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### **CHALLENGING THE ASSUMPTIONS OF POSITIVISM: AN ANALYSIS OF THE CONCEPT OF SOCIETY IN *SAMPI ON BEHALF OF THE BARDI AND JAWI PEOPLE V WESTERN AUSTRALIA* [2010] AND *BODNEY V BENNELL* [2008]**

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#### **Abstract**

*The requirement to prove a society united by a body of law and customs to establish native title rights has been identified as a major hurdle to achieving native title recognition. The recent appeal decision of the Federal Court in *Sampi on behalf of the Bardi and Jawi People v Western Australia* [2010] opens the potential for a new judicial interpretation of society based on the internal view of native title claimants. The decision draws on defining features of legal positivism to inform the court's findings as to the existence of a single Bardi Jawi society of 'one people' living under 'one law'. The case of *Bodney v Bennell* [2008] is analysed through comparative study of how the application of the received positivist framework may limit native title recognition. This paper argues that the framing of Indigenous law by reference to Western legal norms is problematic due to the assumptions of legal positivism and that an internal view based on Indigenous worldviews, which see law as intrinsically linked to the spiritual and ancestral connection to country, is more appropriate to determine proof in native title claims.*

## INTRODUCTION

In this paper I examine the concept of society as an element of proof for native title, and argue that it reflects a positivist view of law that is influenced by dubious assumptions about Indigenous legal systems.<sup>1</sup> I will do this by examining two cases with disparate outcomes. The first case is *Sampi on behalf of the Bardi and Jawi People v Western Australia* [2010] FCAFC 26 (the *Bardi Jawi* case) in which the Full Court of the Federal Court found that the Bardi Jawi people were one society for the purposes of native title recognition with exclusive native title rights.<sup>2</sup> The second case is the earlier decision of the Full Court of the Federal Court in *Bodney v Bennell* [2008] FCAFC 63 (the *Single Noongar* case), in which native title rights were found not to exist despite the finding of a single society of Noongar peoples.<sup>3</sup> I argue that these disparate findings stem from the application of a positivist framework to the concept of society, which may operate to limit the recognition of native title. I will begin by outlining some general principles from Hart's theory of legal positivism. I will then discuss the High Court's decision in *Yorta Yorta Aboriginal Community v Victoria*<sup>4</sup> (*Yorta Yorta HCA*) to show how legal positivism has influenced the development of 'proof' of native title. I will consider commentary that analyses the concept of society in native title jurisprudence as it relates to legal positivism and then analyse the above cases to demonstrate how legal positivism is applied. Finally I propose alternative approaches to the concept of society, which are grounded in Indigenous ontologies and thus more likely to result in affirmative recognition of native title rights.

## LEGAL POSITIVISM AND H.L.A. HART

The requirement to prove a society for the purpose of native title recognition draws upon theories of H.L.A. Hart, one of the leading Western legal scholars of the twentieth century. The search for a society or normative system of rules clearly reflects Hart's conception of law as a system of rules which govern human conduct.<sup>5</sup> Hart's theory departs from that of earlier positivists such as Bentham and Austin, who viewed law as a habit of obedience to the unlimited power of the sovereign. For Hart, this explanation does not adequately explain the continuing authority of law where there is a change in the individual sovereign, the limitations on sovereign power that exist in modern states, and concepts of popular sovereignty.<sup>6</sup> Hart, therefore, sees the concept of rules as necessary to an understanding of 'law' that transcends the coercive orders or exercise of sovereign power which is habitually obeyed.<sup>7</sup>

Hart sees law as the union of primary and secondary rules. Simply put, primary rules govern human behaviour. In respect of primary rules, Hart draws distinctions however, between legal rules, moral obligations and social rules. The difference is explained by the internal aspect of

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<sup>1</sup> An earlier version of the paper was presented at the AIATSIS Native Title Conference 2010. The author acknowledges the helpful comments of Mark Thomas and Loretta de Plevitz on the draft of this paper and those of the anonymous peer reviewers.

<sup>2</sup> *Sampi on behalf of the Bardi and Jawi People v Western Australia* [2010] FCAFC 26

<sup>3</sup> *Bodney v Bennell* [2008] FCAFC 63

<sup>4</sup> *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422

<sup>5</sup> Marett Leiboff and Mark Thomas, *Legal Theories: Contexts and Practices*, Lawbook co., Sydney, 2009, p. 297.

<sup>6</sup> H.L.A. Hart, *The Concept of Law*, 2nd ed, Oxford University Press, London, 1972, pp. 70-77.

<sup>7</sup> Hart, above n 6, pp.70-75.

legal rules which invoke a sense of obligation and hence the voluntary acceptance of them as a normative standard.<sup>8</sup> For Hart, however, a system based on primary rules alone is not sufficient to explain the way rules are created, how they operate in practice, or how rights and interests are varied.<sup>9</sup> Hart, therefore, posits secondary rules which confer powers, both public and private, that encompass the formal aspects of law.<sup>10</sup>

For Hart, secondary rules are necessary to overcome a number of defects arising in systems of law governed only by primary rules, including uncertainty, the static character of primary rules and inefficiency. There are three types of secondary rules: rules of change; rules of adjudication; and the rule of recognition. The development of secondary rules involves a step from the 'pre-legal to legal world'.<sup>11</sup> Rules of change are a remedy for the static character of primary rules, conferring power on those authorised to change the law, processes for changing law, and the adjustment of individual rights and interests.<sup>12</sup> Rules of adjudication are the remedy for inefficiency, which exists where disagreements regarding law are not able to be resolved quickly, and confers power and processes to determine legal disputes.<sup>13</sup> The rule of recognition is the remedy for uncertainty, and identifies that which gives the law its authority and validity.<sup>14</sup> The rule of recognition may have a variety of sources—it may be an 'authoritative text', an inscribed monument, or a process by which the criteria of validity is applied.<sup>15</sup> It also has an internal aspect in that it represents how one 'acts-in-the-law' and thus accepts the law as a standard by which to live.<sup>16</sup> This is what Hart calls a 'critical reflective attitude'.<sup>17</sup>

Hart's concept of law distinguishes between 'simple' or 'primitive' forms of social structures ('tribal societies tightly bound by kinship'), governed only by primary rules, and 'complex' legal systems consisting of primary and secondary rules (modern states).<sup>18</sup> In simple societies, knowledge of the law is considered to be diffuse and therefore the majority of people must adopt an internal view of the law as it provides the basis for both conformity and criticism necessary to ensure social stability.<sup>19</sup> In a modern state, however, the idea that the majority of the population would have full knowledge of the law is considered 'absurd', therefore only legal officials are attributed knowledge of law and hence require a 'critical reflective attitude'.<sup>20</sup> This aspect of Hart's theory has been criticised primarily because he provides little substantial evidence to

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<sup>8</sup> Hart, above no 6, p. 88.

