
WINNING NATIVE TITLE, OR WINNING OUT OF NATIVE TITLE?:

THE NOONGAR NATIVE TITLE SETTLEMENT

by Glen Kelly and Dr Stuart Bradfield

The South West Aboriginal Land and Sea Council ('SWALSC') is involved in resolving six native title claims in the South West of Western Australia, via an 'alternative settlement' process. This process of negotiation requires Noongar claimants to agree that no native title exists in the area of the claims. In exchange for this consideration, Noongar people would receive a comprehensive package of benefits which includes recognition of traditional ownership, land, a significant 'future fund' and a range of other commitments. Twenty years on, how does this stack up against the promise of *Mabo*?

If native title began an arena of intense contest, recent experience in the South West suggests this is little diminished today. The 1992 decision of the High Court clearly changed the course of Australian history. Many Australians initially made it clear they thought this change was of course for the worse. We, and perhaps the majority of Indigenous Australians, remain in disagreement with this view. *Mabo* set a new agenda. It broke barriers and created a raft of opportunities and outcomes that would not have been possible without it.

From the simple but priceless recognition of peoples, cultures and connections to land—priceless because of its long denial—to the benefits from major resource projects that are changing the lives of people and communities, native title has paved the way for a new relationship between Indigenous and non-Indigenous Australians. It has opened the door to a range of possibilities that were in the past, just dreams.

So why would we, and SWALSC, promote an agreement that surrenders native title?

While the native title process has smashed some of the carefully constructed barriers of the past, from a South West perspective, there are dangers that lie within even a 'positive' consent determination recognising native title. The first of these is that the rights that come from such a thing are mostly non-existent—they have been

extinguished. In some regions, up to 95 per cent of the claim areas are extinguished of native title, and where rights may exist, they remain circumscribed by extinguishment and are non-exclusive in any case.

While we may like to, we can't really lay the blame for this inequity at the feet of conservative governments or post-*Mabo* courts. Obviously, governments and courts were successful in securing the 'bucket loads of extinguishment' famously promised by then Deputy Prime Minister Tim Fischer. Despite this, the extinguishment that cruels the potential of native title in Noongar country in fact comes straight from *Mabo*—from the alienation of land by the Crown which is legitimised in the *Mabo* decision.

In light of this, what do you say to a people who have the evidence of connection, but even after being dragged through court, would never achieve any real rights? 'Let's fight the good fight anyway'? This would be a grand dishonesty; a self serving indulgence which would no doubt turn sour when, after the celebrations had ended, people realised that they had not only not achieved any rights, but had in effect permanently entrenched their dispossession in Australian law.

Clearly, this is not the sort of outcome that was contemplated by Indigenous people as the echo of *Mabo* reverberated across Australia. With a couple of decades of reflection and sober analysis, however, this turns out to be the reality—at least for the settled South West.

In the relatively few places where it does exist, native title rights can only be characterised as hollow and fragile. Hollow, in that the bundle of rights permits activities that people effectively do already, and fragile, in that they can be set aside very easily. In huge swathes of land where these rights may exist, they are partially extinguished, and the cleverness of the 'scheduled acts' of the *Native Title Act 1993* (Cth) or the *Wik* principles of pre-existing land use mean no negotiation or any other rights in relation to mining or forestry for traditional owners.

What about compensation for Noongar people's 'loss' of native title? After all, we are talking about an area of land that is some 200,000 square kilometres—a comparable land area to the State of Victoria. The next problem for the Noongar people in pursuing their claims through court is that the absolute and overwhelming majority of the acts extinguishing their title occurred prior to 1975, before which Parliaments could discriminate against people's rights on the basis of their race. This, coupled with the estimated decade or so it would take to work through the tens of thousands of land parcels in the area to figure out if the extinguishment event *did* happen after 1975, would make it seem a zero sum gain given the length of time required to calculate compensation. And of course, twenty years after the recognition of native title, the courts have still not arrived at a formula for monetising the unjust loss of this title.

