Appeal succeeds – society question & native title to the sea

Sampi on behalf of the Bardi and Jawi People v Western Australia [2010] FCAFC 26

North & Mansfield JJ, 18 March 2010

Issue
The main issue in these appeal proceedings was whether the Bardi and Jawi people constituted one society at sovereignty or two. The appeal court found the primary judge should have inferred there was one society at sovereignty and so upheld the appeal on this ground. The extent of native title rights and interests recognised in the intertidal zone and offshore was also in issue. Most of these grounds of appeal were also successful.

Background
In 1995, the Bardi and Jawi people made a claimant application over part of the Dampier Peninsula, islands in the Buccaneer Archipelago and some of the surrounding offshore areas in northern Western Australia. They claimed that, although they were distinct peoples, they had always formed one society for the purpose of holding native title. Justice French did not accept this. The Bardi and Jawi people appealed from French J's determination in *Sampi v Western Australia (No 3)* [2005] FCA 1716, which was made in accordance with the reasons given in *Sampi v Western Australia* [2005] FCA 777 (*Sampi No 1*). The State of Western Australia and the Western Australian Fishing Industry Council (WAFIC) cross appealed.

As the critical issue was whether there was one society or two at sovereignty, the Full Court addressed that issue first. However, before doing do, Justices North and Mansfield considered their role as the appeal court in the circumstances of this case.

Appeal court's role in such 'unusual circumstances'
The unusual aspect of this case was that French J did not hear all of the evidence himself. Justice Beaumont conducted the trial over 24 days but became ill and so the case was transferred to French J's docket. The parties agreed that his Honour could determine the case based on the transcript and a small amount of additional evidence taken over three days (mostly from the same Aboriginal witnesses who had given evidence in the first trial). The additional evidence addressed developments in the law, such as the decision in *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422 (*Yorta Yorta*).

In determining whether the primary judge 'erred in drawing inferences from the evidence', North and Mansfield JJ were guided by the following principles:

- in circumstances where the trial judge's conclusions were 'largely drawn by inference from the facts found by him', an appeal court 'will give respect and

weight to the conclusion of the trial judge' but, once its reached its own conclusion, 'will not shrink from giving effect to it';
- to give weight and respect to the conclusion of the trial judge means not finding error merely because the appeal court prefers a different outcome to that reached by the trial judge where both are equally available or the matter is finely balanced;
- the appeal court must come to the view that the primary judge was wrong in order to interfere and 'a sufficiently clear difference of opinion may necessitate that conclusion';
- the appeal court must 'bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect', i.e. usually, the trial judge has had the advantage of seeing and hearing the witnesses directly'—at [6] to [8], referring to various authorities.

However, in the 'unusual circumstances' of this case, French J 'did not have a significant advantage' over the appeal court because both he and the appeal court relied 'principally' on the transcript of evidence—at [9].

It was also noted that delivery of judgment on the appeal was delayed at the parties' request to allow for negotiation toward a settlement and that, during that time, one of the members of the Full Court retired. The parties consented to North and Mansfield JJ constituting the Full Court—at [10].

Framing the question

Subsection 223(1) of the *Native Title Act 1993* (Cwlth) (NTA) was 'central' to the primary judge's consideration of the legal framework surrounding the critical issue i.e. the 'one society or two' question. French J explained the proper construction of that section before noting that:

> 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 acknowledgment and observance of the laws and customs'—at [963] in *Sampi No 1*.

Primary judge's conclusion

The central issue in this case was whether the Bardi and Jawi people comprise a society in whose favour a determination of native title could be made. French J was of the view that determining that issue required making two enquiries:

- whether there is a society of the requisite kind in existence today; and
- whether that society can be said to have existed since sovereignty—*Sampi No 1* at [968].

As North and Mansfield JJ put it:

> [T]he primary judge concluded that there was a present day Bardi society which, at sovereignty, was able under its laws and customs to receive into membership, at least by intermarriage, people from the Jawi community. The present society could therefore be broadly described as a Bardi and Jawi society. However, only the land and waters in which the Bardi people held rights and interests at sovereignty could be the subject of a

> native title determination. The primary judge therefore made the determination in favour of the Bardi and Jawi applicants but only in relation to the lands and waters of the Bardi people. In so doing, the primary judge rejected the contention of the Bardi and Jawi people that an inference could be drawn from the evidence that they constituted one society at sovereignty—at [28].