<sup>9</sup> Hart, above no 6, p. 79.

<sup>10</sup> Hart, above n 6, p. 79.

<sup>11</sup> Hart, above n 6, p. 91.

<sup>12</sup> Hart, above n 6, p. 93.

<sup>13</sup> Hart, above n 6, p. 94.

<sup>14</sup> Hart, above n 6, p. 93.

<sup>15</sup> Hart, above n 6, p. 92.

<sup>16</sup> Hart, above n 6, p.111.

<sup>17</sup> Hart, above n 6, p. 57.

<sup>18</sup> Hart, above n 6, p. 59.

<sup>19</sup> Hart, above n 6, p 59.

<sup>20</sup> Hart, above n 6, p 59.

support his position<sup>21</sup> that clearly privileges codified bodies of law, and views Indigenous legal structures as something less than ‘law’.

For Hart, so-called ‘primitive’ societies lack secondary rules and by implication can only change by a ‘slow process of growth’.<sup>22</sup> Indigenous law is thus seen as ‘static’ and fixed, unlike the common law which is valued for its flexibility and capacity to adapt to changing social conditions. The application of positivist assumptions also necessitates an unreasonably high level of conformity to the ‘law’ to establish the relevant rule of recognition that ensures the validity of the normative system. Analysing these cases through a positivist lens may reveal how courts deal with the issue of change and continuity in Indigenous societies, which as I will explain below is central to legal concepts of ‘proof’ for native title as outlined by the High Court in *Yorta Yorta HCA*.

### **YORTA YORTA—A POSITIVIST PARADIGM?**

In *Yorta Yorta HCA* the High Court considered the meaning of section 223 of the *Native Title Act 1993* (Cth) which defines native title as the rights and interests ‘possessed under the traditional laws acknowledged, and the traditional customs observed, by the Aboriginal peoples or Torres Strait Islanders’ where those laws demonstrate ‘a connection to lands or waters’ and ‘the rights and interests are recognised by the common law of Australia’.<sup>23</sup> The majority judgment of Gleeson CJ, Gummow and Hayne JJ significantly expanded the requirements of proof contained in this provision through its interpretation of ‘native title rights and interests’, what constitutes ‘traditional laws and customs’, and by anchoring these terms to positivist concepts of law. For the majority judges, because the subject of native title is ‘rights and interests’, they determined native title to be derived from ‘rules’ having ‘normative content’, which to be ‘traditional’ must be derived from the ‘normative rules’ of Indigenous societies as they existed upon the British assertion of sovereignty.<sup>24</sup> The need for native title rights and interests to be expressed by reference to ‘normative rules’ was also seen to encompass a further requirement—that the laws and customs arise from a ‘society’, which it defined as a ‘a body of persons united in and by its acknowledgement and observance of a body of laws and customs’.<sup>25</sup> In addition, because section 223 refers to rights and interests ‘possessed’, the majority judges interpreted this to mean that ‘if the society out of which the body of laws and customs arises ceases to exist as a group which acknowledges and observes those laws and customs, those laws and customs cease to have

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<sup>21</sup> Margaret Davies, *Asking the Law Question*, Lawbook co., Sydney, 2008, pp.104, 118, questions Hart’s distinction as ‘he has not done any empirical analysis of actual legal systems...designated as “primitive” and others “developed” (designations which are in themselves political),’ concluding that Hart’s theory relies on the presumption that a ‘different type of legal system is not a proper legal system’. Leiboff and Thomas (above n 5, p.304), state that Hart ‘provides no evidence, such as anthropological studies of simple societies, to support this idea’. Cf Neil MacCormick, *H.L.A. Hart*, Stanford University Press, Stanford, 1981, p.100, argues, ‘Hart rightly contends that there is anthropological evidence which shows that known primitive communities do have social norms on just such matters as he deals with ... however Hart prefers to call them “social structure(s)”’.

<sup>22</sup> Hart, above n 6, p. 90.

<sup>23</sup> *Native Title Act 1993* (Cth) - section 223.

<sup>24</sup> *Members of Yorta Yorta Community v State of Victoria & Ors* (2002) 214 CLR 422, 443–444. The need for continuity was underpinned by the judges view that upon the British assertion of sovereignty there could be no parallel system of law therefore native title rights and interests must be derived from the normative rules of the ‘pre-sovereignty’ laws and customs of Indigenous peoples—the intersection of normative systems doctrine, 443.

<sup>25</sup> *Members of Yorta Yorta Community v State of Victoria & Ors* (2002) 214 CLR 422, 445.

continued existence and vitality'.<sup>26</sup> Thus the majority judges formulated a test whereby native title claimants must demonstrate a continuous normative system of law and customs that support native title rights and interests, arising from a society of people united by law and custom, from the time of the British assertion of sovereignty to the present.<sup>27</sup>

In acknowledging the 'profound impact' European 'settlement' had on Indigenous Australians, the High Court conceded that some change or adaptation to traditional laws and customs 'will not necessarily be fatal to a native title claim.'<sup>28</sup> What was important for the majority judges was the 'significance of change', and 'whether the law and custom could still be seen to be traditional law and traditional custom.'<sup>29</sup> Therefore, the native title rights and interests may include those arising from traditional rules of transmission or changes to law and custom as 'contemplated' by the traditional law and custom of the group.<sup>30</sup>

