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Basis for recognition of native title over Perth

The Federal Court (Wilcox J) has decided that, subject to matters of authorisation and extinguishment, native title exists in the Perth metropolitan area and is held by the Noongar people.

Bennell v State of Western Australia

Federal Court of Australia, 19 September 2006, [2006] FCA 1243

The decision relates to the hearing of a separate question in a separate proceeding from the balance of the Single Noongar Claim #1 (WAD 6006 of 2003). The separate question related only to the question of the existence of native title over the Perth metropolitan area. The matters of authorisation and extinguishment are to be left to another judge following Wilcox J's retirement on 30 September 2006.

Summary of reasons for the decision

System of landholding at sovereignty

Wilcox J found that at sovereignty, land was held by 'country groups' or 'estate groups'. The areas of land held were relatively well defined. Rights in those areas of land were inherited primarily by patrilineal descent, although there were exceptions. The rights were of an exclusive nature, but were subject to the rights of others to use the land for certain purposes.

Society at sovereignty

Having made these findings, Wilcox J then turned to the question of identifying the society whose laws and customs gave rise to these rights and interests in land. The applicants asserted a single Noongar society. This claim was disputed by a number of the respondents. The State in particular argued that the relevant societies for native title purposes were the 12 or 13 dialect groups which broadly correspond with the 'tribes' identified by Professor N B Tindale (*Aboriginal Tribes of Australia*, University of California Press, 1974). In resolving this question, Wilcox J considered certain aspects of the laws and customs at sovereignty to determine whether there was a body of persons united in and by its acknowledgement of traditional laws and customs: (i) language; (ii) laws and customs in relation to land; and (iii) other laws and customs. His Honour relied on the writings of early observers, and the expert evidence. In the event, his Honour was satisfied that there was a single Noongar society at sovereignty. In reaching this conclusion, Wilcox J relied primarily on:

— the evidence of the expert linguist called by the applicants to the effect that there was a common language throughout the claim area, albeit with dialectical differences

— the early writing of Daisy Bates who recorded that, throughout its area, the ‘Bibbulmun Nation’ was ‘one people, speaking one language and following the same fundamental laws and customs’

— evidence about the existence of the ‘circumcision line’

— evidence about a unique practice of skinning kangaroo

— evidence of interaction between tribes over areas of land greater than their particular dialect areas

— what his Honour considered to be an absence of any suggestion of differences in laws and customs throughout the claim area.

Wilcox J said the test from *Yorta Yorta* as applied in that and subsequent cases did not require that members of the relevant society had knowledge of one another, or acknowledged each others’ rights.

Continuity

Wilcox J considered that the applicants would succeed if they were able to show that they, as members of the Noongar society, continue to acknowledge and observe ‘*at least some* traditional laws and customs *relating to land*’ (emphasis added).

Despite that narrow focus, Wilcox J proceeded to consider the evidence of present day witnesses in relation to three aspects: (i) community identification and interaction; (ii) customs and beliefs; and (ii) laws and customs in relation to land.

In reaching the conclusion that present day Noongar continue to be a body of persons united in and by its acknowledgement of traditional laws and customs, Wilcox J relied ‘heavily’ on the evidence of Aboriginal witnesses as to their identity as Noongar. He also referred to:

— a ‘high degree of consistency’ in relation to spiritual beliefs which was evidence of both ‘unity … and adherence to traditional ways’

— evidence of a rule forbidding marriage between second cousins as a ‘powerful indication of …continuity’

— ‘some traditional beliefs’ persisting in relation to funeral practices

— evidence that traditional rules still apply to hunting, fishing and food-gathering.

Interestingly, despite the reliance placed on language for the purposes of identifying the relevant society at sovereignty, this aspect received little attention in this part of the reasons. Wilcox J did find elsewhere that the evidence supported the proposition that there is, and always has been, only one indigenous language in the south-west; that language is called ‘Noongar’ and is still spoken by many Noongar people.

A crucial finding in relation to the continuity of traditional laws and customs in relation to allocation of rights in land was that ‘the move away from a relatively strict patrilineal system to a mixed patrilineal/matrilineal or cognative system should be regarded as not inconsistent with the maintenance of the pre-settlement community and the continued acknowledgement and observance of its laws and customs’.

In addition to the change in descent rules, Wilcox J also found that ‘home areas’ (the relatively well defined areas held by ‘country groups’ or ‘estate groups’ at sovereignty) had ‘effectively disappeared’, replaced by modern day *boodjas*, which correlate to the ‘runs’ of earlier times.

A significant factor in Wilcox J's finding of continuity seems to have been the fact that the changes in the system of landholding were not of the Noongars' own making, rather they were inflicted on them with the arrival of Europeans. Also, his Honour appears to have proceeded on the basis that, unless he was able to find a 'new society' in the terms described by the High Court in *Yorta Yorta* (see AGS *Litigation Notes* No. 9 23 June 2003), the applicants must succeed.

Importantly, Wilcox J rejected the proposition that the claimants had to establish that at least some of them are descended from the group in occupation of the Perth metropolitan area at sovereignty.

Geographical extent of rights

Consistent with his approach that the question of the existence of particular rights in particular areas are a matter for 'intracommunal allocation', Wilcox J gave no consideration to the existence of particular rights in particular areas, the exception being in relation to the sea (see below). In particular, his Honour offered no analysis of the question of the holders of rights within the Perth metropolitan area and how those rights came to be acquired. In the result, his Honour found that native title is held in the Perth metropolitan area by members of the Noongar society as a whole.

In relation to the sea portion of the claim, Wilcox J agreed with the position taken by the Commonwealth at trial that the low water mark represents the seaward extent of native title rights and interests.

Nature of rights

While Wilcox J was not required to make a final determination, in answering the separate question his Honour made findings as to the nature of native title rights and interests within the Perth metropolitan area.

The applicants claimed non-exclusive rights in relation to the area generally and exclusive rights over identified categories of land. The applicants largely succeeded in relation to the non-exclusive rights claimed. They failed to prove some, and Wilcox J reformulated others.

Wilcox J declined to answer the question of the existence of exclusive native title rights and interests. His Honour left open the possibility of the existence of exclusive rights in the categories identified by the applicants. His Honour did so on the basis that the question of the existence of exclusive rights would need to be determined on a parcel-by-parcel basis.

The Bodney applications

Wilcox J also heard a total of five overlapping applications in and around the Perth metropolitan area. These applications were made by Mr Christopher (Corrie) Bodney, on behalf of the Ballaruk and Didjarruk people. Wilcox J dismissed all of the Bodney applications, largely on the basis that Mr Bodney failed to prove either the existence or the continuity of Ballaruk and Didjarruk as relevant groups for the purpose of the Act.

The State's strike-out motion

Late in the proceedings, the State applied to set the proceedings aside on the basis that they had fallen into procedural error. That application included an application to strike out the application under s 84C of the Act. Wilcox J dismissed the application, and his reasons form part of the judgment.

Appeal period

Parties have 21 days within which to make application for leave to appeal (Order 52 rule 10(2A)(a)), that is by Tuesday 10 October 2006.

Text of the decision is available at:
http://www.austlii.edu.au/au/cases/cth/federal_ct/2006/1243.html

Alex Rorrison of AGS Perth instructed Raelene Webb QC who appeared on behalf of the Commonwealth of Australia, on instructions from officers of the Native Title Unit, Legal Services and Native Title Division, Attorney-General's Department. Alex is a leader of the AGS Native Title and Indigenous Law Network, which includes specialist native title lawyers across Australia.

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