Area covered by claimant application—Bardi Jawi

Sampi v Western Australia (No 4) [2006] FCA 760

French J, 19 June 2006

Issue

The question here was whether two areas were included in the area covered by a claimant application. If they were, then a further question would arise as to whether or not s. 47A of the *Native Title Act 1993* (Cwlth) (NTA) applied. By agreement, these areas were excluded from the determination of native title made in relation to that claim to allow the question to be separately determined: see *Sampi v Western Australia (No 3)* [2005] FCA 1716, summarised in *Native Title Hot Spots* Issue 17.

Background

On 30 November 2005, Justice French made a native title determination in relation to a claimant application made on behalf of the Bardi and Jawi People. Two small freehold areas were expressly excluded from the determination. This was because uncertainty had arisen late in the proceedings as to whether or not those areas were included in the area covered by the application. The two areas, described broadly as the Lombadina/Djarindjin area and the Kooljaman area, are referred to as the 'adjourned areas''.

Areas covered by the claimant application

The original claimant application in this matter was lodged with the National Native Title Tribunal on 1 September 1995 and accepted under the provisions of the old Act on 15 April 1996. As originally drafted, the application excluded:

> [A]ny land contained within that area which is identified herein as being the subject of a grant of a freehold estate other than land granted to the Crown or a statutory authority of the Crown: the Australian Maritime Safety Authority.

The application was amended in 1998 to exclude:

> [A]ny land contained within that area which is, or has been, the subject of a grant of freehold estate identified herein as being the subject of a grant of a freehold estate other than land granted to the Crown or a statutory authority of the Crown but excluding that area of land ... which is vested in the Australian Maritime Safety Authority [AMSA].

If was further amended in 1999 to use a different formulation for describing the excluded areas, which included (among other things) a statement that the exclusion clauses were 'subject to such of the provisions' of ss. 47 to 47B 'as apply to any part of the area contained within this application'.

Adjourned areas not part of application area

The court noted that:

> [T]he original application excluded all freehold grants other than freehold estates granted to the Crown or Crown authorities and including in that later category, AMSA. The 1998 amendment went no further than to except AMSA freehold land from the class of Crown to Crown grants so that it fell within the general exclusion of freehold titles and thus outside the claim area—at [25].

Therefore, French J held there was:

> [N]o room for debate that the application as originally filed and as it stood after the 1998 amendments did not extend to freehold lands save for that subject to grants to the Crown or Crown authorities. The adjourned areas were the subject of freehold titles vested in the Roman Catholic Bishop of Broome and the Kooljaman Land Aboriginal Corporation respectively—at [26].

In other words, the adjourned areas were subject to freehold grants that were not grants to the Crown or Crown authorities and so the adjourned areas were excluded from the area covered by both the original application and the application as amended in 1998.

As to the 1999 amendments (made after the new Act commenced), his Honour noted that, at the time those amendments were made, s. 64(1) had been inserted into the NTA. It prohibited an amendment to an application that would result in any area not covered by the original application from being included in the amended application. Therefore, as his Honour noted, there could be no implication or argument that the amendment made in 1999 brought into the area covered by the amended application any area that had been excluded previously—at [29].

As a result, it was found that, since the adjourned areas were not included in the area covered by the application, they could not be included in the determination.

Fresh application could be made

The court noted:

- this finding did not prevent a separate application for a native title determination being brought in respect of the adjourned areas;
- having regard to the evidence taken and facts found in the primary proceedings, it was likely that the only issue in a new application would be the application of ss. 47A or 47B to those areas—at [31] and [33].

Decision

His Honour found the adjourned areas were not included in the area covered by the claimant application the subject of these proceedings and so they could not therefore be included in the native title determination—at [33].