

### CROSSCURRENTS: LAW AND SOCIETY IN A NATIVE TITLE CLAIM TO LAND AND SEA

On 6 December 2017, **Associate Professor Katie Glaskin** spoke to the Kimberley Society on some key issues in the area of native title and the law. Katie is Associate Professor Anthropology and Sociology at the University of Western Australia and among many other publications is the author of the [book](#) *Crosscurrents: Law and society in a native title claim to land and sea* (UWA Press, 2017).

If nothing else the talk demonstrated the difficulties in reconciling native title claims with our very formal system of law.

The starting point was the *Mabo* decision handed down by the High Court of Australia in 1992. Kimberley Society members interested in looking at any of the decisions referred to in this report will find them readily accessible at [www.austlii.edu.au](http://www.austlii.edu.au)

Prior to *Mabo*, the law held that Australia was terra nullius (translated as 'the land belongs to no one').

In *Mabo* that position was dramatically changed, and the High Court held that a form of native title is recognised by the common law of Australia though the onus of proving the existence of native title lay on Indigenous Australians making application for native title. Part of what applicants are required to prove is that the laws and customs they currently practice, and from which native title rights and interests flow, have continuity with those laws and customs that were practiced at the time of acquisition of sovereignty by the British Crown.

Professor Glaskin outlined in brief the history of the *Sampi* claim which was lodged in 1994 and was a claim brought on behalf of two named groups, Bardi and Jawi, to land and sea north of Broome. At the time the claim was brought, Bardi people numbered approximately 950 and the Jawi people numbered approximately 70.

Research on the *Sampi* claim began in 1994. In 2001, most of the evidence in the case was heard before the Federal Court of Australia.

But in 2002 the High Court handed down its decision in the *Yorta Yorta* claim. That decision introduced the need to show the existence of a 'society' to support a valid claim. The applicants sought leave to address the requirements that *Yorta Yorta* introduced, and in 2003, a further few days of evidence in the case were heard.

While native title claimants are required to demonstrate 'continuity' since sovereignty was claimed by the British Crown, courts have been willing to consider continuity back to the time of effective sovereignty, when non-indigenous peoples settled in a region, and to infer back to the time of actual sovereignty on that basis. In the area that was subject to the *Sampi* claim, it was not until the 1880s that there was an influx of pearlsharers followed by the establishment of missions by religious orders.

The court heard expert evidence from anthropologists who worked on the case on behalf of the applicants, as well as from historians. One of the visual historical records in this area is William J. Jackson's 1917 photographs and film footage, which were taken during E.J. Stuart's expedition to the area (all of which was the subject of the [talk](#) to the Society in November 2017 by Peter Dowding). Tindale's (1974) maps were brought into this case (as they are into most native title cases), but there were problems with his delineation of the areas associated with Bardi and with Jawi, with some of the island names attached to the wrong islands. These issues are likely to have been a consequence of him not having visited the area in person.

The Federal Court handed down its decision on *Sampi* in 2005. The mainland portion of the claim was upheld but the claim to sea and islands was rejected, on the basis that Jawi

society had become incorporated into Bardi society. This view of society was one that based on elements such as language, territory and self-identification. The consequence of this was that country associated with Jawi peoples, which was part of the overall claim area, was excluded.

The decision was appealed to the Full Federal Court in 2007, and the Full Court's decision on the appeal was handed down in 2010. On appeal, the court found that the claim to both land and sea was upheld, that native title was recognized over both Bardi and Jawi country. This decision was based on the court's view that the central question about what constitutes a 'society' in native title cases is the body of laws and customs relating to rights and interests in land and waters.

What was apparent was that courts have a difficult task in preferring one body of evidence over another when events took place long ago and where there are few written records, which inevitably are only partial records.

The complexity of the issue can best be appreciated and understood from the following summary of the 2010 decision:

1. "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."

*Geoff Owen*