High Court should settle Noongar native title dispute & not legislators with coal in mind

by Gerry Georgatos

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There is a historic opportunity unfolding for the High Court of Australia to improve the bargaining powers of native title claimants. It is nearly a quarter of a century since the Mabo 2 High Court ruling that dissed on the racist cruelty of 'terra nullius'. In this 25th year since the historic Mabo decision it maybe that there shall arise the opportunity to improve bargaining powers for native title claimants. The rights of all the claimants are being revisited. Some potential rights were watered down firstly by the Paul Keating government following the immature public hysteria after the High Court in 1992 put an end to the disgrace of 'terra nullius'. Several years later, the John Howard government went about butchering native title rights and bargaining power deteriorated to beggary.

In Western Australia, a controversial compensation package, said valued at $1.3 billion, was pushed by the state government to 40,000 Noongar peoples. In the end very few voted; 1,578 voters but not unique voters. The package came with what should have been unimaginable, that in effect the Noongar peoples extinguish their native title rights! The Native Title Bill, despite all the theatre about exclusive and non-exclusive rights, was established 24 years ago, in reality as a compensatory mechanism 'in perpetuity' to secure where possible from miners and developers a quid to prosper social reforms, to reduce inequalities. But the Western Australians in their 'genius' figured a way to do away with even this, with a one-off package, if accepted. There was gut-wrenching dissent, families pitted against families, the majority refused to vote. But some did vote and it was close, and the 'yes' vote got up.

Despite the 'yes' vote, some of the original applicants refused to sign the Indigenous Land Use Agreements (ILUAs) as they saw themselves effectively ceding their lands and any rights over their historical lands. Four Noongars did an Eddie Mabo and challenged their right over their historical lands. They challenged the Native Title Bill in that it required that all original claimants to sign off the ILUAs.

The four successful complainants were Noongar Elders Margaret Culbong and Mingli McGlade and social justice stalwarts Mervyn Eades and Naomi Smith. Following the unanimous decision in their favour, emotion spilled in the capacity filled gallery. Ms Culbong, "*This is the greatest moment in my life*."

– **Noongar native title surrender rejected by court – ABC News – February 1, 2017**

The Queensland Government and Adani Carmichael were interested parties, with representatives in the courtroom gallery. The decision puts in jeopardy the Adani coalmine project because like the Noongar ILUAs where some claimants refused to sign it off, so too with the local peoples, Wangan and Jagalingou.

– **Adani Carmichael mine in doubt after shock court decision – Townsville Bulletin – February 3, 2017**

Following the ruling you'd think that the Western Australian government and other interest groups would invite to the table all the claimants and do the propriety bit and try to negotiate a better deal. No. Instead the lobbyists ran to Attorney-General George Brandis to rush amendments to the Native Title Bill. *The Guardian* reported Mr Eades vowing there would be a High Court challenge if there was an "attempt by government to change the native title law again to suit their interests and disregard our people's interests."

"If they feel the law got it wrong then they should take their appeal to the High Court, but they do not want to do this because they know all too well that the High Court will uphold the Federal Court ruling."

"So instead they want to change their own rule book," said Mr Eades. Last year, Mr Eades was the recipient of the *Eddie Mabo Social Justice Award* at the National Indigenous Human Rights Awards.

– **Legal action threatened – The Guardian, February 6, 2017**

But the battle with Adani to stop a coalmine or ILUAs from here onward will require more bargaining – a great thing – must not deflect from the catastrophic travesty facing the Noongar peoples and what led some of them to invest their faith in the full bench of the Federal Court. The Noongar ILUAs effectively extinguish native title rights. Noongars are in a battle for their survival in terms of retaining perpetual rights. Noongars are fighting to not become the first to "cede our land and rights" as Mr Eades puts it.

My view is that 1) there is a historic opportunity that has presented to improve the bargaining powers of native title claimants and therefore inquiries should be had to ensure, and in turn deliver to impoverished peoples greater social reform opportunities than ever before. Officially, one in 18 of Aboriginal and Torres Strait Islander deaths are a suicide – 30 per cent of Australia's child suicides are of Aboriginal children and 80 per cent of Australia's suicides of children aged 12 years and less are of Aboriginal children. My research argues that nearly 100 per cent of Aboriginal and Torres Strait Islander suicides are of people living below the poverty line.