It was the reasoning leading to this conclusion that was examined on appeal.

Reasoning of primary judge

The reasoning of the primary judge, found in *Sampi No 1* at [1043] to [1046], was brief and concluded with a finding that:

> The evidence does not allow me to infer that one society of Bardi and Jawi people occupied the claim area at sovereignty and were united by a single set of traditional laws and customs acknowledged and observed by that society today. Nor am I able to conclude that there was one such society which, in effect, communally held the land and waters of the claim area under such a body of law and custom, which was, in effect, the applicants' case.

The factors French J said showed the similarities of the Bardi and Jawi people were:

- a pattern of intermarriage which dated back to sovereignty;
- common creation and otherwise similar cosmologies;
- similar laws and customs defining the rights and responsibilities of clans and families with respect to particular burus or estate areas;
- similar patterns of exploitation of marine resources; and
- common ceremonies in relation to initiations.

The factors said to highlight the distinctiveness of each were:

- the members of each group identified themselves as either Bardi or Jawi;
- they spoke different languages; and
- they occupied separate territories.

Primary judge should have inferred one society at sovereignty

The court found that French J was wrong in 'failing to draw the inference from the evidence that the Bardi and Jawi people formed a single society at sovereignty' for the reasons summarised below—at [50] and [54].

Their Honours first noted that:

- whether the group concerned acknowledged the same body of laws and customs relating to rights and interests in land and waters is central to the consideration of whether a group of people constitute a society in the *Yorta Yorta* sense;
- the primary judge held that the Bardi people as a group acknowledged the same body of laws and customs relating to rights in land and waters but was not able to infer from the evidence that the Jawi people also acknowledged those laws and customs—at [51].

According to their Honours, there was 'a wealth of detail of a highly complex system of land holding and social interaction [before the primary judge] which was

explained by the Aboriginal witnesses and, at length, by [anthropologist] Mr Bagshaw', with the latter's evidence going to 'the depth and detail of the legal code involved'. This included evidence that:

- Bardi and Jawi primarily inherit country and associated rights in country by way of patrifiliation;
- each individual becomes a member of an exogamic kin-aggregate or patrifilial group which is identified with, and responsible for, a specific mythologically inscribed estate or buru and its associated religious resources;
- individual estate-affiliates are 'gamelid' (a person who, together with his or her father, is from a particular country), which 'conveys the sense of an individual who is known to the country itself' and that country is 'conceived of as an active physical and metaphysical entity';
- nimalj rights refer to limited rights which estate-affiliates can grant in respect of their own buru to unrelated or distantly related persons, e.g. nimalj to fish at a certain spot, exploit particular resources or reside in a particular locality within a buru;
- other derivative rights arise in relation to maternal estates (ningarlm) and spousal estates (gurirriny) but the holders of these are expected to defer to estate-affiliates, support them on estate related issues and speak for, and act on behalf of, the physical and spiritual welfare of the estate;
- continuing responsibility exercised in respect of deceased or vacant burus supported the view that the estate rights fell within an overarching system of traditional law and custom defining the connection of the people to their land and waters—at [54].

Their Honours found that 'the inherently communal nature of Bardi and Jawi territorial ownership' was underscored by the proposition advanced in Mr Bagshaw's report that 'it may reasonably be said that all persons with a recognised kin-base connection to an estate have at least some form of ownership interest in it'—at [53].

The court did not agree with French J that Mr Bagshaw's description of the system was based on the premise that the Bardi and Jawi people constituted a single society. Rather, their Honours read Mr Bagshaw's evidence as being 'descriptive of a system which, *as a matter of fact, rather than assumption*, both the Bardi and Jawi people shared' (emphasis added). Accepting this view, that system 'was equally the system of the Jawi people as it was of the Bardi people'—at [55] to [56].

