CASE NOTES

THE PERTH METRO NATIVE TITLE DECISION

Bennell v Western Australia (Federal Court, [2006] FCA 1243, 19 September 2006)

Native title – proof and source – native title holders – content of native title rights – a society - implications

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1. BACKGROUND

In *Bennell v Western Australia* ('Perth Metro decision') a single judge of the Federal Court (Wilcox J) upheld the primary elements of a native title claim by the Noongar people to an area of land in Western Australia covering Perth and surrounds of approximately 9,000 km^2 ('Perth Metro Area'). It has been a long time since a native title decision generated the public interest and media attention of the Perth Metro decision.

Native title is now a relatively common feature of the Australian system of land law, particularly in Western Australia. Since native title was first recognised as existing in Australia in the *Mabo*[1] decision in 1993, there have been some 21 litigated determinations of native title in Australia. In 15 of these decisions, native title was determined to exist. A further 48 determinations that native title exists have been made by consent. In Western Australia, where the Perth Metro decision was made, the State Government is proactive in pursuing consent determinations where a native title claimant groups can meet the State's evidentiary requirements. This policy has contributed to the recognition of native title over nearly 600,000 km^2 of the State. In terms of area, this figure represents over 90 per cent of the land and waters in Australia to which native title has been determined to exist.[2]

Against this backdrop, the reaction to the first instance decision in the Perth Metro matter may appear surprising. Undoubtedly, an element of the interest is because the decision is the first determination that native title exists to an area that includes an Australian capital city. That is, native title is a legal reality only in more remote areas. Nonetheless, over an area such as the Perth Metro Area, the extinguishment of much of that native title is inevitable, so the decision is unlikely to dramatically affect most third party interests or significantly change the status quo.[3].

The decision is technically limited to the Perth metropolitan area and surrounds, the Court's reasoning has significant and direct implications for the recognition of native title throughout the

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1 *Mabo v Queensland (No 2)* (1992) 175 CLR 1

2 All of the statistics in this paragraph were obtained from the National Native Title Tribunal website (http://www.nntt.gov.au/applications/determinations.html)

3 As Wilcox J himself indicated in the summary to his judgment and many of the commentaries on the decision have also stressed.

south west of Western Australia; which is land the Noongar people also claim. If the decision stands (the State of Western Australia and the Commonwealth have already indicated they will appeal), it represents a very significant development in the law about the recognition of native title. It has the potential to fundamentally change the approach to native title determinations in Australia, particularly in areas that have been heavily impacted by development post European settlement.

2. ISSUES BEFORE THE COURT

The Court was asked to decide three questions:

- Does native title exist to the Perth Metro Area?
- If native title exists, who holds it?
- What rights does the native title comprise?

The Perth Metro decision is not a final determination of native title. To determine whether native title exists in respect of each area of land and waters, the *Native Title Act 1993* (Cth) (*Native Title Act)* requires the Federal Court to decide:

- who the persons or groups of persons holding the native title rights are;
- the nature and extent of the native title rights in relation to the determination area;
- the nature and extent of other interests within the determination area; and
- the relationship between the native title and the other rights and interests.

The Perth Metro decision provides the answer to the first two questions in relation to the Perth Metro Area. A further hearing or agreement between the parties would be required before a determination could occur that native title exists. Given indications that an appeal will be made to the Perth Metro decision, any final determination of native title is likely to be some time, possibly many years, away.

3. DECISION

3.1 Does native title exist to the Perth Metro Area?

Justice Wilcox found that subject to the important question of extinguishment, native title exists to the Perth Metro Area. The Noongar people successfully demonstrated that a system of laws and customs of Noongar society existed at sovereignty and continues to exist to this day. The Court acknowledged the impact of European settlement on that system of laws and customs but decided that the effects of settlement had not destroyed the continuity of Noongar society and that its existence today is sufficiently founded in the traditional laws and customs which existed at sovereignty.

