Proposed determination of native title & joinder application– Bardi Jawi

Sampi v Western Australia (No 2) [2005] FCA 1567

French J, 4 November 2005

Issues

This decision deals with matters arising from the Federal Court's reasons in *Sampi v Western Australia* [2005] FCA 777 (*Sampi No. 1*), namely:

- an application for joinder by either the Jawi Aboriginal Corporation or certain individuals under s. 84(5) of the *Native Title Act 1993* (Cwlth) (NTA); and
- whether a determination of native title should be made in relation to what the court identified as traditional Jawi territory.

Background

The original application in this matter was lodged in 1995 on behalf of the Bardi and Jawi People. For further background to this case, see the summary of Justice French's reasons for judgment in *Sampi No. 1*, summarised in *Native Title Hot Spots* Issue 15. In those reasons, French J foreshadowed the form the determination of might take. The applicant was subsequently ordered to file and serve a draft determination and to inform the court as to whether native title was to be held in trust and, if so, to nominate a prescribed body corporate (PBC) to be the trustee of native title: see ss. 55, 56 and 57 of the NTA. However:

- the applicant filed submissions seeking a further determination in response to French J'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 ... the traditional territory of the Jawi'—*Sampi No 1* at [1047]; and
- on 19 September 2005 , the Jawi Aboriginal Corporation (the corporation) and 24 individuals (20 of whom were members of the corporation) made joinder applications.

Joinder applications

The court may join any person under s. 84(5) of the NTA if satisfied that 'the person's interest may be affected by a determination in the proceedings'. The corporation's rules identified its members as all the traditional owners of Sunday Island, which is within the area identified by French J as traditional territory of the Jawi. The chairperson of the corporation swore an affidavit identifying the corporation's activities as directed to assisting persons who hold native title rights to Sunday Island in support of a submission that this gave the corporation a special interest in the proceedings. The corporation had an aquaculture licence on the south side of Sunday Island and it wanted to build infrastructure, including living quarters, accommodation for tourists and an airstrip on the island. However, the relevant land was a crown reserve subject to a 99 year lease to the Bardi Community Inc. (now Ardyaloon Inc.) and Ardyaloon Inc. had not responded to the corporation's requests

for 'land tenure' on Sunday Island. The evidence was that, following the reasons for judgment, the corporation held a meeting (the Lombadina meeting) where it was resolved to withdraw its instructions to the Kimberley Land Council, (the KLC) the representative body acting for the claimants, in relation to the native title claim. A new legal representative was appointed, the corporation resolved to withdraw any authorisation given to the applicant in the claimant application and instructed its new legal representative that:

> [T]he Jawi people saw the determination of native title as separate to the determination made in favour of the Bardi and Jawi people in respect of Jawi country, including Sunday Island.

A further resolution stated that the persons at the meeting were Jawi people with authority under the traditional laws and customs to speak on behalf of those who had rights and interests in Sunday Island.

Four affidavits were filed on 25 August 2005 by members of the native title claim group stating they had not withdrawn instructions from the KLC and that they had not withdrawn authorisation from the current applicant. Two of the deponents were present at the Lombadina meeting and deposed that the minutes were not a true and accurate record of what had happened.

The submissions filed by the corporation were that the following issues were yet to be determined in the proceedings:

- whether it was open to the court to make a separate determination of native title in favour of Jawi people in relation to the area said to have comprised the traditional territory of the Jawi;
- in the event that such a determination was made:
- the relationship between any native title rights and interests and the non-native title rights in respect of Sunday Island , including the lease held by Ardyaloon Inc.;
- whether that native title is to be held on trust and, in any case, the identity of the prescribed body corporate.

Findings on joinder applications

In finding that no case for joinder of the corporation had been made out, French J noted that:

- on the evidence, in did not appear that the absence of a native title determination would impact adversely upon the corporation's plans;
- the corporation's arguments for joinder should have been advanced a long time ago and it was now far too late for joiner as this would delay the final resolution of the claim with little apparent effect—at [20].

As for the alternative (joinder of 24 individuals), the court noted their submission that:

- they wished to put an alternative proposition to that put by the applicant, which was for a determination of native title similar to that made by the Full Court in *De*

Rose v South Australia (No 2) [2005] FCFCA 110 (*De Rose*) , summarised in *Native Title Hot Spots* Issue 15;

- the evidence before the court was sufficient to establish they had group rights comprising native title in relation to Sunday Island that were possessed under traditional laws acknowledged and traditional customs observed by a larger traditional block which comprised the relevant society.

The state opposed joinder, pointing out that the persons seeking joinder included 12 individuals who jointly comprised the applicant bringing the claimant application and that to change the composition of the applicant, the provisions of the NTA must be followed or the application must be amended: see *Johnson v Minister for Land and Water Conservation (NSW)* [2003] FCA 981 per Stone J at [8], summarised in *Native Title Hot Spots* Issue 7. Another of the respondents, in opposing the joinder application, submitted that it amounted to an attempt to recall the decision in *Sampi No. 1*. The applicant in the Bardi Jawi claimant application did not support the joinder application.

