Honour was prepared to make a native title determination along the lines indicated above in relation to mainland areas, the relevant intertidal zone and adjacent reefs exposed at low tide as well as other reefs in the area which are exposed and particularly those visible from the shore or from the intertidal zone.

The door was left slightly ajar on the issue of a separate determination for the remaining Jawi people in respect of their traditional lands—see [1047].

His Honour identified three areas which needed to be resolved before the determination could be made:

- the extent of the offshore areas that could be included in the determination;
- the position of the southern boundary of traditional Bardi country; and
- the specific identification of extinguishing tenure areas—at [6], [1151] and [11].