Aboriginal witnesses' evidence

The court agreed with French J that the testimony of the Aboriginal witnesses was 'of the highest importance in a determination of the evidence of native title'. According to North and Mansfield JJ, that evidence established that 'the Bardi and Jawi people shared one system of law at least as far back as the latter part of the 19th century'. Therefore:

> On the basis of this ... evidence the primary judge should have found that the Bardi and Jawi people acknowledged the same laws and observed the same customs concerning

> rights and interests held in land and waters at least from the present back until the time of these witnesses' 'old people' or grandparents, namely, the latter part of the 19th century—at [63].

Further, it could be inferred that this was also the case from the latter part of the 19th century back to sovereignty because: "[T]he constitutional status and elaborate nature of the rules in question make it improbable that the system arose in the relatively short period between sovereignty and the time of the ... 'old people'"—at [65], referring to *Gumana v Northern Territory* (2005) 141 FCR 457; [2005] FCA 50.

The court concluded that French J should have inferred that the Bardi and Jawi people are, and have been since the time of sovereignty, 'united by their acknowledgement of a common set of laws and their observance of a common set of customs'—at [66].

Indicators of separateness

It was found that the linguistic evidence, the evidence of distinct territories and the existence of self-referents was 'not sufficient to displace the inference from the wealth of other evidence that the Bardi and Jawi people were a single society at sovereignty'—at [66] and [75].

The difference in language was at the level of dialect. As was noted,

> The difference in dialect, in the overall picture ... , does not tend to lead to the view that the traditional laws acknowledged and traditional customs observed by the Bardi and Jawi were not acknowledged and observed by them as one society or that they were not inextricably linked by those normative rules which existed at sovereignty—at [68].

Similarly, the use of the self-referents 'is paralleled in many unified societies'. Their Honours referred to the fact that Australians call themselves Victorians or Queenslanders or Western Australians because they 'have a residential linkage in those States' while at the same time being 'united in adherence to the law of Australia' and forming 'part of the Australian society'. In this case, the territorial delineation provided 'further evidence of a common set of laws and customs with respect to land' in that Bardi and Jawi possession of particular territory was (according to Mr Bagshaw) the result of a 'supernaturally-authored territorial demarcation' that pointed to 'an overarching set of laws and customs derived from a common cosmology'—at [69] to [70].

After pointing out that each native title case turned on its facts, the court noted decisions from which 'certain lines have emerged between the characteristics of those groups which fall within the requirements laid down in *Yorta Yorta* and those which do not'. It was, they thought, noteworthy that there had been cases where a native title claim group that adhered to 'an overarching set of fundamental beliefs' was found to constitute a society 'notwithstanding that the group was composed of people from different language groups or groups linked to specific areas within the larger territory which was the subject of the application'—at [71] to [4], referring to *Neowarra v Western Australia* [2003] FCA 1402, *Alyawarr, Kaytetye, Warumungu, Wakay*

Native Title Claim Group v Northern Territory of Australia [2004] FCA 472, *Northern Territory v Alyawarr, Kaytetye, Warumunga, Wakaya Native Title Claim* (2005) 145 FCR 442; [2005] FCAFC 135 and *King v Northern Territory* (2007) 162 FCR 89; [2007] FCA 944.

Conclusion – one society, determination should include Jawi territory
North and Mansfield JJ concluded that:

> [T]he primary judge should have inferred from the evidence that the Bardi and Jawi people constituted a single society from sovereignty until the present. The primary judge should not have excluded the country of the Jawi people from the determination. The determination should, subject to resolution of the remaining arguments, include the territory of both the Bardi and Jawi people. As a result of these findings, the cross-appeal by the State must fail—at [79].

Islands north of Dampier Peninsula
French J excluded islands to the immediate north of the Dampier Peninsula from the determination because, in his opinion, those islands were not part of Bardi country. Since their Honours had found there was one Bardi and Jawi society at sovereignty, it was 'necessary to revisit that conclusion'. North and Mansfield JJ were satisfied that this was an area over which native title rights and interests exist and there was:

> [A]mple evidence to support the tentative view of the primary judge that the land and waters north and east of the Dampier Peninsula mainland to Hadley Passage were part of the Bardi and Jawi peoples' land (the step of finding the one society at sovereignty having been taken—at [83].