And 2) importantly if the Commonwealth Government buckles and pushes through amendments to keep the minimalist bargaining powers, without requirement for all the claimants to agree, it must include an exception in that the Noongar ILUAs should not be allowed to proceed. They are about extinguishing their perpetuity rights. Those seeking amendments to the Native Title Bill to undermine the Federal Court ruling and to subsequently push through the Noongar ILUAs should be instructed to settle either with the claimants or in the High Court.

The Member for Lingiari, ALP parliamentarian, Warren Snowdon said in the House of Representatives, "*I might just remind the House that I was part of the Keating government and indeed on the cabinet committee that finally negotiated the Native Title Bill.*"
"*I am aware of the negotiations that took place and the fact that aspects of the Bill were watered down to satisfy crossbenchers in the Senate. Part of the reason, I think, that we are in this fix is what happened in the final days of negotiating the Bill through the Parliament in the first instance*."
"*It is worth pointing out that I am in this place now, in this debate, when I would otherwise be in the House of Representatives Standing Committee on Indigenous Affairs discussing matters to do with Indigenous affairs. Why wouldn't the parliament, the Attorney and the Prime Minister refer this legislation for an inquiry by the House committee, for example?*"
"*We are not mugs around here. Some of us know what goes on.*"

It maybe true that 140 ILUAs have been invalidated and that Adani Carmichael and the Queensland Government may not get their way just yet and their coalmine. I am not a supporter of another coalmine but more importantly here is the opportunity to repair some of the diabolical debacle that has been native title.

The Noongar native title extinguishment deal with its $1.3 billion compensation package time-limited over 12 years is the worst ever native title deal offered. Maybe I'm dreaming that the landscape has changed enough to deliver repair to native title, and that social reforms can be secured that will transform lives, save lives. We should be that honourable and visionary…

– Noongar native title deal ruled invalid by Federal Court – The Guardian
– **Simplistic offer will not end solve years of neglect – The West Australian, February 23, 2013**
– **Land deals fails important tests – The West Australian, July 15, 2013**
– **A deal without certainties, July 12, 2014**

Background

1st publication

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Simplistic offer will not solve years of neglect

The State Government's billion-dollar native title offer fails to address Noongar disadvantage, write Len Collard and Gerry Georgatos

Much has been said and written about the State Government's billion-dollar offer to the Noongar people via the South West Aboriginal Land and Sea Council. The media has focused predominately on the various personalities arguing with each other and the volatile divisions.

Some people have not helped with divisive derision and the casting of aspersions on one another.

It does not help when shadow treasurer Ben Wyatt, who has Yamatji heritage, indirectly marginalises protesters as on the fringes and as ungrateful, nor when protesters resort to screaming obscenities and racially vilifying others.

The protesters at Kings Park have highlighted the inadequacies of the Government's native title offer. A billion dollar package, of which only half is a cash component, disbursed over 10 years and limited to this, is a simplistic first step to address the myriad social problems and intergenerational poverty — acute, abject, endemic and pernicious — imposed on the Noongar people.

We have studied native title agreements, and the settlements are so minuscule they are incapable of remedying the social problems in Aboriginal communities which are plagued by problems imposed by more than a century of disenfranchisement.

We agree with SWALSC chief executive Glen Kelly and Mr Wyatt that the native title process is "buggered" and that the courts fail to live up to intentions of native title in reparations and adequate remedies.

However, the Australian political landscape, in terms of the national consciousness, is changing and if the billion-dollar offer is accepted with a contractual obligation requiring the further "extinguishing" of native title rights, future generations of Noongars will have little to work with and courts will point out to them "your ancestors signed your rights away — here it is in black and white, on the dotted line".

Noongars may be better off to wait another decade for more adequate outcomes unless SWALSC, along with elders, negotiate an improved outcome which does not require extinguishing rights to future claims.

Let us understand some of what is being said and written. It is contestable to argue that rights to lands have been extinguished by more than a century and a half of land development and land agreements — this is an assumption premised by simplistic logic and assumptions that courts are similarly predisposed to.

It is not a question of sovereignty issues per se, however, rather of rights, entitlements, reparations,

remedies, customary and traditional ties — these in no way threaten current land use. Nothing has been extinguished, it has only been assumed so or ruled as such.

The terms of the agreement between SWALSC and the Government in working to negotiate the offer at hand are disturbing — limited to a two-year period, excluding Noongar claimants and protocols from the table. Most disturbing is that within the agreement either party can terminate the negotiations with 14 days notice — it smacks of strings attached, hence the imputation of outcomes at all costs.

