

1 of 1 DOCUMENT: Australian Property Law Bulletin (newsletter)/2008/Volume 23 No 2 -- August 2008/One step forward and one step back: the Noongar south-west native title claim

(2008) 23(2) APLB 18

One step forward and one step back: the Noongar south-west native title claim

Dr Simon Young UNIVERSITY OF WESTERN AUSTRALIA

The Full Federal Court's recent return to the native title field, in the *Bodney v Bennell*¹ decision of April 2008, was another lengthy and important addition to this difficult body of Australian jurisprudence. The primary decision of *Bennell v WA*² of 2006 concerned one distinct portion of a broader 'single Noongar application', which in its entirety covered some 186,000 square kilometres of land and adjoining waters in the south west of WA. The separated portion, brought on for advanced consideration in conjunction with smaller overlapping claims in that area, included the Perth region.

The matter specifically in issue here was proof -- essentially, whether the Noongar claimants had been and remained a 'community' (or 'society') for native title purposes, had continued a sufficient acknowledgement and observance of traditional laws and customs, and had maintained a sufficient traditional connection with the area in issue. Justice Wilcox at first instance answered in the affirmative (except in respect of off-shore areas and islands), finding that, subject to questions of extinguishment, native title rights and interests in the relevant area were held by a single broad Noongar society, and concluding along the way that the modern community acknowledged and observed laws and customs that were a recognisable adaptation of presettlement laws and customs. The Full Federal Court in *Bodney v Bennell* cast significant doubt on these conclusions, setting aside Wilcox J's decision and returning the matter for reconsideration.

First-instance decision on the claim

Wilcox J in the primary decision³ accepted the basic framework of the conventional Australian approach to proof, with its somewhat microscoped inquiry into cultural continuity.⁴ His Honour particularly focused on the *Yorta Yorta*-bred survival of 'society' component of the inquiry.⁵ However, in the face of considerable community change in the relevant area (and the loss of many traditional practices) his Honour tempered the strict approach to proof in a variety of ways:⁶

- o he approached the notion of 'society' with some considered flexibility and caution;⁷
- o he expressly acknowledged the necessity of (and accommodated) community change in a variety of contexts;⁸
- o he expressly accommodated some difference and dissent within the relevant group -- that is, difference in individual practices and beliefs, some disregard of the 'rules', and even some rejection of the 'society';⁹
- o he apparently distinguished the inquiry into continuation of a 'society' from a general search for unchanged laws and customs, indicating at various points in his 'society' discussion that he was merely seeking continued acknowledgement of 'some' traditional laws and customs;¹⁰
- o he emphasised a 'communal/inter se' distinction in dealing with the community's law and customs,¹¹ with the implication that his microscoped inquiry into inter se rules was not a central concern in assessing the survival of the native title interest, but rather just one tool in applying the survival of 'society' and existence of 'normative system' requirements;¹² and
- o upon turning to the actual survival of native title interests, he clearly adopted a 'compartmental' approach to proof -- in essence, requiring only continuity in the law and custom underpinning the surviving native title rights.¹³

It is important to mention at this juncture, when assessing Wilcox J's apparent liberality in applying the relevant principles, that this was a claim (and a case) that cast no doubt upon the effects of the many prior government grants and actions that had comprehensively extinguished native title over much of the area in issue. The lands and waters subject to such extinguishment were expressly excluded from the claim and therefore all freehold and much leasehold land was omitted from the application.

Full Court appeal

The Full Federal Court -- comprised of Finn, Sundberg and Mansfield JJ -- was prepared to assume, without deciding, that Wilcox J's initial conclusion that there existed a single Noongar society (occupying the south-west) at settlement was correct.¹⁴ However, the court proceeded to comment on a number of aspects of his Honour's approach, finding specific error in two respects. It was held that Wilcox J had failed to properly address two matters to which the relevant provisions of the *Native Title Act 1993* (Cth)¹⁵ (as interpreted in the High Court decisions) drew attention.