Therefore, the determination of native title rights and interests will be amended to include this area.

Tidal movements and the existence of native title
French J had found that non-exclusive native title rights and interests could be recognised in the intertidal zone and in relation to reefs within and adjacent to that zone and offshore reefs otherwise exposed and traditionally used by the Bardi/Jawi people, together with the waters in their immediate vicinity. As the parties could not reach agreement as to how this should be reflected in the determination, it was determined in *Sampi v Western Australia* [2005] FCA 1567 that there should be '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 to low tide only when that reef is exposed or covered by water to a depth not more than' two metres. On appeal, the Bardi and Jawi people characterised this as a temporal limitation either on the existence or the exercise of the very limited native title rights and interests recognised in those areas and argued that the proviso was in a form not contemplated by the NTA.

The court agreed with the submission that ss. 223 and 225 of the NTA 'do not contemplate the type of limitation which is contained in the proviso'. Since no party had proposed any alternative limitation, it was decided that the determination should be amended to omit the proviso—at [95].

Seaward extent of recognition extended to three nautical miles

The application area generally extended to the three nautical mile limit. French J recognised the following rights in relation to waters, shoals and reefs seaward of the high water mark:

- the right to access, move about in and on and use and enjoy the sea;
- the right to hunt and gather in and on the sea, including for dugong and turtle;
- the right to access, use and take any of the resources of the sea (including the water of the intertidal zone) and to manufacture any object or other thing from these resources.

However, recognition was limited to the area between the high water mark and the mean low water mark and reefs when exposed or covered by water to a depth of not more than two metres between the mean low water mark and the two metre bathometric contour at the lowest astronomical tide of the mainland coast of the Dampier Peninsular. Beyond the two metre bathometric contour at the lowest astronomical tide, French J found that the evidence as to use of the open sea beyond the intertidal zone was limited and did not establish definable rights under traditional law and custom in relation to that use. The three reasons given for rejecting the 'sea' claim were:

- the claimants had not established that the use of the sea area was made under traditional law and custom;
- the evidence of use of the sea on the western side of the mainland was insufficient to establish any claimed right;
- while there was more extensive use of the sea to the north of the mainland in the region of the islands by Bardi people, that area was not in Bardi country and so their use of the sea in that territory could not give rise to rights or interests in the Bardi society.

Obviously, the third reason depended on French J's findings that the relevant rights and interests were held by the Bardi society. As a result:

> [T]he question he asked in respect of the sea areas was whether the evidence established native title rights and interests in the Bardi people. As we have explained earlier in these reasons, the relevant society which held any rights or interests established by the evidence was the Bardi and Jawi society. Thus, the proper enquiry was whether the Bardi and Jawi people had established native title rights or interests in the sea claim area. As the primary judge approached the issue on a different basis, this Court must determine for itself whether the evidence established that the Bardi and Jawi people have native title rights or interests in the sea claim area on the basis of the evidence led in the first and second trials—at [102].

The court canvassed the evidence of the Aboriginal witnesses concerning the rights in the sea area. North and Mansfield JJ were satisfied that the evidence as a whole established that:

> [I]t is, and has been since sovereignty, customary for the Bardi and Jawi people to use the sea around the coast of the mainland of the Dampier Peninsula and among the islands for hunting, fishing and travelling. That evidence supports customary rights to access, move

> about in and on, and use and enjoy those areas, to hunt and gather including for dugong and turtle, and to access, use and take any of the resources of the sea for food and trapping fish. There was also evidence that resources from the ocean such as trochus shell were used for religious, spiritual, ceremonial and communal purposes. This evidence taken as part of the evidence as a whole supports a right to access, use and take the resources of the sea for those purposes as claimed by the Bardi and Jawi people—at [111].

Therefore, it was found that French J was wrong to find that 'the evidence did not establish these defined rights under the traditional law and custom of the Bardi and Jawi people' and, since none of the respondents contended otherwise, the three nautical mile limit was determined to be an appropriate outer boundary line to mark the extent of the native title rights and interests in the sea. The determination of native title will be amended to reflect that boundary.