The majority judges confirmed and acknowledged decisive limitations of positivist jurisprudence in this context. They envisaged problems with the focus on a normative system, 'particularly if it were to be understood as confined in its application to systems of law that have all the characteristics of a developed European body of written laws'.<sup>31</sup> They also identified problems in defining traditional laws and customs due to the constructivist characterisation of 'rules' and the distinctions drawn in positivist legal theory between 'legal rules', 'habitual behaviour' and 'moral obligations'.<sup>32</sup> The majority judges note that:

To speak of such rights and interests being possessed under, or rooted in, traditional law and traditional customs might provoke much jurisprudential debate about the difference between what H.L.A. Hart referred to as 'merely convergent habitual behaviour in a social group' and legal rules. The reference to traditional customs might invite debate about the difference between 'moral obligation' and legal rules...Likewise, to search in traditional law and traditional customs for an identified, even an identifiable, rule of recognition which would distinguish between law on the one hand, and moral obligation or mere habitual behaviour on the other, may or may not be productive.<sup>33</sup>

Further they add:

In so far as it is useful to analyse the problem in the jurisprudential terms of the legal positivist, the relevant rule of recognition of a traditional law or custom is a rule of recognition found in the *social structures* of the relevant indigenous society as those structures existed at sovereignty.<sup>34</sup>

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<sup>26</sup> *Members of Yorta Yorta Community v State of Victoria & Ors* (2002) 214 CLR 422, 445.

<sup>27</sup> Failure to meet any of these criteria would result in a finding that native title is extinguished, as was the case in *Yorta Yorta HCA* where the claimants were said to 'no longer constitute the society out of which traditional laws and customs sprang', 458.

<sup>28</sup> *Members of Yorta Yorta Community v State of Victoria & Ors* (2002) 214 CLR 422, 455.

<sup>29</sup> *Members of Yorta Yorta Community v State of Victoria & Ors* (2002) 214 CLR 422, 455.

<sup>30</sup> *Members of Yorta Yorta Community v State of Victoria & Ors* (2002) 214 CLR 422, 443.

<sup>31</sup> *Members of Yorta Yorta Community v State of Victoria & Ors* (2002) 214 CLR 422, 442.

<sup>32</sup> *Members of Yorta Yorta Community v State of Victoria & Ors* (2002) 214 CLR 422, 442-443.

<sup>33</sup> *Members of Yorta Yorta Community v State of Victoria & Ors* (2002) 214 CLR 422, 442-443.

<sup>34</sup> *Members of Yorta Yorta Community v State of Victoria & Ors* (2002) 214 CLR 422, 446, emphasis added.

And then:

The caveat we have entered about the utility of jurisprudential analysis is not unimportant. Leaving aside the questions of choice between different schools of analytical thought, *any analysis of the traditional laws and customs of societies having no well-developed written language by using analytical tools developed in connection with very differently organised societies is fraught with evident difficulty.*<sup>35</sup>

Clearly the statements of the majority judges in *Yorta Yorta HCA* indicate explicit awareness that the methodological suppositions of positivism may not be suited to the task of identifying traditional laws and customs that constitute the ‘normative rules’ of an Indigenous ‘society united by a body of law and customs’. However, the judges choice of legal positivism, which privileges particular types of legal institutions, as the theoretical framework to interpret the meaning of ‘traditional laws and customs’ under the *Native Title Act*, created a framework whereby Western legal norms could be invoked to uphold or deny native title rights.

### COMMENTARY ON THE CONCEPT OF SOCIETY

The concept of society in native title jurisprudence has been the subject of much commentary which highlights the significance of this element of proof. In the *Native Title Report 2007*, Tom Calma, the former Aboriginal and Torres Strait Islander Social Justice Commissioner, said that the need to prove a ‘normative society’ is not a legislative requirement but rather a hurdle imposed by the courts which has been interpreted in a way that has limited the rights and interests Indigenous peoples may claim.<sup>36</sup> Calma has recommended amendments to the *Native Title Act* to introduce a ‘presumption of continuity’ for the society and traditional laws and customs of native title claimants<sup>37</sup>—matters which are currently before the Australian Senate in the Native Title Amendment (Reform) Bill 2011.<sup>38</sup> The requirement that native title claimants constitute a society remains problematic, primarily for Indigenous groups that have experienced substantial interruption as the result of colonisation.<sup>39</sup> The commentary also highlights how judicial bias towards a rigid threshold in the establishment of the concept of society places undue focus on the group asserting native title and influences how the native title group is framed. The influence of positivism is noted as further evidenced in the normative system approach, raising questions

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<sup>35</sup> *Members of Yorta Yorta Community v State of Victoria & Ors* (2002) 214 CLR 422, 447, emphasis added.

<sup>36</sup> Tom Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2007*, HREOC, Sydney, 2007, p.6.

<sup>37</sup> Tom Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2009*, HREOC, Sydney, 2009, p.84. See also Justice R French, *Lifting the burden of native title – some modest proposals for improvement*, Australian Law Reform Commission, *Reform 93, 2009*, available at <http://www.austlii.edu.au/au/other/alrc/publications/reform/reform93/3.html> (accessed 11 May 2011).

<sup>38</sup> Presented by Australian Greens Senator Rachael Seiwart on 21 March 2011, available at <http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22legislation%2Fbillhome%2Fs817%22>.

<sup>39</sup> See, for example, Russell Bartlett, *Native Title in Australia*, 2<sup>nd</sup> ed, Butterworths, Sydney, 2004, p.151; David Lavery, ‘A Greater Sense of Tradition: The Implications of the Normative System Principles in Yorta Yorta for Native Title Determination Applications’, *Murdoch University Electronic Journal of Law*, Vol. 10, No. 4, 2003, p.16; Lisa Strelein, ‘Members of the Yorta Yorta Aboriginal Community v Victoria [2002] HCA 58 (12 December 2002) – Comment’ (February 2003), *Land, Rights Laws: Issues of Native Title*, vol 2, Issues Paper no.21, Native Title Research Unit, AIATSIS, 2003; Simon Young, *The Trouble with Tradition: native title and cultural change*, Federation Press, Sydney, 2008, p.267.

about the relevance of the internal view of applicants with respect to the credentialed finding of fact required in native title claims. The following section will briefly outline commentary addressing the concept of society as it relates to native title in legal literature.