First, it was concluded that Wilcox J had failed to properly assess whether there had been continuous acknowledgement and observance of the traditional laws and customs by the Noongar society from sovereignty until recent times. It was suggested that the judge had conducted an inquiry into continuity of society largely divorced from inquiry into continuity of the presovereignty normative system. This, it was said, 'may mask unacceptable change with the consequence that the current rights and interests are no longer those that existed at sovereignty, and thus not traditional'.¹⁶ There appeared to be various subcomponents to this criticism of the primary judge's approach:

- o that in significant contexts Wilcox J paid insufficient attention to whether *each generation* of the society continued to observe the relevant laws and customs from sovereignty to the present;¹⁷
- o that in important instances Wilcox J had failed to clearly consider whether post-sovereignty phenomena (such as the 'boodja' -- the area accessible to a particular individual) were acceptable adaptations of pre-sovereignty ones;¹⁸ and
- o that Wilcox J erroneously relied upon the *reasons* for particular change (namely specific western interference) in mitigation of that change, which was said to be impermissible under the *Yorta Yorta* precedent.¹⁹

Apart from the question as to the relevance of the reasons for change, upon which opinion is clearly divided in the recent jurisprudence,²⁰ it appears that the difference between the primary judge and the appeal court may have been more one of degree than of framework. It is not clear that Wilcox J did adopt the truncated 'society'-only version of the inquiry (see the explanation of his methodology above). And the charge of inattention to generational continuity and the acceptability of adaptation was perhaps more a discomfort with Wilcox J's evidential interferences and deliberate receptivity to specific change. The true difficulty here lies in the intractably problematic nature of this assessment of 'change', an exercise that has tormented the current Australian native title jurisprudence. The Full Court acknowledged at various points that some change to traditional laws and customs is not fatal, and added at one point (despite ambiguity on this in the High Court decisions) that even change to the native title rights and interests themselves can in some instances be permissible (at least where no greater burden is imposed on the sovereign title).²¹ However, the assessments required here are extraordinarily difficult ones -- legally, morally and evidentially.

The problems are made worse by the Australian methodology's tendency to microscope the inquiry into cultural continuity. The Full Court, despite its instinctive objection to Wilcox J's broader view, does hint at one methodological correction that can mitigate this microscoping tendency. As noted above, their Honours suggested, in responding to argument about whether 'new' rights can develop after sovereignty, that perhaps the 'true position' is that 'what cannot be created after sovereignty are rights that impose a greater burden on the Crown's radical title'.²² Their accompanying examples, combined with comments made elsewhere,²³ indicate that they are here acknowledging (albeit less explicitly and more cautiously than the primary judge) an important but often-neglected distinction; the distinction between the communal (or external) native title interest and the inter se (or internal) distribution of that interest within the community. The latter is logically of little concern to the western legal system, and hence cultural continuity in that

regard should be less important.

The second major error that the Full Court identified in the primary judge's reasoning related to the assessment of the claimants' 'connection' pursuant to s 223(1)(b) of the *Native Title Act 1993* (Cth). It was concluded that Wilcox J had erroneously assumed that the establishment of a connection with the larger Noongar claim area meant there was necessarily a connection with the smaller separated portion (it being a part of the larger area). The approach of Wilcox J, viewed in the mathematical abstract is unobjectionable. So again the objection of the Full Court would seem to be not so much to framework but to the lack of rigour and specificity in the primary judge's approach, this time in his assessment of the claimants' connection with the relevant area (and indeed the area of the broader claim).²⁴ Their Honours queried, as a sub-issue here, whether Wilcox J had properly considered whether the native title was in fact owned by the community as a whole²⁵ (and whether native title is 'ordinarily' communal, as widely thought).²⁶ However, this was not a matter specifically pursued in the appeals.

The Full Court particularly emphasised in this context that the inquiry into connection should not be fused or confused with the inquiry into the existence of rights and interests under s 223(1)(a), although it was conceded that both are sourced in traditional laws and customs and that in some cases the same evidence will be used to identify each.²⁷ The court seemed to draw from the distinction some support for their insistence on geographical (and sub-communal) particularity in the connection inquiry,²⁸ which framed the most telling criticism of the primary judge on the issue of connection.²⁹

... if those persons whom the laws and customs connect to a particular part of the claim area have not continued to observe without substantial interruption the laws and customs in relation to their country, they cannot succeed in a claim for native title rights and interests even if it be shown ... that other Noongar peoples have continued to acknowledge and observe the traditional laws and customs of the Noongar ...

On one reading of this passage, the Full Court is breaking into internal or inter se community matters. The problems of logic in such an approach are betrayed by the reference to the fact that in the situation described, 'they' (the particular persons) cannot succeed in a claim for native title -- but of course it is not 'they' that have claimed, it is the community. The broader difficulties of an inattention to the communal/inter se distinction were touched upon above. These theoretical problems aside, the essence of the Full Court's conclusion appears to be that the primary judge did not properly assess whether any communal native title in the hands of the Noongar community truly survived in relation to this particular area.