Right to protect offshore areas – no need for unnecessary precision

The Bardi and Jawi people claimed a right to care for, maintain and protect the land or sea respectively, including their places of spiritual or cultural significance. French J did not recognise this right in relation to offshore areas. On appeal, the Bardi and Jawi people argued that rights in similar terms had been recognised in other cases and that the evidence supported the existence of the claimed right. North and Mansfield JJ found that the Bardi and Jawi people had not established the evidentiary basis for success on this ground. Therefore, it was found that French J correctly excluded the claimed 'right to protect' in the offshore areas generally—at [126].

However, their Honours indicated that, if there had been evidence to support it, they would not have rejected the claim to such a right on the ground that it lacked sufficient precision (as French J apparently did). They went on to point to the evidence that might have been used to indicate what the claimed right encapsulated. According to the court:

> To require a greater precision than is expressed in the formulation of the rights or interests under the laws or customs of the Aboriginal people is to fail to recognise the rights or interests which arise under that law. Once the statutory requirements for the recognition of native title are established, there is no warrant for limiting the rights and interests by adding a gloss to the statutory requirements in the form of a stipulation for a particular level of precision in the articulation of the rights or interests—at [120].

It was also noted that similar rights and interests were accepted in *Attorney-General (NT) v Ward* (2003) 134 FCR 16, *Neowarra v Western Australia* [2004] FCA 1092, *Alyawarr*, *Daniel v Western Australia* [2005] FCA 536, *De Rose v State of South Australia (No. 2)* (2005) 145 FCR 290—at [121] to [125].

Right to protect recognised in relation to Alarm Shoals and Lalariny

Particular arguments were put in relation to the recognition of a right to protect Alarm Shoals and Lalariny.

Alarm Shoals is an area of shallow water north of Cape Leveque largely within the three nautical mile limit. The right to access, move about in and on, and use and enjoy the area for spiritual purposes and the right to care for, maintain and protect the area as a place of spiritual significance were claimed. French J recognised that the area was of great significance but held there were no native title rights or interests in Alarm Shoals because, essentially, what was asserted involved a right to exclude which the common law does not recognise as a native title right in offshore areas. Evidence about how significant Alarm Shoals is to the Bardi and Jawi People was given by Paul Sampi, 'an elderly senior law man with a very wide and deep knowledge of the culture of his people'. According to Mr Sampi, it was a dangerous spiritual place and, under Bardi and Jawi Law, 'nobody is allowed to go there'—at [130].

While their Honours agreed that the claim for a right to access, move about in and on, and use and enjoy Alarm Shoals for spiritual purposes was not made out because the Law required that Bardi and Jawi people keep away from it, they found (contrary to French J) that the evidence supported the right to care for, maintain and protect Alarm Shoals as a place of spiritual significance. It was not 'restricted to a responsibility to exclude from Alarm Shoals'. Although the evidence was brief:

> Recognition of rights or interests must take into account not only current circumstances which call for the exercise of rights or interests but circumstances which may call for their exercise in the future. Thus, for example, Bardi and Jawi law men would be bound under Bardi and Jawi law to speak out against, say, a proposal to construct a natural gas platform at Alarm Shoals. ... . The right to care for, maintain and protect Alarm Shoals as a place of spiritual significance should have been included in the determination. Expressed in those terms, such a right would not be one which the common law would not recognise—at [133].

Lalariny is a rock feature on the west coast of the Dampier Peninsula. French J did not include Lalariny in the area where native title was recognised because Mr Sampi's gender restricted evidence was to the effect that traditional law and custom required it to be avoided, which French J found was inconsistent with the rights claimed over the area. On the appeal, the Bardi and Jawi people contended it should have been treated in the same way as the surrounding offshore and intertidal areas. The public statement of the restricted evidence indicated it was an area that 'holds a particular cultural significance to the Bardi and Jawi people resulting from its close association with a particular spiritual being' and that nobody should go there.