### **Framing the native title group**

Strelein highlights how the High Court's decision in *Yorta Yorta HCA* represents a major shift in the requirements of proof of native title with the nature of the group emerging as a 'fundamental threshold question for native title claimants', noting that outcome rested on the trial judges' perceptions of the group. This perception may have been influenced by 'pre-existing biases and prejudices' and limited by 'the ability of a non-Indigenous judiciary to conceive the contemporary expressions of Indigenous identity, culture and law as consistent with the idea of a pre-sovereign normative system'.<sup>40</sup> Palmer states that larger group formations tend to conform more readily to native title doctrine,<sup>41</sup> which may lead to problems in the adversarial context as smaller groups are more likely to be internally consistent and larger groups more prone to 'cultural dissonance' which may be perceived as 'disunity and the admission of two or more different societies'.<sup>42</sup> Palmer identifies difficulties in trying to interpret 'society' because of the legal significance placed on this term, and the nexus between a society and laws and customs, which in his view is 'entrenched in jurisprudential thinking'.<sup>43</sup> For Palmer, this results in a legal perspective that sees society as a 'thing' or 'repository' of laws and customs as opposed to anthropological approaches where society is viewed as a 'set of relationships'.<sup>44</sup> McIntyre argues that the society needs to be framed as the broadest group united by traditional laws and customs because clan groups are not regarded as *creating rules* and thus cannot be a society in their own right.<sup>45</sup> Lavery also discusses how the 'greater meaning' attributed to 'traditional' by the High Court has implications for the way native title claimant groups are 'framed', with courts unlikely to recognise small clan based claims.<sup>46</sup> Hiley describes this as a 'rights and interests qualifier', with the relevant society being one that regulates rights and interests in land.<sup>47</sup>

### **The influence of positivism**

The influence of positivism on the majority judges in *Yorta Yorta HCA* has been noted by a number of commentators. The 'normative systems' approach has been criticised by Young as implying 'detail' and 'completeness' leading to 'definitional over-specificity and over-particularity in the search for cultural constancy and continuity'.<sup>48</sup> Young is critical of the concept of society, seeing this as a 'new rationalisation' of this strict approach which invokes a

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<sup>40</sup> Strelein, above n 39, p.6

<sup>41</sup> Kingsley Palmer, 'Societies, Communities and Native Title', *Land, Rights, Laws: Issues of Native Title*, vol. 4, Issues Paper no. 1, Native Title Research Unit, AIATSIS, 2009; see also Lavery, above, n 39, p.67.

<sup>42</sup> Palmer, above n 41, p.14.

<sup>43</sup> Palmer, above n 41, p.3.

<sup>44</sup> Palmer, above n 41, p.6.

<sup>45</sup> Greg McIntyre, 'Native title rights after Yorta Yorta', *James Cook University Law Review*, vol. 1, no. 9, 2003, p. 278, emphasis added.

<sup>46</sup> Lavery, above n 39, p.76.

<sup>47</sup> Graham Hiley, *Native Title News*, Lexis Nexis, vol 8, no 9, 2008, p.1.

<sup>48</sup> Simon Young, above n 39, p. 267.

‘scale of organisation’ mindset which in his view is ‘not receiving the clear rebuke that it deserves according to contemporary understandings of Aboriginal cultures’.<sup>49</sup>

Henriss-Anderson discusses how the majority judges draw upon analytical jurisprudence (or legal positivism)<sup>50</sup> in their interpretation of traditional laws and customs.<sup>51</sup> She notes, however, a shift in emphasis from matters of form to the content of traditional laws and customs to establish ‘continuity’ with respect to law and custom and the society they are derived from.<sup>52</sup> Henriss-Anderson suggests there is a leap in logic from the need to prove a normative system to the corresponding requirement that the relevant normative system is one that ‘came under a new sovereign order’, in other words, that it is ‘traditional’.<sup>53</sup> Here Henriss-Anderson reveals how the requirement to prove a normative system becomes synonymous with the need to show an Indigenous society, which has continued existence and vitality.<sup>54</sup>

Anker’s analysis of *Yorta Yorta HCA* also highlights the influence of positivism in the majority judges’ reasoning that ‘normative rules’ must form the basis of traditional laws and customs.<sup>55</sup> In her view, however, the application of positivist legal theory does not go far enough and should also take into account the ‘internal sense of obligation felt by those subject to the normative rules’, which would assist in identifying the difference between merely convergent habitual behavior and normative rules.<sup>56</sup> This, she argues, would shift the inquiry to whether the claimants act from a sense of obligation arising from the traditional normative system *as it is meaningful to them* as law in the ‘present tense’.<sup>57</sup> On the other hand, Brennan is skeptical of government respondent submissions that the internal views of claimants are determinative of the existence of a society, which he argues may detract from an ‘objective’ analysis of ‘cultural homogeneity or similarity, or intercourse between groups’.<sup>58</sup> The dearth of critical literature exploring the relevance of Hart’s theory of positivism and how it informs the *type* of the laws and customs that have a bearing on whether a native title group constitutes a society requires further attention. These central questions will be explored in the analysis of cases below.

## THE BARDI JAWI CASE

In *Sampi v WA* [2005] FCA 777 (*Sampi*) the Bardi and Jawi people claimed native title as two closely related but distinct peoples who were united in law and custom. They argued their unity as a society was demonstrated through their common belief in creation ancestors, intermarriage, ceremony and culture, and their sharing of land and sea country. For the Bardi Jawi, their local land holdings were *burus*, however, their laws and customs place constraints upon ‘ownership’ of

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<sup>49</sup> Simon Young, above n 39, p.282.

<sup>50</sup> Leiboff and Thomas (above n 5, p.29) note that legal positivism is sometimes called analytical jurisprudence.

<sup>51</sup> Diana Henriss-Anderson, ‘Case Note: *Yorta Yorta v Victoria* (2003)’ 9 *James Cook University Law Review*, Special Issue, 2002/2003, p.337.

<sup>52</sup> Henriss-Anderson, above n 51, pp. 337-339.

<sup>53</sup> Henriss-Anderson, above n 51, p.338, citing *Yorta Yorta* at [89].

<sup>54</sup> Henriss-Anderson, above n 51, p.338.