The basis on which the judge determined the existence of native title to the Perth Metro Area is forensically unusual. The Perth Metro Area is part of a much larger claim by the Noongar people referred to as the "Single Noongar" claim which covers the majority of the south west of Western Australia.[4] Despite confining the proceedings the subject of the decision to the Perth Metro Area,

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[4] The Single Noongar claim covers a 196,000km2 triangle of the south west region of Western Australia bounded in the north by Jurien, east by Southern Cross/Ravensthorpe, and in the south by Albany.

Wilcox J heard evidence on country throughout the area of the Single Noongar claim about the existence of Noongar society and its laws and customs in relation to that wider area. In the decision, Wilcox J acknowledges this evidence as truthful and persuasive.

Wilcox J found that it was unnecessary for the Noongar people to establish connection to the Perth Metro Area divorced from their asserted connection to the wider Single Noongar area. Wilcox J held that the Noongar people demonstrated the necessary connection to the claim area as a whole (excluding offshore islands and waters below the low water mark).[5] This decision will have direct implications for the determination of whether native title exists over the remaining area of the Single Noongar claim.

3.2 Who holds the native title?

Justice Wilcox found that the Noongar people hold native title. The Court referred to a "Noongar network" of families throughout the Single Noongar claim area (including the Perth Metro Area) essentially finding that this network comprises a single society in which the members are united by their observance of laws and customs and that this normative system relates to land. Specific membership criteria were not articulated by the Court. However, the claim was essentially a language based claim (ie the defining feature of the Noongar people is that they all speak or spoke Noongar or a derivative of that language – there was some evidence that Noongar may not have survived as a complete language).

3.3 What rights does the Noongar native title comprise?

The Noongar were determined to hold non-exclusive rights to the Perth Metro Area to the low water mark. No native title rights were determined to exist below the low water mark or to the islands including Rottnest. The Court identified eight separate rights noting that these will need to be refined through the determination process. These rights are:

- to access and live on the area;
- to conserve and use the natural resources of the area for the benefit of the native title holders;
- to maintain and protect sites, within the area that are significant to the native title holders and other Aboriginal people;
- to carry out economic activities on the area, such as hunting, fishing and food-gathering;
- to conserve, use and enjoy the natural resources of the area, for social, cultural, religious, spiritual, customary and traditional purposes;
- to control access to, and use of, the area by those Aboriginal people who seek access or use in accordance with traditional law and custom;
- to use the area for the purpose of teaching, and passing on knowledge, about it, and the traditional laws and customs pertaining to it;
- to use the area for the purpose of learning about it and the traditional laws and customs pertaining to it.

Some of these rights are unlikely to be particularly controversial from a technical perspective; similar rights have been recognised in other determinations. Others may be challenged on appeal.

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5 Perth Metro decision, [792].

Some of the issues that may arise with the rights as articulated on this preliminary basis include the following.

3.3.1 Conservation and use of natural resources

An unrestrained right to "use" natural resources may need to be qualified to be consistent with the law. The concept of "use" is very broad and presumably means something more than for social, cultural, religious, spiritual, customary and traditional purposes because those purposes are the subject of a separate right. The High Court has confirmed that any native title to minerals and petroleum has been extinguished.

3.3.2 Economic activities

The reference to the right to carry out "economic activities", particularly in combination with the right to use natural resources may require clarification. In other cases, the Court has preferred to expressly limit the recognition of such rights to non-commercial purposes.[6] The evidence supporting the conduct of "economic" activities rather than, for example, "personal, domestic or non-commercial communal purposes" was not expressly identified by the Court. Regardless of the ultimate formulation, the Native Title Act recognises that laws relating to the regulation of activities which comprise a native title right (such as fishing) are also effective to regulate such native title rights unless those rights are exercised solely for the purpose of satisfying the native title holders' personal, domestic or non-commercial communal needs.

3.3.3 Controlling the access of other Aboriginal people

Various forms of this right have been claimed in other native title claims and in some instances recognised.[7] The reason the claimants would have confined the right accepted by the Court to other Aboriginal people who seek access in accordance with traditional laws and customs, is to distinguish the right from an unconfined right to exclude access. The Full Federal Court in *Alyawarr*[8] identified three difficulties with a right in these terms.