Whether the primary judge's supposed digression on the matter of connection was a difference in framework or simply a difference in flexibility of application, there are clearly conflicting views in the case law as to whether a rigorous independent connection test should be applied on top of the identification of traditionally sourced rights and interests.³⁰ The problem here arises from the fact that beyond the possible implications of the statutory structure, it is difficult to understand why it is necessary for claimants to establish a connection beyond that inherent in the establishment of traditionally sourced rights and interests in the relevant area. The risk of an insistence upon independent inquiries is, as apparently accepted by the Full Court,³¹ that the microscoped inquiry into cultural continuity drifts off into anthropological observations that may really have little relevance to any native title rights and interests.

Conclusion

The result of this appeal was that the case was remitted to the lower court for the matter to be re-examined (possibly with this distinct area reunited with the broader Noongar south-west claim).³² Such faltering legal advances are regrettable in this field of law. The costs and delays of a system that continually draws parties into factually and legally complex litigation weigh heavily on all stakeholders. And in the clinical adversarial context, the questions are asked and answered in unnatural isolation from the social, historical and political context that makes them so vitally important. Wilcox J's primary decision in this matter appears to have been met with considerable public support in WA, perhaps indicating that the country is now ready for a less adversarial discussion and resolution of these critical issues.

Unfortunately the appeal result illustrates that, for now, the Noongar claimants and the Australian native title doctrine are still very much lost in the legal detail.

Simon Young, Senior Lecturer, Faculty of Law, University of Western Australia.

1 (2008) 167 FCR 84.

2 (2006) 230 ALR 603.

3 Above.

4 See, particularly, *Members of Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422. For more detailed discussion see Young S *The Trouble with Tradition: Native Title and Cultural Change* Federation Press, NSW 2008.

5 See particularly the comments above note 2 at [601] and [759].

6 Above note 4 p 417.

7 Above note 2 at [77]-[78], [424]-[425], [437].

8 See for example above note 2 from [773] and at [785] (inter se rules); at [729] and [787] (permission methods); at [758] (funeral practices); and from [784] (movement).

9 See for example above note 2 at [601], from [753], at [779] and at [787]. See also from [764] (flexibility in inter se rules permitted) and from [779] (lack of clear articulation of rules accommodated).

10 See for example above note 2 at [776] and [791].

11 See particularly above note 2 from [61], and at [78] and [794]-[795].

12 See particularly above note 2 at [601] and from [764].

13 See particularly above note 2 at [800].

14 Above note 1 at [43].

15 See s 223.

16 Above note 1 at [74].

17 Above note 1 at [73] and [77]. Note also in this respect the Full Court's criticism of Wilcox J's handling of expert evidence, especially at [95].

18 Above note 1 at [79]-[80], [82] and [83].

19 Above note 1 at [81], [82] and from [96].

20 In apparent support of Wilcox J's approach, see for example *Neowarra v Western Australia* (2003) 205 ALR 145 at [249], [309]-[310], [319], [321]-[322], [373]-[374] and [764]; *Rubibi Community v Western Australia (No 5)* [2005] FCA 1025; ; BC200505384 at [96], [147], [183] and [241]; *Harrington-Smith on behalf of the Wongatha People v Western Australia (No 9)* (2007) 238 ALR 1at [967].

21 Above note 1 at [74], [119]-[120].

22 Above note 1 at [121].

23 For example, above note 1 at [147] and [154].

24 See above note 1 at [170] and [181].

25 Above note 1 at [153].

26 Above note 1 at [158].

27 Above note 1 at [165].

28 Above note 1 at [167], [178] and [179].

29 Above note 1 at [186].

30 In apparent support of a more liberal approach, see *De Rose v South Australia* (2003) 133 FCR 325 from [305]; *De Rose v South Australia (No 2)* (2005) 145 FCR 290 from [109]; *Sampi v Western Australia* [2005] FCA 777 at [1075]-[1079]; *Rubibi Community v Western Australia (No 5)* [2005] FCA 1025; ; BC200505384 at [376]; *Rubibi Community v Western Australia (No 6)* (2006) 226 ALR 676 at [95]; *Northern Territory v Alyawarr, Kaytetye, Warumungu, Wakaya Native Title Claim Group* (2005) 145 FCR 442 from [88].

31 Above note 1 at [169].

32 Above note 1 at [211].

---- End of Request ----

Download Request: Current Document: 1

Time Of Request: Wednesday, October 01, 2014 15:45:18