<sup>55</sup> Kirsten Anker, ‘Law in the Present Tense: Tradition and Cultural Continuity in Members of the Yorta Yorta Aboriginal Community v Victoria’, *Melbourne University Law Review*, vol 27, no.1, 2004.

<sup>56</sup> Anker, above n 55, p.16.

<sup>57</sup> Anker, above n 55, p.16.

<sup>58</sup> Sean Brennan, ‘Recent Developments in Native Title Case Law’, Human Rights Law Bulletin Seminar, HREOC, Sydney, 4 June 2007, p.26. Brennan is referring to the argument raised by the Commonwealth in *Risk v NT* (2007) FCAFC 46, however, the Full Court declined to deal with this issue [6]-[7].



specific tracts of country, which are respected by both Bardi and Jawi peoples.<sup>59</sup> The respondents to the claim denied the existence of a single Bardi Jawi society due to use of distinct self-referents (both internally and externally), distinct ecological zones and differences in languages,<sup>60</sup> with Western Australia and the Commonwealth arguing they were in fact two societies, and the Western Australian Fishing Industry Council submitting Bardi Jawi is a new society.<sup>61</sup> All respondents contended that land holdings were at the clan level.<sup>62</sup> The Western Australian Government argued that a shared normative system of law and customs was not an exhaustive test of the existence of a society and given the broad definition of this concept the court should have regard to a ‘constellation of factors’ and the picture they yield of the group.<sup>63</sup> Justice French agreed with this general proposition, stating that while a common body of law and custom is a ‘powerful indicator’ of group identity, and traditional assertion will be another, group identity of itself does not deny the existence of a wider society.<sup>64</sup> Justice French said, however, that society should be given its ordinary meaning, and ‘must not become a “trojan horse” for introduction of novel elements or criteria foreign to the requirements of the Act and the common law’, nor for ‘importing social, scientific or jurisprudential criteria’.<sup>65</sup>

Justice French’s findings were that while Bardi Jawi were one society in contemporary times he could not infer they were a society at colonisation as they had different but related languages, and were regarded as distinct peoples occupying discrete territories in the early ethnographic evidence.<sup>66</sup> He also found that he could not draw such an inference from the Aboriginal evidence of their common creation cosmology and similar systems of law and customs in relation to land.<sup>67</sup> Justice French formed the view that the Jawi people had been subsumed into Bardi society in recent times, noting that there were no rules of succession that would allow incorporation of Jawi territory into Bardi territory.<sup>68</sup> These findings were reflected in the determination made by the court, which only covered what was regarded as Bardi country.

On appeal to the Full Court of the Federal Court in *Sampi v Western Australia* [2010] (*Sampi FCA*) the claimants argued that the primary judge misapplied the *Yorta Yorta HCA* principles by taking into account irrelevant factors in forming the conclusion that they were not one society at the time of colonisation.<sup>69</sup> The Full Court of the Federal Court, comprising Justices North and Mansfield, found that the primary judge had erred in failing to draw an inference that Bardi and Jawi formed a single society at the time of colonisation—the central question being whether the group acknowledged the same body of law and customs relating to rights and interests in land and waters.<sup>70</sup> The Full Court found that the anthropological evidence supported the view that the Bardi Jawi constituted a single society due to a common belief in ‘The Law’ as the basis of their

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<sup>59</sup> *Sampi v Western Australia* [2005] FCA 777 at [976].

<sup>60</sup> *Sampi v Western Australia* [2005] FCA 777 at [980].

<sup>61</sup> *Sampi v Western Australia* [2005] FCA 777 at [982]-[984].

<sup>62</sup> *Sampi v Western Australia* [2005] FCA 777 at [982].

<sup>63</sup> *Sampi v Western Australia* [2005] FCA 777 at [979].

<sup>64</sup> *Sampi v Western Australia* [2005] FCA 777 at [979].

<sup>65</sup> *Sampi v Western Australia* [2005] FCA 777 at [1042]. Justice French’s views were adopted by the Full Court in *Alyawarr FCA*, of which he was a member—see discussion below.

<sup>66</sup> *Sampi v Western Australia* [2005] FCA 777 at [1017], [1042]-[1046].

<sup>67</sup> *Sampi v Western Australia* [2005] FCA 777 at [1017], [1043]-[1044].

<sup>68</sup> *Sampi v Western Australia* [2005] FCA 777 at [1017], [1046].

<sup>69</sup> *Sampi on behalf of the Bardi and Jawi People v Western Australia* [2010] FCAFC 26, [37].

<sup>70</sup> *Sampi on behalf of the Bardi and Jawi People v Western Australia* [2010] FCAFC 26, [50]-[51].

system of land holdings, and the testimony of Aboriginal witnesses of being ‘one people’ living under ‘one law’.<sup>71</sup> The Full Court regarded as seminal the internal view of claimants as relevant to the issue of whether they were a single society at the time of colonisation.<sup>72</sup> Here the emphasis was on the view held by the Bardi Jawi that they were united in the acknowledgement of one law; rather than the view that they were distinct but closely related peoples.

In *Sampi FCA*, the Court also saw as significant the assumption of responsibility over deceased or vacant estates, which in their view demonstrated a broader system of law, which sustained the connection between people and country.<sup>73</sup> The Full Court concluded that the ‘elaborate nature of the rules’ and the ‘structural features’ of the community made it unlikely that the system had evolved post-sovereignty, therefore there was evidence to infer that Bardi Jawi were a society united by a body of laws and customs at sovereignty.<sup>74</sup> The finding of one society in this case resulted in the Full Court making, appropriately, a comprehensive native title determination inclusive of country previously regarded as distinctly Jawi territory.<sup>75</sup>

The Full Court also adopted the respondents’ submission that it is appropriate to have regard to a constellation of factors to identify the determinative features of what constitutes society—the court’s reasoning being that the current case served to highlight how the claimants could point to myriad factors to support their claim. In this regard, the court viewed the question of society as the ‘ultimate fact’ on which there are many constitutive facts that may support the inference of a continuing society from pre-sovereignty to the present.<sup>76</sup>