The first is that the right to exclude others is only an incident of exclusive possession that cannot exist where there is no right to exclusive occupation against the whole world. The second is the risk of creating a criterion for exclusion based on a person's Aboriginality.

Thirdly, no persons other than the native title holders themselves would be bound by the traditional laws and customs of the group. The Court in *Alyawarr* said that the position might be different if the native title holders were a subset of a wider society incorporating other groups bound by the same laws and customs (ie part of a "cultural bloc").[9] The basis on which the Noongar people's native title was recognised in the Perth Metro decision appears consistent with

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6 See for example, *Rubibi Community v State of Western Australia (No 7)* [2006] FCA 459, [12] cf *Sampi v State of Western Australia (No 2)* [2005] FCA 1567.

7 See for example, *Attorney-General (NT) v Ward* (2003) 134 FCR 16 but note the comments about the difficulties in the reasoning in *Northern Territory of Australia v Alyawarr, Kaytetye, Warumungu, Wakaya Native Title Claim Group* [2005] FCFCA 135 @ [151].

8 *Northern Territory of Australia v Alyawarr, Kaytetye, Warumungu, Wakaya Native Title Claim Group* [2005] FCFCA 135, [148].

9 This finding is also interesting in the context of the comments below referring to the application of the *Yorta Yorta* principles in the Perth Metro decision.

the former position; that is, the Noongar people comprise the total society bound by the relevant laws and customs.

4. HOW DOES THE DECISION SIT WITH EXISTING AUTHORITY?

Representatives of the Western Australian and Commonwealth governments have raised concerns to the effect that the Perth Metro decision will give rise to legal uncertainty and is a departure from established legal precedent. This legal uncertainty is the basis on which the Premier of Western Australia and the Commonwealth Attorney General respectively indicated that the State of Western Australia and the Commonwealth will appeal the decision.

4.1 Definition of native title

The leading case on the definition of native title is the High Court's decision *Yorta Yorta v State of Victoria & Ors*.[10] *Yorta Yorta* considered the meaning of "native title" under the Native Title Act. Under section 223 of that Act, "native title" or "native title rights and interests" are defined as the communal, group or individual rights where:

- the rights and interests are possessed under the traditional laws acknowledged and the traditional customs observed by the Aboriginal people;
- the Aboriginal people, by those traditional laws and customs have a connection with the land; and
- the rights and interests are recognised by the common law of Australia.

The questions being posed by the State of Western Australia and the Commonwealth in respect of the correctness of the Perth Metro decision concern the basis on which Justice Wilcox decided the Single Noongar people had satisfied the first element of the definition and, to a lesser extent, the second.

4.2 Principles articulated in *Yorta Yorta*

The *Mabo* decision recognised that rights and interests in land in Australia can find their source in Aboriginal traditional law and custom, not just the common law and Acts of Parliament.[11] The majority in *Yorta Yorta* identified three key elements to the meaning of "traditional" in the context of the definition of "native title" in the Native Title Act.

4.2.1 The age of the traditions

"Traditional", it was said, conveys an understanding of the age of the traditions. The origin of the content of the laws and customs must be found in the rules of the society that existed **before** the assertion of sovereignty. This point in time is important in the analysis because at sovereignty, the Crown acquired a radical title to the land. Any existing rights and interests to that land survived because they owed their origin to a normative (or law-making) system other than the legal system of the new sovereign power. They owed their origin to the traditional laws acknowledged and the traditional customs observed by the relevant Aboriginal people.

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10 (2002) 214 CLR 422.

11 *Yorta Yorta,* 440.

Sovereignty had a critical effect. Upon the Crown acquiring sovereignty, the normative system which then existed could no longer validly create new rights, duties or interests. Accordingly, only native title rights and interests that originate in pre-sovereignty law and custom are capable of recognition. The first step to establishing native title is therefore the enquiry as to the rights and interests that existed at sovereignty.

