

Determination of native title – Bardi Jawi

Sampi v Western Australia (No 3) [2005] FCA 1716

French J, 30 November 2005

Issue

This decision deals with the making of a determination of native title under the *Native Title Act 1993* (Cwlth) (NTA) recognising the existence of native title over part of the West Kimberley region in Western Australia.

Background

For the background to this determination, see *Sampi v Western Australia* [2005] FCA 777 (*Sampi No. 1*), summarised in *Native Title Hot Spots Issue 15*, and *Sampi v Western Australia (No 2)* [2005] FCA 1567 (*Sampi No. 2*), summarised in *Native Title Hot Spots Issue 17*. It was formally handed down on country at One Arm Point on the Dampier Peninsula, north of Broome.

Vacation of dismissal of Brue Reef application

On 10 June 2005, the court dismissed a second application made by Bardi Jawi over Brue Reef. However, as a result of the findings made in *Sampi No. 1* that native title did not exist in the area covered by that application, it was pointed out to the court that a s. 225 determination in those terms should be made in relation to the area it covered. Therefore, on 21 November 2005, Justice French vacated the order to dismiss the application so that a determination reflecting the finding could be made over Brue Reef.

Application adjourned in on 47A issue

On 25 November 2005, a problem arose about the potential application of s. 47A to certain small areas that was not raised at trial and could not be resolved prior to the on-country determination. French J ordered that the application should be adjourned in relation to those areas—at [4].

Determination

Before handing down the determination, the court noted that:

- the Bardi and Jawi People of the Dampier Peninsula had struggled long and hard for the recognition of their native title and should be congratulated for achieving it;
- they had established the existence of native title rights and interests held by Bardi Jawi people as a group that had observed one set of traditional laws and customs under which their native title rights and interests arise;
- their existence as a society of Aboriginal people and their traditional laws and customs ‘may be traced back to before the time at which Western Australia was colonised’ — at [5] to [8].

His Honour acknowledged that some claimants would be disappointed that the native title determination did not extend to traditional Jawi territory but noted that:

The proof of native title rights and interests is not an easy matter and the Court is only empowered to make determinations on the evidence before it. The absence of any determination on the islands does not, of course, prevent Bardi and Jawi People from continuing their association with them or even from making arrangements with government about the use of some or all of them—at [8].

Existence of native title

Native title was recognised in relation to parts of the determination area, which can be generally described as the northern part of the Dampier Peninsula and certain intertidal areas and adjacent reefs and islets, together with the waters in the immediate vicinity. Over the remainder of the determination area, a determination was made that native title did not exist: see ss. 94A and 225.

Common law holders

Where native title was recognised to exist, the native title holders were determined to be the Bardi and Jawi people, described as the descendants of certain named ancestors and persons adopted by those descendants in accordance with the traditional laws and customs of the native title holders.

Nature and extent of native title rights and interests recognised

Over what can be very generally described as that part of the determination area landward of mean high water mark on the mainland, native title was recognised as being the right to possession and occupation as against the whole world, including rights to:

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

Over the other parts of the determination area where native title rights and interests were recognised (generally described as certain intertidal areas, adjacent and offshore reefs and islets and the waters in the immediate vicinity) , they consist of non-exclusive rights to:

- access, move about in and on and use and enjoy those areas;
- hunt and gather, including for dugong and turtle;
- access, use and take any of the resources thereof (including water and ochre) for food, trapping fish, religious, spiritual, ceremonial and communal purposes.

In areas seaward of the mean low water mark, the preceding native title rights and interests are limited to reefs and islets within that area when they are exposed or covered by not more than two metres of water.

The native title rights and interests are exercisable in accordance with, and subject to, the:

- traditional laws and customs of the native title holders; and
- laws of the State of Western Australia and the Commonwealth, including the common law.

Limits on rights to waters

The court determined that notwithstanding anything in the determination, there are no exclusive native title rights or interests in:

- flowing waters;
- any natural collection of water that a river, creek, stream or brook flows through;
- any underground water source.

Relationship between native title and non-native title rights and interests

The relationship between native title and non-native title rights and interests is that:

- to the extent of any inconsistency, the native title rights and interests continue to exist but, to that extent, have no effect on the non-native title rights and interests;
- recognition of native title does not prevent the doing of any activity required or permitted to be done by or under non-native title rights and interests and those rights and interests, and any activity required or permitted by them, prevail over native title rights and interests and any exercise thereof but do not extinguish them.