The Full Court’s acceptance of the internal view of the Bardi Jawi applicants concurs with the view of Justice Mansfield in *Alyawarr v NT* [2004] FCA 472 (*Alyawarr FCA*) which involved a native title claim by the Alyawarr, Kaytetye, Warumungu, Wakaya Aboriginal people representing multiple estate and language groups.<sup>77</sup> In finding that the claimant group was a society, Justice Mansfield accepted the anthropological evidence and that of the Aboriginal witnesses who described themselves as ‘one family’ and ‘one mob’ living under traditional laws and customs governed by Altyerr law, sharing common creation ancestors.<sup>78</sup> These findings were not disturbed on appeal to the Full Court of the Federal Court in *NT v Alyawarr* [2005] FCAFC 135 (*Alyawarr FCA*) with Justices Wilcox, French and Weinberg endorsing the trial judge’s findings that the claimants were a single society, implicitly accepting the claimants’ internal view as to their law. The Full Court also adopted and expanded upon the ordinary meaning of society advanced by Justice French in *Sampi* outlined above, describing it as a ‘repository’ for ‘traditional law and customs’ and a ‘conceptual tool’ to be used in the application of the NTA.<sup>79</sup>

Given this statement it would appear that in *Alyawarr FCA* the Full Court accepted the applicants’ perception of themselves as one people living under one law at face value without attributing any particular jurisprudential meaning to the term. The Full Court in *Alyawarr FCA*

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<sup>71</sup> *Sampi on behalf of the Bardi and Jawi People v Western Australia* [2010] FCAFC 26, [59]-[62].

<sup>72</sup> *Sampi on behalf of the Bardi and Jawi People v Western Australia* [2010] FCAFC 26, [77].

<sup>73</sup> *Sampi on behalf of the Bardi and Jawi People v Western Australia* [2010] FCAFC 26, [53].

<sup>74</sup> *Sampi on behalf of the Bardi and Jawi People v Western Australia* [2010] FCAFC 26, [65]-[66].

<sup>75</sup> *Sampi on behalf of the Bardi and Jawi People v Western Australia* [2010] FCAFC 26, [78].

<sup>76</sup> *Sampi on behalf of the Bardi and Jawi People v Western Australia* [2010] FCAFC 26, [77].

<sup>77</sup> *Alyawarr v NT* [2004] FCA 472, [2].

<sup>78</sup> *Alyawarr v NT* [2004] FCA 472, [135]-[139].

<sup>79</sup> *NT v Alyawarr* [2005] FCAFC 135, [78].

also endorsed the findings of Justice Sundberg in *Neowarra v WA* [2003] FCA 1402 (*Neowarra*) that the Ngarinyin, Wunanbal and Worrora people were one community with their law transcending both clan and language groupings,<sup>80</sup> despite a disjuncture between the groups self descriptor of ‘three tribes’, and the ‘anthropological construct’ of ‘Wanjina-Wungurr.’<sup>81</sup> What is clear from *Sampi FCA*, however is that the internal view of applicants was relevant to ascertaining their collective view as a society living under one law and not the view of their identity as distinct but closely related groups. This finding corresponds to Hart’s internal aspect of the rule of recognition, that which gives authority and validity to the law of the Bardi Jawi.

The findings in *Sampi FCA* that the assumption of responsibility over deceased or vacant estates showed an overarching system of law also reflects Hart’s notion of secondary rules, specifically rules of change. A number of other cases have also pointed to rules of succession as indicating a unity of law beyond what respondents have contended are clan based ownership rights. For example, in *Neowarra* Justice Sundberg noted that there was a ‘process of succession’ whereby an adjoining clan would take over ownership of country if a clan died out,<sup>82</sup> or adopt a single remaining clan member.<sup>83</sup> In *Alyawarr FCA*, Justice Mansfield found that the evidence showed ‘significant crossing or sharing of such responsibilities’ under a broader communal law, and a process of succession whereby caretakers take over responsibility to ensure that ‘country is not left empty’ or until a person is ‘grown up’ to look after it.<sup>84</sup> Similarly, in *Rubibi v WA* 2005 FCA 1205 Justice Merkel found that ‘contingency provisions’ within the traditional laws and customs of the Yawuru people, which enable succession of rights and interests in land and changes to group membership, were permissible changes within the *Yorta Yorta HCA* principles.<sup>85</sup> Indeed these ‘contingency provisions’ were described by Professor Sampson as ‘secondary rules’.<sup>86</sup>

These cases demonstrate that two elements of positivist jurisprudence were central to the courts’ findings of a society of people united by a body of law and custom and thus addressing fundamental threshold issues in native title claims. Firstly, the courts’ consideration of the internal view of applicants with respect to their acknowledgement of ‘the Law’ as ‘law’, mirrors Hart’s critical reflective attitude—which is an intrinsic part of the rule of recognition and the accepted norms guaranteeing the validity of the legal system. Secondly, the courts’ references to rules relating to the succession of rights are consistent with Hart’s categorisation of secondary rules in the form of rules of change. As outlined above, rules of change serve the function of remedying the static nature of primary rules and thus give a legal system the capacity to adjust the rights and interests of parties through rules of transmission or succession. The existence of secondary rules also highlights the continuing authority of Indigenous legal or normative systems (perhaps despite the British assumption of sovereignty over Indigenous lands). While there is little doubt that the principles of legal positivism can be found in these successful native title cases, their absence can factor in unsuccessful findings in relation to the continuity of society and directing inquiry into whether traditional laws and customs have been ‘substantially interrupted’. I will now examine the *Single Noongar* case to demonstrate this point.

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<sup>80</sup> *Neowarra v WA* [2003] FCA 1402, [84].

<sup>81</sup> *Neowarra v WA* [2003] FCA 1402, [108].

<sup>82</sup> *Neowarra v WA* [2003] FCA 1402, [150], [313].

<sup>83</sup> *Neowarra v WA* [2003] FCA 1402, [312]-[314].

<sup>84</sup> *Alyawarr v NT* [2004] FCA 472, [132], [148].

<sup>85</sup> *Rubibi v WA* 2006 FCA 1205, [266].

<sup>86</sup> *Rubibi v WA* 2006 FCA 1205, [289].

