

Talking Western Australia



The Noongar native title decision

The recent Federal Court decision by Justice Murray Wilcox, in relation to the Noongar people of the South-West of Western Australia, has led to much speculation about what the decision means, where native title might apply in a metropolitan area and how the decision will affect the progress of native title claims in other parts of the country.

On 19 September, Justice Wilcox delivered his judgment recognising the Noongar people as the native title holders over some of the land and waters within Perth and extending east to the town of Northam. At the same time he also considered five other applications overlapping this area that had been filed on behalf of the Bodney Family Group. All of the Bodney claims were dismissed.

The Single Noongar judgment of 19 September is not a full determination of native title. Justice Wilcox answered only the first three questions of a determination, that is, whether or not native title exists; if so who holds the native title; and, what is the nature and extent of the native title rights and interests.

Further questions, such as the level of extinguishment of native title within the claim area and whether the native title rights and interests are exclusive or non-exclusive, are still to be determined by the Federal Court. Justice Wilcox encouraged parties involved in the trial to reach agreement on these questions rather than to argue them in court.

Some of the confusion surrounding Justice Wilcox's decision arises from the fact that the Noongar people, represented by the South West Aboriginal Land & Sea Council, had lodged a larger claim in 2003 (Single Noongar Claim Area 1) encompassing areas within the South-West of the state. The metropolitan portion of this larger claim was dealt with on 19 September because a smaller metropolitan claim, called the Combined Metropolitan Working Group application, had already been partly heard in trial before the Single Noongar Claim Area 1 application was lodged.

While still in the trial process, the Combined Metropolitan Working Group joined their claim with the larger Noongar claim. The court decided to continue hearing evidence in relation to the smaller claim. It was also decided that the trial judge would only deal with the three questions noted above.

While the issue of where native title might have survived for the Noongars is still to be sorted out, there are existing laws about where native title rights and interests might apply. According to those laws, the known tenure of the affected area shows that the vast majority of the land and waters within the outer boundary of the claim will have no surviving native title. This is because, in all but very special circumstances, native title can not be claimed on privately owned land (including freehold), freehold land held by the State or Commonwealth, most national

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parks, many other reserved lands, most agricultural leases, most special purpose leases, residential leases, commercial leases, community purpose leases and any area where there is a public work including schools and hospitals.

In the context of the metropolitan area, there might be very small pockets of unallocated crown land and some reserve land where native title rights and interests may have survived. However, even over areas where native title is found to have survived, where others have rights and responsibilities over the same area (including public rights), the law gives their rights priority over native title.

Existing public access and enjoyment of public places such as beaches, parks, waterways and foreshores is protected by state legislation that confirms that access continues.

An interesting aspect of Justice Wilcox's decision is that while the trial area was only that portion of the Single Noongar Claim Area 1 which covers the metropolitan area, in making his decision he said that the Noongar people had proven connection to the whole of the Single Noongar Claim Area 1, i.e. most of the South West of Western Australia. Although this will no doubt be a relevant consideration for the continued proceedings, the whole area claim will be decided independently.

The WA Government, Federal Government, WA Fishing Industry Council and Mr Bodney for the Bodney Family Group have each filed applications for leave to appeal against Justice Wilcox's decision. The applications will be heard by the full Federal Court in March. The WA Government has indicated publicly that it is willing to negotiate with Noongar people while the appeal is under way.

Reports of further claims being lodged over other metropolitan areas and cities, such as Melbourne and the Gold Coast, since the Noongar decision are misleading. Claims already existed over metropolitan areas in every capital city of Australia, except Hobart, and many over other large towns before Justice Wilcox made his judgment last month.

All of these claims are making their way through the native title system through a process of negotiation or litigation. Each claim group will have to present their own evidence and convince other parties and the court that it supports a claim for native title. In every case, native title claimants are trying to show the court that they have continued to practise their traditional laws

and customs and maintained a connection to the claim area since the time the British first asserted sovereignty in the area. The evidence put before the trial judge will be unique to every claim, so recognition of native title over one metropolitan area does not mean that it will be recognised over any other. Each set of circumstances and evidence will be unique.

Native Title Claims Resolution Review

The Attorney-General Philip Ruddock has announced a raft of changes to the process for resolving native title claims after engaging independent consultants who completed a review into the system earlier this year. The changes are aimed at resolving claims more quickly and at less cost.

For more information on the outcomes of the review see the Attorney-General's website or the National Native Title Tribunal's website.

For a copy of Justice Wilcox's full judgment see the Federal Court website www.fedcourt.gov.au.

For a legal analysis of Justice Wilcox's judgment see the Tribunal's regular newsletter *Hot Spots*.

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