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# NATIVE TITLE IN THE SOUTHWEST: THE NOONGAR RECOGNITION BILL

by Michael Mccagh

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## INTRODUCTION

The Noongar people possess a vibrant contemporary Indigenous culture<sup>1</sup> and a compelling history.<sup>2</sup> This culture is facing many issues of late. Of those issues, the pending native title claim is possibly the most significant.

Almost a decade ago, the claim went through the courts with a vexing result. However, the resolve of the Noongar people has not faded.<sup>3</sup> Since the disappointing litigation result, negotiations with the Western Australian ('WA') Government to settle the claim have been ongoing for over four years.<sup>4</sup> The most recent upshot is a sizeable offer from the WA Government, which has been agreed with in principle by the regional native title corporation, though remains at a stage of consultation with portions of the Noongar people. There are pockets of disagreement within the Noongar people as to whether the offer should be formally accepted.

The State's offer is embodied by the Noongar (Koorah, Nitja, Boordahwan) (Past, Present, Future) Recognition Bill 2014 (WA). The scale and scope of the package offered by the Bill are seemingly unprecedented. The first noteworthy point is the quantum of land to which the deal relates, which is the entire Noongar land of about 200 000 square kilometres in the southwest corner of WA, including Perth. This makes the deal highly significant for Noongar people and symbolic for Indigenous recognition Australia wide. The inclusion of Perth means that Indigenous people in a large city can benefit from the deal. The second noteworthy factor of the Noongar Recognition Bill is that the package being offered to the Noongar people is valued at approximately \$1.3 billion. In addition to the utility that may be gained by the Noongar people, these two factors, among others, may be of influence to the claims of other Indigenous groups throughout the nation. It is important to note that the deal is not a granting of native title, but an expression of recognition of traditional ownership accompanied by a financial package. The drawback is that accepting these benefits will extinguish all future native title claims in the area.

## OUTLINE OF LITIGATION HISTORY

In *Bennell v State of Western Australia*,<sup>5</sup> the applicants made five small claims of native title over small pockets of Perth and one large claim over the entire Noongar area, excluding land that had already been extinguished, such as freehold land and lease land. The five small claims were all dismissed. In relation to the larger Noongar claim, Wilcox J of the Federal Court held that, except where it had been extinguished, native title existed over the Perth metropolitan area.<sup>6</sup> His Honour made that finding after concluding that the Noongar people, in relation to a sample area of the Noongar land, met the required definitions found in section 223(1) of the *Native Title Act 1993* (Cth), and elaborated on in *Yorta Yorta*,<sup>7</sup> namely, that the claimants have a right or interest in the land under traditional laws; observe traditional laws and customs; have a continued connection with the land and continued use of the traditional laws and customs; and the common law recognises their interests.

The effect of his Honour's judgment was that in principle, the Noongar people had proven they had native title over the part of the Noongar region. However, the land to which the title would be subject to was yet to be determined. While the judgment of Wilcox J did not actually grant native title, it constituted a step in the granting of certain native title rights to the Indigenous people of the southwest.<sup>8</sup>

The successful result was overturned on appeal by the Full Federal Court in *Bodney v Bennell*.<sup>9</sup> Among the errors of law found to have been made by Wilcox J, it was held that the Noongar people had not proven that the observance of traditional laws and customs was continuous from white settlement in the 19<sup>th</sup> century until the present, as is required by the law of native title.<sup>10</sup> The Full Court also said that it was an error for Wilcox J to have considered the Noongar land as a whole. Rather, the Perth metropolitan area required separate consideration. It is important to note that this decision left open the question of native title for the Noongar land outside of Perth.

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## THE POST-LITIGATION ADVANCEMENT OF THE NOONGAR INTERESTS

### COLLECTIVE ADVANCEMENT OF CLAIMS THROUGH THE SWALSC

The Noongar people are comprised of tribes that fall within six native title groups. The creation of such native title groups, which are not unique to the southwest, has provided benefits—such as the allowance of greater access to expertise and added strength in mediation.<sup>11</sup> It is suggested that the pursuing of a single Noongar native title claim over the land of all six native title groups, whether it be through the courts or by negotiation, through the South West Aboriginal Land and Sea Council ('SWALSC') is the correct way to approach the matter. A single large claim is the most resource efficient method of claiming native title over the Noongar land. It increases the bargaining power of the claimants upon negotiating a consent determination and is more likely to lead to consistent outcomes throughout the region.<sup>12</sup> These benefits appear significant, however there has been some opposition over SWALSC acting as the main decision-maker and spokesperson for all Noongar people. It should be noted though, that each of the six native title groups must be in agreement for the deal to proceed. Nevertheless, SWALSC does maintain a significant position in this regard. There is also concern over SWALSC being granted the rights and responsibilities of administering any funds that are paid to Noongar people as a result of any mediated outcome.<sup>13</sup> SWALSC also maintains a significant position in this regard.