## THE SINGLE NOONGAR CASE

The Single Noongar claim over a large area of south-west Western Australia was made on behalf of 218 Noongar families comprising some 6,000 Noongar peoples. The Noongar peoples also argued that they were ‘one people’ living under ‘one law’, sharing a common identity and distinguishing themselves from neighbouring groups, the Wangais and Yamatjis. They gave evidence of shared creation story, spiritual beliefs, moiety systems, kinship and marriage rules, death rituals, and hunting and gathering practices.<sup>87</sup> They also gave evidence about the Noongar land ownership system,<sup>88</sup> and that the substance of law was enforced by the Noongar leaders.<sup>89</sup> At first instance the trial judge was asked to consider the ‘separate question’ of whether the claimants had native title rights and interests in the Perth metropolitan area.

In *Bennell v WA* [2006]<sup>90</sup> Justice Wilcox found that the present day Noongar network had a continuous existence from the time of asserted sovereignty and continued to acknowledge their traditional laws and customs in an adapted form. The primary judge found that changes in land holding rules were the ‘logical result’ of the need to marry into a different family group and the increased mobility of the Noongar peoples as a result of colonisation.<sup>91</sup> Justice Wilcox interpreted *Yorta Yorta HCA* to mean that he should consider whether the normative rules of the Noongar people were sourced in the pre-sovereignty society or a different society<sup>92</sup> concluding that the laws and customs observed by the Noongar people were derived from a pre-sovereignty source and thus supporting native title rights over Perth.

On appeal in *Bodney v Bennell* [2008] FCAFC 63, the Full Court comprising Justices Finn, Mansfield and Sundberg overturned the findings of the trial judge. The Full Court assumed for the purpose of the appeal that the Noongar people constituted a single society at colonisation, however the court was of the view that the trial judge had conflated the ongoing existence of the Noongar ‘community’ with the continuation of traditional laws and customs, and therefore had not given adequate consideration to whether the normative system was traditional (in the sense that it had continued substantially uninterrupted from generation to generation).<sup>93</sup> The court stated:

Change and adaptation will not necessarily be fatal. So long as the changed or adapted laws and customs continue to sustain the same rights and interests that existed at sovereignty, they will remain traditional. An enquiry into continuity of society, divorced from an inquiry into continuity of the pre-sovereignty normative system, *may mask unacceptable change* with the consequence that the current rights and interests are no longer those that existed at sovereignty, and thus not traditional.<sup>94</sup>

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<sup>87</sup> *Bodney v Bennell* [2008] FCAFC 63, [53]-[61].

<sup>88</sup> *Bodney v Bennell* [2008] FCAFC 63, [62]-[66].

<sup>89</sup> *Bodney v Bennell* [2008] FCAFC 63, [58].

<sup>90</sup> *Bennell v WA* [2006] FCA 63.

<sup>91</sup> *Bennell v WA* [2006] FCA 63, [685].

<sup>92</sup> *Bennell v WA* [2006] FCA 1243, [791].

<sup>93</sup> *Bodney v Bennell* [2008] FCAFC 63, [64].

<sup>94</sup> *Bodney v Bennell* [2008] FCAFC 63, [74], emphasis added.

Therefore the Full Court found it necessary to scrutinise changes to Noongar laws and customs to determine if the normative system was traditional, which by implication would show the continuity of a pre-sovereignty Noongar society. The Full Court found the trial judge had failed to establish whether changes in the land holding rules from pre-sovereignty ‘estates’ and ‘runs’ to the current system of ‘boodjas’ were a permissible adaptation or change, thus concluding that ‘boodjas are a post-sovereignty phenomenon’ and therefore not traditional.<sup>95</sup> Further, the Full Court found that while ‘permission rules’ still existed in Perth they were not universally followed and that this was further evidence of the discontinuity of traditional laws and customs.<sup>96</sup> Given the court’s findings, the orders of the trial judge were set aside and the case remitted to the docket judge to decide whether the claim should proceed together with an associated claim over the full extent of Noongar lands.<sup>97</sup>

For the Full Court, the only way changes to land holding rules would be acceptable was if they sustained the same rights and interests as the traditional ‘estates’ or ‘runs’, overlooking the potential for changes contemplated by the traditional laws and customs of the group. While it is unlikely that Noongar laws and customs would cover contingencies arising from colonisation of their lands, the logic employed by Justice Wilcox was that the evolution of the land holding rules was necessary to ensure the survival of the Noongar society and its normative system. According to *Yorta Yorta HCA*, the only other way that changes may have been ‘acceptable’ is if they were brought into effect by rules of transmission that governed how rights and interests could be adjusted by the Noongar community. The evidence did not substantiate the existence of such rules. The Full Court’s findings that the ‘permission rules’ were not universally followed is suggestive of Hart’s view of ‘simple’ social structures where rules must be accepted as the common standard by the majority to ensure conformity and compliance. Whereas Justice Wilcox viewed the logical interaction of Noongar rules as evidence of a dynamic normative system able to adapt to change, the Full Court represented the Noongar society as lacking a complex legal system and thus not being sufficiently traditional. The influence of legal positivism is evident in the court’s characterisation of the continuity of Noongar laws and customs and thus Noongar society.

### A NEW VIEW OF SOCIETY

The case of *Sampi FCA* is significant in that it opens up the possibility for the internal view of applicants to be taken into account as it relates to their perception of being a society united by a body of law and custom. The above analysis of the *Single Noongar* case, however, shows that deference to the internal view of applicants may be problematic if it is limited by the underlying assumptions of positivist conceptions of law. Therefore it is argued that reference to the internal view of native title claimants must be grounded in Indigenous worldviews to overcome the assumptions of legal positivism.

What is clear from both the *Bardi Jawi* and the *Single Noongar* cases is that the members of the claimant groups were united in their belief as to the source of their law: a common belief in the

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<sup>95</sup> *Bodney v Bennell* [2008] FCAFC 63, [80]-[83].

<sup>96</sup> *Bodney v Bennell* [2008] FCAFC 63, [82].