4.2.2 Possession under traditional laws and customs

The reference to possession of native title rights and interests under traditional laws and customs requires that the normative system comprising the laws and customs is a system that has had continuous existence and vitality since sovereignty.[12]

The mechanism the Court must use to answer this question is the examination of the Aboriginal society. A society is a body of persons united in and by its acknowledgement and observance of a body of law and customs. Accordingly if the society out of which the laws and customs arise ceases to exist as a group which acknowledges and observes those laws and customs, the normative system ceases to exist. This is the case even if the laws and customs continue to be known or passed on from individual to individual despite the dispersal of the society. It is only through acknowledgement and observation as a society that laws and customs have any meaning.

The Court said that continuity of acknowledgement and observance of the normative rules must have continued "substantially uninterrupted". The majority said the qualification of "substantially" is important because it recognises that proof of continuous acknowledgement and observation of traditions that are oral over the period since sovereignty is difficult. The qualification recognises the profound effect on Aboriginal society of European settlement. Nevertheless, it was essentially on this point that the Yorta Yorta people failed to demonstrate they held native title and it was a point that the majority of the Court emphasised is a difficult hurdle for native title claimants to overcome.[13]

4.2.3 Transmission

Tradition also refers to a means of transmitting law and custom. A traditional law or custom is one which has been passed from generation to generation of a society, usually by word of mouth and common practice.

This element enables account to be taken of developments in the laws and customs at least of a kind contemplated by the traditional law and custom in question.[14] The Court acknowledged that these developments could involve "significant adaptations".

4.3 Application of the *Yorta Yorta* principles

The principles articulated in *Yorta Yorta* have now been applied in several litigated determinations including the Perth Metro decision. The principles also form the basis of State Governments' assessment of material provided by native title claimants in support of a consent determination. While the outcomes in each determination are determined by the evidence, the application of these

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12 *Yorta Yorta,* 444.
13 *Yorta Yorta,* 456.
14 *Yorta Yorta,* 443.

principles has brought a level of stability and consistency to the development of native title law in Australia in the last 4 years.

Wilcox J held that the Noongar people successfully demonstrated the continued existence of their native title rights and interests in accordance with the principles in *Yorta Yorta*. In arriving at this conclusion some of the notable aspects of his reasoning are as follows.

4.3.1 Noongar society at sovereignty

Wilcox J determined that there was a single Noongar community in 1829 across the whole of the Single Noongar claim area.[15] In making this finding Wilcox J relied upon the assessment of historical writers; the evidence of the Applicants' linguistic expert to the effect that there was one fundamental language used throughout the claim area (albeit with regional differences); the differences in practices such as circumcision and kangaroo skinning within and without the claim area; the existence of "tribal interaction" within the claim area and the absence of significant normative differences within the claim area (with the exception of descent rules which Wilcox J found were dubious distinctions).

Wilcox J rejected the respondents' submission that the Noongar people did not comprise a society under which the rights and interests were held. Of course, this question turns on the evidence. Nevertheless, the decision is an interesting one because the area of the Single Noongar claim is very large and, despite the finding of a single language and similar laws and customs, the evidence did disclose discrepancies between laws and customs identified across the claim and some distinctions (such as dialects) at smaller, group and tribal levels. Wilcox J accepted there was no evidence that, at sovereignty, Noongar people throughout the claim were aware of other members or acknowledged them as members of a single society. Wilcox J determined that this is not required by the description of a society in *Yorta Yorta* as a "body of persons united in and by its acknowledgement and observance a body of law and customs".

In terms of legal reasoning, this decision is not significantly different to other decisions that native title existed at sovereignty and is held by a particular society. A number of decisions have been made on the basis that the relevant holding group is defined in terms of a common language and laws and customs with tribal or estate group variances.[16] These sorts of regional variations (such as responsibilities for particular sacred sites) are explicable on the basis that they do not go to the laws and customs that define the normative system in relation to the land the subject of the native title holding society. However the Perth Metro decision appears to represent an extension of this reasoning to an extremely broad society. The extension of this logic in Western Australia (and elsewhere) could in theory lead to a drastic reduction in the number of claims (through, for example, amalgamation) depending on the application of the reasoning in relation to language and "cultural bloc" commonalities.