### NEGOTIATION AS THE METHOD OF ADVANCEMENT

The approach of SWALSC has been to promote and seek the settlement of the matter by agreement between the Noongar claimants and the State of WA, as opposed to litigating the claim in court.<sup>14</sup> There are numerous reasons to support this approach of pursuing mediation over litigation, most of which derive from the dissatisfaction with litigated outcomes. Namely, the law surrounding the claiming of native title remains uncertain<sup>15</sup> and there are numerous difficulties to making a claim.<sup>16</sup> In effect, this means that the likelihood of a successful claim is not high. As *Bodney v Bennell* demonstrates, substantiating a continued connection with the land can prove difficult.<sup>17</sup> Further, if the court finds against the claimants, the loss would be effectively entrenched into law. Further again, a litigated outcome would certainly involve considerable time and expense.<sup>18</sup> These are likely to be significant reasons for the fact that most successful native title determinations are the result of negotiated agreements.<sup>19</sup>

There is a more important problem with a litigated outcome. Even if the Noongar claimants were successful in their claim, native title appears to only grant a limited benefit to the claimants.<sup>20</sup> For example, native title is limited to the realm of property,<sup>21</sup> and it does

not grant the right to economic development on the land.<sup>22</sup> On the other hand, negotiations can deliver flexible outcomes, which in turn can lead to the conferral of practical rights.<sup>23</sup> For example, negotiated outcomes can transcend land rights into areas such as health, which require resources.<sup>24</sup> The result is that negotiated outcomes are more likely to be in accordance with the benefits that Indigenous people seek.<sup>25</sup> For the Noongar people, this may mean that a negotiated outcome could deliver resources tailored to improve many of the specific social problems currently being faced by them. The narrow benefit conferred by native title, on the other hand, is likely to be diluted by the extensive freehold leases already existent through the area.

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**The State's final offer, if accepted, could go some way to mending the serious social problems currently facing Noongar people.**

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### SUMMARY OF NEGOTIATION HISTORY AND CURRENT POSITION

In December 2009, the WA Government welcomed negotiation discussions.<sup>26</sup> In 2012, SWALSC presented to the State the outcomes it sought, which included recognition as traditional owners, a land base, a quantum of funds, governance rights to traditional owner corporations and a cultural centre.<sup>27</sup> In 2013, the State Government made a final offer. That offer remains at the stage of deliberation amongst the Noongar people.

SWALSC has agreed in principal with the offer made by the WA Government in 2013. It is important to note that this does not mean that a deal has been done. The negotiation is now at the stage of consultation, which means that if it is to proceed, all of the six native title groups must accept the offer. It may be that formal acceptance is not far away.

The substance of the agreement in principal is embodied in the Noongar (Koorah, Nitja, Boordahwan) (Past, Present, Future) Recognition Bill 2014 (WA). The Bill will be passed upon SWALSC's formal acceptance of the State's offer.

### THE NOONGAR (KOORAH, NITJA, BOORDAHWAN) (PAST, PRESENT, FUTURE) RECOGNITION BILL

The Bill was tabled in the WA Parliament in February 2014. It formally recognises the Noongar people as the traditional owners of the Noongar land.<sup>28</sup> Accompanying the recognition is a package of measures that finally settle all native title claims in the region.<sup>29</sup> The

package is said to be valued at approximately \$1.3 billion,<sup>30</sup> and includes, among other things, the deposit of \$60 million per year for 10 years into a Noongar Boodja Trust; \$10 million per year for 10 years to the six regional bodies corporate and central support body<sup>31</sup> and up to 320 000 hectares of crown land.

## OPPOSITION TO THE AGREEMENT

There is opposition from within some local Aboriginal communities to any native title settlement between the State Government and SWALSC. The opposition is largely subsequent of a desire from a portion of the local Indigenous population to not have their native title extinguished, even at the high price offered. According to those who oppose the deal, if the deal does not proceed, then their land rights last forever.<sup>32</sup> On the other hand, if the deal proceeds, they are having their land taken away from them, which, predictably, they do not want.<sup>33</sup> From that perspective, it is not the place of the current Indigenous population to sign away land rights since those land rights were passed on from ancestors, and should be passed on to descendants.<sup>34</sup> The result of such a signing away of land rights is that future Aboriginal people will be told that their ancestors signed away their rights. This would become of particular significance if the legal recognition of native title were to change in the future.<sup>35</sup>

## CONCLUSION

The Noongar people took their native title claim through the courts with a disappointing result. Since that outcome, significant ground has been made to achieving a negotiated outcome with the WA Government. The value of the State's most recent and final offer may mean that, if accepted, it could go some way to mending the serious social problems currently facing Noongar people.<sup>36</sup> Though there is some opposition, the \$1.3 billion offer, as embodied in the Bill, appears to grant progressive outcomes.

The scope and scale of the benefits conferred upon the Noongar people, as well as the fact that this is the first claim to incorporate a major city, means that the enactment of the Bill would be a breakthrough for Indigenous Australians. The inclusion of Perth, a capital city, into native title negotiations is symbolic as it relates to native title over settled areas of Australia,<sup>37</sup> which have previously remained immune. It demonstrates the benefits of negotiated outcomes and may pave the way for other claimants around the country to achieve equally advantageous outcomes. Indigenous groups throughout Australia should keep their eye on the progress of this claim.<sup>38</sup>

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*expressed in this article are solely those of the author and do not necessarily reflect that of the firm.*

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- 29 See Noongar (Koorah, Nitja, Boordahwan) (Past, Present, Future) Recognition Bill 2014 (WA) Preamble.
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- 38 At the time of publication of this issue, six Indigenous Land Use Agreements were signed on 8 June as part of the Noongar Recognition Bill. This had not occurred at the time of writing. For more information see AAP, 'Massive WA Native Title deal edges closer', SBS News (online), <<http://www.sbs.com.au/news/article/2015/06/08/massive-wa-native-title-deal-edges-closer>>.

#### Woman Becomes Water triptych, 2008

Alison Williams  
Acrylic on linen  
450mm x 1100mm x 3