So while a win in the courts would provide formal recognition as traditional owners—probably the thing native title does best—it would provide little else. In the process, it would have consumed the energy and aspirations of many great people, not to mention witnessed the terrible attrition of elders and cultural leaders, many of whom have been lost in the 15 years since the claims were lodged, many more who would be lost in the 15 or more years yet needed to fully resolve the matter through the courts.

When contemplating this properly, when really reflecting on what path needs to be taken, it isn't hard to be consumed by extreme disappointment in native title and the native title system. It's easy to conclude that far from the instrument of recognition and empowerment that we thought it was after Eddie Mabo's triumph, the High Court's fine print, State and Federal Parliaments, and successive court decisions have incrementally reinforced the subservient position of Indigenous interests in favour of what the preamble to the Native Title Act describes as 'the needs of the broader Australian community'.

So what's it good for in the South West of Western Australia?

From our perspective, the real power of native title is that it provides us with a vehicle to progress the aspirations of a nation. It provides a way of co-ordinating and focussing Noongar interests and the community and provides a means through which governments and other parties can reach agreement with the nation of people who are the Noongar on a range of matters far broader than mere

native title. It may be something of an irony that it was a no holds barred court battle that was the catalyst for the present approach. Justice Wilcox's 2006 recognition of a Noongar people in the Federal Court—overturning the then Western Australian Labor Government's denial of such nationhood—made the current process possible. For it is recognition of nationhood we are seeking via this alternative settlement negotiation.

At the initial negotiation meeting in 2010, in calling for a 'nation to nation dialogue', the Noongar team's lead negotiator put it this way:

These talks are an opportunity for us to not only deal with the technical matters of native title, but also present an opportunity to lay to rest some of the burdens of history and the legacy this leaves us with.

This is a chance for us, as Noongars, to come to terms with today's world and the undeniable fact that history cannot be undone, to secure recognition and rights to traditional lands and to secure a footing in today's world which can be used to advance our people and our culture in a way that works today...

And this we argue, is in the interest of the state and the people of Western Australia, just as much as it is in the interest of Noongar people.²

Perhaps surprisingly, the response on behalf of Western Australia acknowledged the fact the process we were entering into *was* about more than resolving the technical, legalistic question of the existence or otherwise of native title. Perhaps the tone was set; and, particularly in the early stages of negotiation, discussions aimed at concluding an alternative settlement were imbued with something of a 'higher sense of purpose'. This reflected a deliberate approach by SWALSC and the Noongar Team to set out broad principles at the outset—and stick to them. Those principles, articulated at that initial plenary, were that any settlement or agreement must:

- acknowledge the past and serve the future;
- be just, and be capable of being recognised as such by any reasonable person;
- provide equitable recognition and benefit across all Noongar people, regardless of where they live in the South West; and
- be sustainable in the long term with regard to economics, governance structures, and social and environmental impacts.

As outlined above, the sad reality is that a litigated outcome that looks like that is simply not possible in Noongar

country, given the terms of the Native Title Act, and 'the tide of history'. While we have a way to go to finalising an agreement, but having pursued a negotiated settlement for nearly three years, we now have a serious offer on the table from the Western Australian Government which would secure ownership of a significant land base, recognition of Noongar traditional ownership via an Act of Parliament, seven resourced Governance entities, a significant cash component, and a range of other things which are not 'part of the conversation' of litigated native title.

Of course, an alternative settlement of native title is still a native title agreement no matter what the range of topics. We have yet to see how far the shadow of the Native Title Act will extend into a post-settlement world where Noongar people should be free to express their nationhood

as they see fit, within the confines of the Australian state. But it may be another paradox in the history of native title that in relinquishing their formal claims, the Noongar people may be on the cusp of achieving the comprehensive outcomes many hoped would flow from Eddie Mabo's victory.

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- 1 *Mabo and Others v Queensland (No. 2)* (1992) 175 CLR 1.
- 2 Glen Kelly, 'Opening Remarks', Plenary Session, South West Native Title Settlement Negotiations, Perth, 13 April 2010.

Koerai – Turtle Shell Flake
Alick Tipoti

Linocut,
660mm x 980mm