<sup>97</sup> *Bodney v Bennell* [2008] FCAFC 63, [211]. The Full Court also found that the claimants had not proved specific connection to the Perth metropolitan area [189].

creation ancestors which gives Indigenous law its validity and ongoing continuity and vitality. The claims were framed in terms of what Moreton-Robinson calls an 'ontology of country' or the 'Indigenous sense of belonging, home and place', which is grounded in our ancestral connections to country.<sup>98</sup> For Moreton-Robinson, Indigenous law and belonging comes from the creation ancestors who created all living things, shaped the features of country and 'established the Aboriginal ways of life: a moral code for its social institutions and patterns of activity. Ancestral beings provided the rules for what can and cannot be done through good and bad behavior. Ancestral beings are immortal'.<sup>99</sup> Thus for Moreton-Robinson it is the creation ancestors that provide the source and ongoing authority of Indigenous law.

Irene Watson describes Nunga law as beginning in the 'Kaldowinyeri, coming out of creation', as a way of life that reproduces our spiritual attachment to the ancestral beings, reflecting the interconnectedness of all living things.<sup>100</sup> For Watson:

Raw law is unlike the imposed colonial legal system. It is unclothed of rules and regulations. The law is for the peoples to know and live by as the ancestors had, from Kaldowinyeri. The raw law is not imposed, it is lived as a way of life.<sup>101</sup>

So for Watson Nunga law is not defined by 'rules' but rather is birthed by the creation and 'lived' to give respect to the interconnectedness of the land and its people.

Karen Martin also defines 'relatedness' as the ontological premise underpinning her articulation of a Quandamooopah<sup>102</sup> worldview, whereby the 'depth of relatedness is so powerful that it guides our lives. It is our Law'.<sup>103</sup> For Martin, the creation ancestors 'are the originating sources of our Law and life and our Stories, thus giving identity. These are laws about our relatedness... they are life giving, sustaining and renewing'.<sup>104</sup> So from a Quandamooopah worldview the reality of relatedness to the creation ancestors 'sustain the Law and thus relatedness'.<sup>105</sup>

What these Indigenous women identify is that the source of our law is the creation ancestors, who place people on country and give us the laws by which to live, thus maintaining our connection to country and the ancestral beings. For Moreton-Robinson the Indigenous sense of belonging, home and place sourced in the ancestral connection to country, constitutes an 'incommensurable difference' between Indigenous and other Australians.<sup>106</sup> It is this difference that courts must accept as providing the source and validity of Indigenous law, and the basis for its ongoing vitality and continuity, in order to acknowledge Indigenous law on its own terms, as it is

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<sup>98</sup> Aileen Moreton-Robinson, 'I Still Call Australia Home: Indigenous Belonging and Place in a White Post Colonizing Society' in Sara Ahmed et al (eds), *Uprootings/Regroundings: Questions of Home and Migration* Berg Publishers, Oxford, 2004, p.23.

<sup>99</sup> Moreton-Robinson, above n 98, pp.31-32.

<sup>100</sup> Irene Watson, 'Kaldowinyeri – Munaintya – In the Beginning', *Flinders Journal of Law Reform*, vol. 4 no. 1, March 2000, p.1-6.

<sup>101</sup> Watson, above n 100, pp.3-4.

<sup>102</sup> Quandamooopah is most commonly referred to as Quandamooka, however Martin prefers the former which she regards as more consistent with the lexical structure of Jandai language (p.129).

<sup>103</sup> Karen Lillian Martin, *Please Knock Before You Enter: Aboriginal Regulation of Outsiders and the Implications for Researchers*, Post Pressed, 2008, p.70.

<sup>104</sup> Martin, above n 103, p.66.

<sup>105</sup> Martin, above n 103, p.66.

<sup>106</sup> Moreton-Robinson, above n 98, p.23.

‘meaningful’ to Indigenous Australians.<sup>107</sup> As the above analysis has shown, the application of Western legal norms to native title jurisprudence has the effect of judges only being able to recognise what they know—that is, complex legal systems that incorporate positivist concepts of law. On the other hand, while the Single Noongar claimants showed a similar internal view of the source of their law, the absence of positivist elements led to a finding that their law lacked the capacity to adapt to changing circumstances. Therefore, the search for sameness, as defined in terms of legal positivism, rather than difference, led to disparate outcomes in these native title claims. As Margaret Davies stated:

The Western concept of law—essentially legal positivism—admits only one law, and it is the dominant institutionalized state-based version. This linguistic act of exclusion obliterates other laws: in the case of Australia, for example, it obliterates consciousness and recognition of Indigenous laws.<sup>108</sup>

The application of positivism to aspects of Indigenous law is quite clearly at odds with Indigenous worldviews, which situate Indigenous law as being sourced in the creation ancestors who give people law and custom. This is most evident in Justice French’s acknowledgement that for Bardi Jawi people ‘law’ encompasses the *totality* of law and custom, including the belief in supernatural beings who created ‘the basic rules of customs regulating social order’.<sup>109</sup> This aspect of Indigenous law, however, was not considered relevant to the existence of Bardi Jawi society.

## CONCLUSION

While inevitably native title claims will be determined on the facts of the case which may vary considerably from group to group, the above discussion on the influence of legal positivism on native title law may shed light on the ways judges interpret continuity and change in relation to Indigenous societies and normative systems. The presence of secondary rules appears to be a significant factor in finding that a native title group constitutes a society united by a body of law and custom. The recent decision in *Sampi FCA* marks the advent of the Court’s expanded authority to take into consideration the internal view of native title claimants to decide whether they are ‘one people’ living under ‘one law’, holding out the possibility of an important corrective to the narrow, external assessment of fact informed by legal positivism. However, consideration of the internal view of applicants as to their understanding of law led to a very different outcome in the Single Noongar claim. It is important for judges to be mindful of the assumptions of Hart’s theory of positivism and the distinctions he draws between ‘primitive’ and ‘complex’ legal systems so that the internal view is not interpreted in a way that perpetuates the prejudices and biases inherent in positivist concepts of law. A better view of society is one that is grounded in Indigenous ontologies and recognises the enduring quality of Indigenous ancestral connections to country as the source of law and its continuity and validity.

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<sup>107</sup> In *Western Australia v Ward* [2002] HCA 28, [14] the High Court majority noted the difficulty of expressing the Aboriginal spiritual connection to country in terms of rights and interests for the purposes of determining issues of extinguishment under the NTA.

<sup>108</sup> Davies, above n 21, p.298.

<sup>109</sup> *Sampi on behalf of the Bardi and Jawi People v Western Australia* [2010] FCAFC 26, [40].

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