Their Honours agreed with French J that the evidence did not support the existence of a right to move about in and on, and use and enjoy the area, the right to hunt and gather including for dugong and turtle and the right to access, use and take any of the resources thereof for food, trapping fish, religious, spiritual, ceremonial and communal purposes because they 'could not exist in an area which traditional law required that people avoid'. However, as with Alarm Shoals, there was some specific evidence about the cultural significance of Lalariny and the responsibility of Law men to protect the area and the fact that the evidence was given in restricted session indicated the cultural importance of the area. It was held that the evidence was

sufficient to justify recognition of the right to protect in relation to Lalariny—at [139] to [140].

Exclusive possession to islets

The determination recognised a native title right to exclusive possession above the high water mark of the mainland coast. Lesser 'non-exclusive' native title rights were recognised in offshore areas between the high water mark and the two metre bathometric contour at the lowest astronomical tide of the mainland coast. There are a number of islets, including Manynyingnurr (Nannygoat Island) and Anbarrngani (Leveque Islet), which include land above the high water mark. French J thought the Bardi and Jawi people had conceded that the native title was non-exclusive in those areas. On appeal, the Bardi and Jawi people contended no such concession was made and that the land above the high water mark in the offshore area should be treated in the same way as the land on the Dampier Peninsula, i.e. exclusive possession should be recognised. The court was satisfied there was no concession. The evidence in relation to the islets was quite limited.

North and Mansfield JJ found that

- it was not necessary for the Bardi and Jawi people to identify every offshore site and lead evidence of the claim for exclusive possession specific to each site;
- the evidence in relation to two of the islets showed how close these areas are to the mainland and how they are 'capable of being accessed at times as if they were part of the mainland';
- there was nothing significant in the evidence that demonstrated that the land above the high water mark in the offshore area should be treated differently from such areas on the mainland;
- the determination should have recognised the same exclusive rights in respect of the islets as were recognised in respect of the mainland area —at [146].

Exclusivity and 'use and enjoyment'

The Bardi and Jawi people claimed the right to 'possession, occupation, use and enjoyment' in relation to the land above mean high water mark. French J refused to include the phrase 'use and enjoyment' because he thought it was 'too widely stated and could pick up a variety of rights not contemplated by traditional law and custom'. On appeal, the Bardi and Jawi people contended the determination should have included reference to use and enjoyment because the formula 'possession, occupation, use and enjoyment'. They pointed to 11 cases in which such a right had been recognised. The court agreed that the cases established that was 'a usual practice' to use the composite expression 'possession, occupation, use and enjoyment' to express 'the nature of the native title rights flowing from a finding that Aboriginal people are entitled to exclusivity in relation to land'. Their Honours were of the view that French J's departure from the 'usual usage' was not satisfactorily explained and found that 'use and enjoyment' should be included—at [153].

WAFIC cross appeal

WAFIC, supported by the Commonwealth, argued that the right to fish recognised in the determination should be limited to non-commercial purposes because no claim

was made for commercial fishing rights. The determination included the right to 'access, use and take any of the resources thereof (including water and ochre) for food, trapping fish, religious, spiritual, ceremonial and communal purposes'. On the appeal, WAFIC:

- referred to six cases where the court had expressly stated in the determination that the native title rights recognised were non-commercial;
- argued that there was value in adopting a consistent approach;
- properly drew attention to three cases in which non-commercial rights had been recognised in determinations but those rights had not been expressly designated as non-commercial.

As there was 'no settled practice', North and Mansfield could not conclude that the primary judge was wrong. WAFIC's argument that including reference to the non-commercial nature of the rights and interests would give greater clarity to the determination was rejected—at [160].

Decision

The court decided to allow the Bardi and Jawi people's appeal on the issues of the one society or two, exclusivity and 'use and enjoyment', the islands south-west of Hadley Passage, tidal movements and the existence of native title, islets and the seaward extent of native title. The appeal was allowed in part on the issue the right to protect Alarm Shoals and Lalariny but otherwise dismissed. The cross appeals by the State and WAFIC were dismissed.

The determination made by French J will be set aside 'in due course'. The parties, as directed, have filed an agreed form of orders. Submissions have been made about some aspects of the form of the determination.