

Determination of native title – matters of form

Sampi on behalf of the Bardi and Jawi People v Western Australia (No 2) [2010] FCAFC

North and Mansfield JJ, 18 August 2010

Issue

This case deals with finalising the form of a native title determination following an appeal brought by the Bardi and Jawi People. The parties were mostly in agreement but the court was asked to determine how the right to care for, maintain and protect should be defined, how the area known as Brue Reef should be described and whether the location of a place that, under traditional law and custom, had to be avoided should be given in the determination.

Background

In March 2010, the Full Court handed down *Sampi on behalf of the Bardi and Jawi People v Western Australia* [2010] FCAFC 26 (*Sampi FC No 1*, summarised in *Native Title Hot Spots Issue 32*), indicating the Bardi and Jawi People's appeal would be allowed in part and the cross-appeals brought by the State of Western Australia and the Western Australian Fishing Industry Council (WAFIC) would be dismissed. The parties were ordered to try to agree as to the form of the orders and the determination of native title reflecting the appeal court's decision or, if there was no agreement, to file submissions and proposed determinations. Agreement was reached on all but the issues noted earlier.

The right to care for, maintain and protect is non-exclusive

After some discussion, the Bardi and Jawi People sought to have this right recognised in the determination as follows:

[T]he right to care for, maintain and protect those [identified] parts [of the determination area], but not including the following rights: (a) the right to access, move about in or on, and use those parts; (b) the right to hunt and gather in those parts; (c) the right to access, use or take any of the resources on those parts; (d) except in relation to any part of the feature known as Lalariny that extends above the mean high water mark – the right to exclude others from that part.

The State, the Commonwealth and WAFIC objected to (d), arguing that it amounted to an assertion of a right to exclude people from Lalariny, a right that was not argued on appeal and was not recognised by the Full Court in its reasons for judgment.

Justices North and Mansfield acknowledged that they did not 'explicitly' state that the right to care for, maintain and protect 'was non-exclusive'. However, 'the reasons make it clear that this is the intention'. As the right to protect 'does not amount to an exclusive right', it was found that proposed subclause (d) 'did not reflect the ... decision and should not be included' in the determination—at [9] to [10].

Brue Reef should be in schedule of 'no native title' areas

Brue Reef, which is around 12 nautical miles off the coast of the Dampier Peninsula, is an area where native title was not recognised. The State and the Commonwealth wanted Brue Reef expressly excluded. The court agreed with Bardi and Jawi People that:

- Brue Reef should be included in the schedule that identified areas over which no native title is recognised;
- an express exclusion was 'unnecessary and apt to confuse';
- this aspect of the determination should reflect the form of the determination made by the primary judge as it should, given Brue Reef was not an issue in the appeal proceedings—at [14].

Lalariny should be precisely located

The Bardi and Jawi People submitted that the determination should not give the exact location of the rock feature known as Lalariny because:

- the location of Lalariny was not given in the determination made by the primary judge and therefore should not be included in the appeal court's determination;
- it would be 'culturally problematic to disclose the precise location' of Lalariny—at [15].

If the court did not accept this, then they asked that it simply be identified by an arrow on the maps pointing to the general location of Lalariny. Given the significance of Lalariny to the Bardi and Jawi People, the court understood their concerns. However:

[I]t would not be appropriate for the Court to avoid inclusion of the location of Lalariny in the Determination. ... [I]ts omission may create significant difficulties in both the enforcement of the native title rights and interests in relation to it, and potentially in relation to any future act processes under ... the *Native Title Act 1993* (Cth)—at [17].

Decision

Having resolved the outstanding 'minor drafting issues', the court made a native title determination 'in accordance with these reasons and the reasons given' in *Sampi FC No 1*. The court recorded its 'appreciation to the parties and their representatives for their assistance in the process of fixing the terms' of the determination—at [19] to [20].

Determination

Native title rights and interests were recognised in relation to parts of the determination area. Those rights and interests are held by the Bardi and Jawi People, described as the descendants of a number of named ancestors and the people adopted by those descendants in accordance with the native title holders' traditional laws and customs. Over those parts of the determination area where native title has not been extinguished to any extent and those areas where any extinguishment must be disregarded, the right of possession, occupation, use and enjoyment as against the whole world is recognised. It was determined that native title is extinguished over the remainder of the determination area.

Over parts of the determination area seaward of mean high watermark (other than Lalariny and Alarm Shoals), native title is comprised of the right to:

- access, move about in and on and use and enjoy those areas;
- to 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.

Native title in relation to Lalariny and Alarm Shoals is comprised of the right to care for, maintain and protect those parts but does not include rights to access, move about in or on, and use those parts, hunt and gather on those parts or access, use or take any of the resources on those parts.

The native title rights and interests are exercisable in accordance with, and subject to, the traditional laws and customs of the Bardi and Jawi people and laws of the State and the Commonwealth, including the common law. There are no exclusive native title rights or interests in:

- waters which flow within any river, creek, stream or brook;
- any natural collection of water into, through, or out of which a river, creek, stream or brook flows; and
- waters from and including an underground water source.

The nature and extent of other rights and interests recognised in relation to the determination area are set out, as is the relationship between the native title rights and interests and those other interests. The areas where ss. 47A or 47B applies are identified.

Native title is to be held in trust by Bardi and Jawi Niimidiman Aboriginal Corporation.