4.3.2 Continuation of Noongar society to the present day

Wilcox J found that the single Noongar community identified as existing in 1829 has continued to exist to the present day. In reaching this finding, the Court was satisfied on the balance of probabilities of the continuity of acknowledgement and observance of traditional laws and customs by the Noongar community from 1829 to the present day. Based on the decision there appears to

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15 Perth Metro decision, [452].

16 For example, *Rubibi Community v State of Western Australia (No 5)* [2005] FCA 1025, *Risk v Northern Territory of Australia* [2006] FCA 404; *Neowarra v State of Western Australia* [2003] FCA 1402.

have been limited evidence about the period from the early 20th century until the recent past. The findings of Wilcox J on this point can be contrasted with *Yorta Yorta* itself and the findings of Mansfield J in the *Risk* decision.[17] The latter decision related to the Larrakia people's claim to an area including Darwin. Despite the Larrakia people having establishing they held native title at sovereignty and were reinvigorating those laws and customs in the present day, the Court held that the society at sovereignty had not continued to exist during all of the intervening period. The *Risk* case can be distinguished on the evidence because the Northern Territory appears to have lead far more material in relation to the period between sovereignty and the recent past than was lead in the Perth Metro decision. However when the outcomes in these decisions are contrasted, it raises a legal question as to the extent of inferences of fact about the continuity of observance of traditional laws and customs that may be drawn based on the *Yorta Yorta* reasoning.

4.3.3 Present day Noongar society

T the Perth Metro decision raises some interesting issues about the extent to which a law or custom that is traditional can adapt to meet present day circumstances and still retain its characteristic as a law or custom derived from pre-sovereignty society.

In this regard, Wilcox J's reasoning again relies on the principles in *Yorta Yorta*, in particular the notion that significant adaptation of pre-sovereignty laws and customs does not destroy their traditional characteristic. In *Rubibi (No 5)* (which concerned an area including Broome in Western Australia), Merkel J held that the adaptation of laws and customs in that instance was permissible because there was evidence that the traditional laws and customs in question provided for unexpected contingencies, and that the evolution of the kinship and connection to country rules was a response to the challenges of European settlement.

The Perth Metro decision relies on this principle of adaptation over time.[18] For example, the Court allowed for changes to the criteria for membership due to settlement impacts including the movement away from a patrilineal system of descent to a system that incorporates birth in the area and the choice to be associated with Noongar country. However what is less clear on the face of the Perth Metro decision is the mechanism in the traditional laws and customs that provides for these adaptations in a manner that is consistent with those laws and customs.

5. IMPLICATIONS OF THE DECISION

5.1 Immediate implications

The Single Noongar decision is only a decision at first instance which is not binding on other Federal Court judges. However despite this, and the legalistic and technical nature of the issues outlined above, the decision has some potentially significant immediate implications.

An appeal appears almost inevitable. The State of Western Australia and the Commonwealth have already indicated that they will appeal. Any appeal is likely to take at least a year to resolve.

If the finding that native title exists stands, the work involved in determining the extent of non-native title interests in the claim and establishing the effect of those interests on native title will be

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17 *Risk v Northern Territory of Australia* [2006] FCA 404.

18 Perth Metro decision, [777].

substantial. The tenure work that the State of Western Australia will need to conduct will be complex and time consuming and regardless of whether the issues are litigated or determined with the agreement of the parties, the process will likely take several years. Most existing interests are unlikely to be significantly affected because they will likely be either valid or validated and many will extinguish native title. However there is the risk that some non native title interests will be found to be invalid. While this risk is relatively remote, it is not unforeseeable and the issue has already arisen in Western Australia (in the case of freehold lots in Broome in *Rubibi*).

