

## LOCAL GOVERNMENT & NATIVE TITLE

22 September, 06

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### NOONGAR NATIVE TITLE DETERMINATION OVER PERTH

On 19 September, Justice Wilcox handed down a decision in the Federal Court that Noongar hold native title over the Perth metropolitan area.

In an article in *The Weekend Australian* of 24 – 24 September Noel Pearson, the well known Aboriginal leader, says:

*“...Noongar is not a legal bombshell because it does not extend the law on native title beyond what was already decided by the High Court of Australia...It is not even a political bombshell...The bombshell in Noongar is moral and psychological.”*

This is an accurate assessment of the decision.

The bombshell noted by Pearson lies in the fact that few thought it likely that any native title claim would be successful in urban Australia. Recognition of native title has been seen as a matter confined to remote and regional areas of the country.

This perception may have been put to rest by the Noongar case. “May” because the judgment of Justice Wilcox in the case is almost certainly going to be the subject of appeal.

Whilst the Noongar claimed native title over a large area of Western Australia the decision handed down by Justice Wilcox relates only to the Perth metropolitan area. It is also limited to answering the question whether native title exists in this area. It does not deal with where, within that area, native title has been extinguished.

The judge noted that the exercise of determining the individual pieces of land where native title has survived would be extremely time consuming and expensive. He encouraged the parties to discuss a negotiated solution focusing on undeveloped land, including national parks.

In reaching his decision the judge recognised the now well established requirements for a successful native title claim:

1. a **community** (or group or individual) who held rights and interests to land and waters, possessed under their **traditional laws and customs**, at the date of European settlement.

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2. that this community ***continues today*** to exist and to acknowledge those laws and customs.
3. that the community has ***maintained a connection*** with the land and waters claimed.

Judge Wilcox found that all of these requirements had been met. In particular, with respect to requirement #3, the judge decided the Noongar did not need to demonstrate a connection specific to the Perth metropolitan area divorced from their claimed connection to the whole claim area. It was sufficient for them to demonstrate a connection to the whole claim area.

The judge was also conscious of the need to put his decision in context. He said:

*"It is perhaps important for me to emphasise that a Determination of Native Title is neither the pot of gold for the indigenous claimants nor the disaster for the remainder of the community that is sometimes painted. A Native Title Determination does not affect freehold land or most leasehold land; it cannot take away peoples' back yards. The vast majority of private landholders in the Perth region will be unaffected by this case."*

For local councils the implications of the decision include:

1. the need to be aware that native title may continue to exist on some remnant areas of land within their local areas;
2. a recognition that these areas are likely to be of limited extent and that freehold and most leasehold titles are not affected;
3. 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;
4. a recognition of the likely advantages of a negotiated outcome to the existence of native title within council areas rather than litigation.

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