Leave sought to re-open case — Rubibi

Sampi v Western Australia [2003] FCA 463

Beaumont J, 1 May 2003

Issues

This decision relates to an application on behalf of a native title claim group for leave to re-open their case in relation to the facts and, in the event of the grant of that leave, all necessary directions for the hearing of further evidence in light of the High Court decisions in *Commonwealth v Yarmirr* (2001) 208 CLR 1, *Western Australia v Ward* (2002) 191 ALR 1 *Ward* [2002] HCA 28 (*Ward*, summarised in *Native Title Hot Spots* Issue 1 and *Members of the Yorta Yorta Aboriginal Community v Victoria* [2002] HCA 58 (*Yorta Yorta*, summarised in *Native Title Hot Spots* Issue 3).

Background

The evidence and submissions in the principal proceedings brought by the Bardi and Jawi People before Justice Beaumont concluded in November 2001, with the qualification that, by consent of all the parties, the parties reserved the right to make further submissions after the High Court delivered judgment in several native title cases then under consideration.

Following the decisions Yarmirr, Ward and Yorta Yorta, further instructions were obtained from six senior Bardi and Jawi law men and women who had previously given evidence, relating to:

- the existence or otherwise of a normative system of traditional laws and customs in relation to the land and waters of the Bardi and Jawi at sovereignty under which the Bardi and Jawi society existed and which remains in effect today;
- the detailed nature and content of the specific rights and interests in the land and waters possessed under those pre-sovereignty traditional laws and customs and which continue substantially unchanged today; and
- whether or not Bardi and Jawi society, by their traditional laws and customs at sovereignty, had what is described by the common law as 'exclusive possession' of their traditional land and waters—at [4].

The application for leave to re-open was accompanied by statements called 'substances of evidence' from 13 witnesses. It was conceded that the additional evidence had been, at all material times, available to the applicants and, to a limited extent, evidence of that kind had already been led orally. The evidence sought to be led dealt 'in significantly greater detail and particularity, with issues that are central to the ... application for determination of native title'—at [7], [10] and [11].

Beaumont J had difficulty with the general way in which the submissions for leave to re-open were made. There was no attempt to refer any of the statements made in the 'substances of evidence' back to evidence already given, or perhaps, omitted to be given. In his Honour's view, such detail could be crucial for the Federal Court to

decide whether the interests of justice required that leave be given at all, or in some respects only—at [14].

Therefore, given the advanced age of witnesses proposed to be recalled, his Honour considered the only feasible way to manage the litigation at this stage was to take the evidence in order to preserve it (preservation evidence) in the form of oral questions in chief, then to allow cross-examination and then invite submissions on what, if any, of this evidence should be allowed by way of re-opening—at [15].

Decision

Beaumont J stood the matter over to a date to be fixed for the purpose of giving any directions required for the taking of preservation evidence—at [16].