

Local Government and Native Title

May, 08

Full Court Decision on Perth Native Title Determination- Can Local Government Breathe Easier?

On 23 April 2008 Justices Finn, Sundberg and Mansfield of the Full Federal Court handed down their decision in the appeal from the decision of Justice Wilcox in September 2006 that native title existed over the Perth metropolitan region.

Justice Wilcox's decision was described at the time as a "bombshell". Before then, few people thought a native title claim could be successful in metropolitan or urban Australia. Recognition of native title was seen as a matter confined to remote and regional areas of the country.

The Full Court set aside Justice Wilcox's decision and referred the whole matter to another judge in the Federal Court at Perth for a fresh determination.

The Noongar peoples' claim area covers the whole of south-western Western Australia. Justice Wilcox's decision only dealt with the question of whether native title existed over the Perth metropolitan area. Justice Wilcox had held, somewhat surprisingly to many, that when Europeans had first claimed and settled Western Australia, the Noongar people of the south west were one community, following the same laws and customs. The Full Court assumed this to be the case, without deciding it.

However, the Full Court held that Justice Wilcox had failed to consider two crucial matters the *Native Title Act* requires:

1. has there been continuous acknowledgement and observance of the traditional laws and customs by the Single Noongar Society until recent times? The Full Court did not consider Justice Wilcox had properly applied the evidence to this question.
2. did the claimants have a traditional connection with the Perth Metropolitan Area? Justice Wilcox had taken the view, wrongly in the Full Court's opinion, that it was enough that the claimants had established a connection with the whole claim area, and since Perth was a part of that larger area, the connection requirement was satisfied for Perth.

This Alert is intended as an alert only. It does not purport to be a comprehensive advice. Readers should seek professional advice before acting in relation to these matters.

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Importantly, the Full Court has not said that native title does not exist in the Perth Metropolitan Area. It has, however, said that Justice Wilcox did not apply the evidence in the correct way, and has ordered that the question be decided again by another judge, Justice Wilcox having retired. Native title may still be found to exist in some form over the claim area, including the Perth Metropolitan Area, although the Full Court has set higher evidentiary standards to be met than those applied by Justice Wilcox.

The decision heightens the likelihood of the Western Australian State Government concluding some kind of native title agreement with the Noongar people which may well involve some form of recognition of native title over certain areas.

For local councils throughout Australia the implications of the decision include:

- The need to be aware that native title may continue to exist on some remnant areas of land within their local areas;
- A recognition that these areas are likely to be of limited extent and that freehold and most leasehold titles are not affected;
- A requirement to comply with the “future act” procedures in the *Native Title Act* in carrying on activities on land where native title has not been extinguished;
- A recognition of the likely advantages of a negotiated outcome to the existence of native title within council areas rather than litigation.

Contacts:

For further information or advice, please contact:

George McKenzie
Partner
+61 7 8235 7452
george.mckenzie@finlaysons.com.au

Ross Boyd
Special Counsel Native Title
+61 8 8235 7437
ross.boyd@finlaysons.com.au