French J found there was no separate interest established by the material relied upon nor any evidence that made out a credible case to support joinder. Again, in exercise of the discretion available under s. 84(5), the court held it was, in any event, far too late to reopen and restructure these proceedings with a view ... to securing an outcome different from that ... already reached' in *Sampi No. 1*—at [28].

Should a further determination be made?

His Honour, after referring to his conclusions in *Sampi No. 1* at [1046] to [1047] and [1082], stated that, absent further argument or agreement:

- the court was prepared to make a determination in favour of the native title claim group as defined in the application, which would include those Jawi people found to form part of the contemporary Bardi society;
- however, the area covered by that determination could not extend beyond the traditional territory of the Bardi since there were no rules of succession identified that would allow consideration of the incorporation of Jawi traditional territories into Bardi territory;
- the court did not consider that the case and evidence led to the identification of a distinct Jawi society presently in existence which acknowledges traditional laws and customs under which native title rights and interests are possessed;
- none of the islands forming part of the traditional Jawi territory would be the subject of the determination—at [28] to [31].

The applicant made submissions in support of a further determination in relation to traditional Jawi territory in which *De Rose* at [38] was relied upon, where it was said that:

> If it is necessary for the purposes of proceedings under the NTA to distinguish between a claim to communal native title and a claim to group or individual native title rights and interests, the critical point appears to be that communal native title presupposes that the claim is made on behalf of a recognisable community of people, whose traditional laws and customs constitute the normative system under which rights and interests are created

> and acknowledged. That is, the traditional laws and customs are those of the very community which claims native title rights and interests.

Reference was also made to *Northern Territory v Alyawarr, Kaytetye, Warumungu, Wakaya Native Title Claim Group* [2005] FCAFC 135 (*Alyawarr*), summarised in *Native Title Hot Spots* Issue 16, where the Full Court upheld a communal or claim group level claim by a community which did not include all individuals affiliated with the four language groups with which the seven landholding groups and their countries had affiliation. The applicants submitted, among other things, that:

- whether the entire native title claim group involves and, at sovereignty involved, two societies or one may not matter in the context of this case because the closeness of the normative systems in this case 'indicated an inherent capacity for cross-recognition';
- jurisprudentially, this allowed the claim group to comprise an overlap of two 'societies' or, in the alternative, for two native title claim groups to substantially overlap in respect of a claim area;
- applying the *Alyawarr* 'principle', it did not matter if 'one and a half' societies or one were involved, so long as it collectively included those who possessed rights and interests in the collective parts of the claim area under laws and customs the origins of which could be traced to a normative system at sovereignty--at [34] to [36].

French J found there was no basis upon which a further determination could be made in respect of the islands:

> The evidence supported a finding that there is one and only one extant traditional society. That is the Bardi society. Its traditional country was found not to include the islands to the north and north-east of the peninsula. There was no basis for a finding of a Jawi society 'overlapping' the Bardi society and retaining the requisite connection to the claimed islands—at [37].

Competing draft determinations

French J considered various points of difference in regard to the proposed draft determination, including:

- the demarcation of the landward side of the intertidal zone (which divided exclusive from non-exclusive native title rights and interests), with 'mean high water mark' being preferred by the court;
- whether 'use and enjoyment' should be included as part of the description of a right to 'exclusive possession', with his Honour reaffirming his view that it should not;
- whether a native title right to 'live on waters, 'whatever that means', should be recognised, with French J concluding there was no factual basis to support it;
- whether the determination should expressly state that certain areas were excluded from the determination area because native title was extinguished, with the court holding it was unnecessary to do so;
- whether a 'fluid', rather than fixed, description of the seaward boundary should be used, with the court preferring to include 'a proviso to the effect that non-exclusive native title rights and interests are exercisable seaward of the mean low

water mark on any reef exposed at low tide only when that reef is exposed or covered by water to a depth not more than two metres';

- whether to add 'non-commercial' to the qualifier that the native title rights and interests recognised were exercisable 'for personal, domestic, social, cultural, religious, spiritual, ceremonial and communal purposes', with the court deciding this was unnecessary;
- whether 'the right of any person to use ... any road in the determination area over which ... the public has a right of way according to the common law' should be recognised in the determination, with the court holding it should not unless there was at least a precise identification of the 'roads' in question which, in this case, there was not;
- whether a new paragraph recognising the public right to use any road in the determination area, with French J accepting the applicant's submission that it should not, given the potentially significant impact of such a clause on native title rights and interests—at [45] to [113].

Conclusion

His Honour decided that a determination of native title in accordance with his reasons would be made on country but allowed a short time for the making of further submissions on technical or drafting issues, with his Honour noting that this was not 'an invitation to canvass these reasons'—at [116].