Assuming native title is determined to exist, the rights of the Noongar people articulated by Wilcox J will require refinement. The native title rights recognised were described as "non-exclusive". However, the Court appears to have left open the possibility of a determination that exclusive rights could be recognised in relation to some classes of tenure. The basis of this reasoning is unclear and would need to be addressed. This aspect of the decision appears to be the basis of the Commonwealth Attorney General's comments in relation to public access to areas like beaches and it is possible that it is one element of the decision that will be the subject of an appeal.[19]

If native title is determined to exist, the question of compensation for certain acts done after 1975 may then arise. The potential compensation liability (which would largely fall to the State of Western Australia) is unknown but could be significant. The Native Title Act provides for the payment of compensation and purports to cap liability at the freehold value of the land. However, the application of these principles has not yet been the subject of consideration by the Federal Court in any detail and the value of freehold in the areas affected by the Perth Metro decision would on the whole be a lot higher than in many other native title determination applications.

Where native title is determined to exist and a person wishes to obtain new rights or tenure, the future act procedures under the Native Title Act are entrenched. These procedures already operate where a registered native title claim and are well known to most developers and proponents in Australia.

Finally, although the decision was limited to the Perth Metro Area, the Court determined that the Noongar people had demonstrated they held native title across the whole Single Noongar area. This decision will have direct implications for the determination of native title over the remaining area of the claim. While any appeal is pending it is likely that the Federal Court proceedings concerning the remaining areas of the claim will be adjourned. However, the State has already indicated that it wishes to negotiate with the Noongar while the appeal proceeds although it is not

5.2 Proving the existence of native title

If the Perth Metro decision stands, the Court's reasoning represents a significant practical development in the law about the recognition of native title particularly in areas that have been heavily impacted by development post European settlement. The decision is potentially very significant both forensically, in terms of the evidence a Court requires to meet the *Yorta Yorta*

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[19] In relation to the comments relating to access to areas like the intertidal zone, section 212 of the Native Title Act provides for the recognition of existing rights of access in native title determinations. *Rubibi (No 7)* recognised such rights in accordance with this provision and the corresponding State legislation in Western Australia (section 14 of the *Titles (Validation) and Native Title (Effect of Past Acts) Act 1995* (WA)). For Justice French's brief consideration of the provision see *Rubibi (No 7)* [12].

requirements, and at a more technical level in terms of the formulation of other native title claims to address these requirements.

The Perth Metro decision provides significant encouragement to native title claimants across Australia in relation to metropolitan and heavily populated areas. That is, to prove the existence of native title in accordance with the principles set down in *Yorta Yorta*. For example, in Queensland, there are metropolitan claims affecting, among others, Brisbane, the Gold Coast and the Sunshine Coast. These claims are generally formulated around a native title claim group based on direct descent. However, if the Perth Metro decision stands, the formulation of these claims may benefit from review in light of the principles established in relation to the evolution of the Aboriginal society.

The Perth Metro decision also has the potential to set a bench mark for native title claimants in negotiating with State Governments for consent determinations in that, on its face, the decision appears to set an easier hurdle to meet than may have previously been understood to exist (at least by State Governments). For example, in Victoria where there have been only two determinations of native title, one of which was *Yorta Yorta*. Currently in that State, there are no claims set down for hearing and the State is actively engaged in mediation in relation to 3 other groups of claims.

In all States, considerable effort is being devoted to the resolution of claims by agreement. Until any appeals against the Perth Metro decision are resolved, there may be a period of (at least perceived) legal instability. Native title claimants may be encouraged by the Perth Metro decision to seek more from State governments than the States are willing to offer pending the outcome of the appeals.

6. CONCLUSION

The Perth Metro decision is a significant victory for the Noongar people and, if it stands, represents a significant development in the evolution of the law relating to native title in Australia.

Despite the publicity the decision has attracted, it is unlikely to have significant practical implications for third parties with existing interests in the determination area. There are obvious implications for the administration of Crown land within the Perth Metropolitan area, as the Native Title Act's future act processes will be entrenched and a compensation claim is likely. In this respect the implications are similar to other litigated determinations that native title exists and might therefore be regarded as unremarkable. However, the extremely complex land tenure history of the Single Noongar claim area will add greatly to the administrative burden of resolving those issues in practical terms

The greatest potential significance of the decision arises from the manner in which the Court applied the principles established in *Yorta Yorta* to an area that has been intensively developed. Whether the decision has any long term significance will depend upon the results of a likely appeal.