

Evidence — sacred sites, confidential information

***Wilkes v Western Australia* [2003] FCA 156**

Beaumont J, 5 March 2003

Issue

This case concerned an application to the Federal Court for orders that would exclude certain people from the hearing of evidence about certain sites and protect confidential information in the Combined Perth Metropolitan Claim proceedings.

Background

One of the people sought to be excluded from the hearing had his own claimant application that overlapped the Wilkes application (the latter is referred to as the Combined Perth Metropolitan Claim). The other two people were Aboriginal men who asserted interests in the area covered by the Combined Perth Metropolitan Claim and were 'objecting' to that application. Prima facie evidence had been given to the effect that:

- the sites were sacred;
- the explanation of the significance of these sites to the Noongar people is something kept in the confidence of those people;
- it is part of the traditional law and custom of the Noongar people that only certain elders have authority to permit others to enter such sacred sites;
- the three men sought to be excluded were from other areas and would be at risk of suffering an illness if they were present on the sites when evidence was given.

The court's powers

Justice Beaumont noted that:

- subsection 82(2) of the *Native Title Act 1993* (Cwlth) allows the court to take into account 'the cultural and customary concerns of Aboriginal peoples ... but not so as to prejudice unduly any other party to the proceedings'; and
- subsection 17(4) of the *Federal Court of Australia Act 1976* (Cwlth) (FCA) empowers the court to exclude persons from open court where their presence would be contrary to the interests of justice;
- section 50 of the FCA empowers the court to restrict publication of particular evidence in order to prevent prejudice to the administration of justice—at [5] to [7].

It was noted that 'several competing interests need to be taken into account when making ... advance interim orders to protect information claimed ... prima facie, to be of a confidential character'—at [8].

Decision

His Honour made orders that:

- the unrepresented applicant should be permitted to hear the evidence in relation to those sites that were also covered by his application. This was ‘a necessary incident of providing him with an adequate opportunity to be heard in his own cause’;
- the two unrepresented opponents to the Combined Metropolitan Claim were in a different position. In advance of the giving of the evidence, the confidential character of the explanatory information should, *prima facie*, be given more weight than their as yet undefined interests in opposing the claim;
- the transcript of the evidence given at the specified sites be separated from the general transcript and be marked ‘restricted evidence’; and
- copies of the transcript are only to be made available to the court and to each person entitled to attend the hearing at the specified sites—at [10] to [12].