It is token and insulting to claim that the proposal's achievements will include affirmative pro-social employment for Aboriginal workers, for instance with the Department of Environment and Conservation, as park rangers and in other human resource labour, or that gains include joint management of parks and other sites, or that there shall be Noongar language signs, or that customary rights will be achieved on crown lands ignoring extinguishment.

This is a nonsense because these are self evident and do not have anything to do with any bona fide native title proposal. The native title proposal needs to focus on preserving people's rights and entitlements, remedies and justice.

The Ord final agreement, as elder Ben Ward who campaigned long and hard for its negotiation will tell you, has not alleviated the social problems that his people and the Kununurra Waringarri Aboriginal Corporation face.

This point should not be lost because native title agreements have short-changed people nationwide.

If SWALSC can negotiate billions of dollars long overdue from the State Government without extinguishing any rights, this will be an achievement.

The offer equates to a cash component of $3.70 a day for each Noongar for 10 years. It is a simplistic equation, however, the offer is simplistic if it is to be argued that it will help Noongars move forward from intergenerational social problems and horrific incarceration rates.

Hypothetically, if a Noongar trust fund was set up and if every Noongar contributed $3.70 a day for 10 years, they would raise the half a billion dollars — that's how little these funds are when you consider the Government gains from their signing rights away.

The funds on offer are the equivalent to a sports stadium and a building or two in the city. Does any right-minded citizen believe these piecemeal funds can address a century and a half of human carnage and damage?

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2nd publication

Land deal fails important tests – Published in The West Australian July 15, 2013

Link to PDF here: http://freepdfhosting.com/970ffb2f05.pdf

3rd publication

A deal without certainties – native title

Much has been made of the State Government's billion dollar-plus offer to the Noongar people, that it is the most generous offer of its type – but is it? It is not, nowhere near and nor is it grounded in certainties.

Is it a genuine native title offer or a politicised move to coerce a proposition that native title rights have been settled for all those considered Noongars and that all future rights are extinguished?

The South West Aboriginal Land and Sea Council (SWALSC) had been the entity built up over the years that often supported the native title claims of holders through the Courts. If the deal goes through, what will eventuate if the $1.3 billion time-limited deal is sealed is that SWALSC will no longer support native title holders and claimants through the courts. If this happens, the majority of native title holders will be marginalised, with inadequate access to their legal rights.

But what if the deal does go through, what certainties will it deliver to the Noongar peoples?

Premier Colin Barnett has said that the deal's centrepiece will be the Noongar Recognition Bill – that the Noongar peoples were the original custodians of the lands we live on. Noongar peoples do not need anyone to tell them what they already know. If this is the best on offer then we have a long way to go.

The Recognition Bill is token, conferring no substantive legal rights to the custodians.

In terms of the return of land to Noongar peoples, arguably up to 300,000 hectares of near wasteland and bushland may be identified for lease and management while another 10,000 to 20,000 hectares may be identified for freehold. But, this is all a Clayton's style deal, because the freehold titles can be resumed by Government at any time, and similarly so land management agreements revoked at any time if the acquisition is argued in the public interest. So Noongar and Wedjela people, we ask you all where is the certainty?

Therefore it is highly probable that the State will not be obliged to compensate the Noongar people for the acquisition of our lands – freehold or management.

The negotiation process of which land parcels are to be transferred from the State to the Noongar Boodja Trust will be deliberated over five years but commencing only after the deal is voted through by what will be less than a few per cent of the Noongar people.Once again there is no certainty for anybody Noongar or Wedjela because in reference to the so called land negotiation agreement it is noted in Section 6(b)(ii), "Whilst the State will use its best endeavours to reach agreement with SWALSC or the Trustee, there is no guarantee that it will do so." This ought to send a shiver down the spines of all Australians as it is a deal that may create animosity.

That State Government of Western Australia does not guarantee that approvals under these conditions will be given, whether over five years or over a further period of ten years, nor can it guarantee a minimum measure of land allocation. And according to Section 10 (b) once again any land transfer must have the further approval of the Minister for Mines and Petroleum.

And in the event that any land will be transferred there will be no exemptions from rates, taxes and any other associated levies or costs, Why?

Where is the certainty? Well there is not in any shape or form for anyone.

The packaged offer is tenuously at the very low end of the range in terms of per head of population. The Noongar population may exceed 40,000 and therefore the dividend notionally is bottom of the barrel.

A few years ago, SWALSC and the State Government combined in a heads-of-agreement opportunity to settle native title claims to all Noongar country. The Government and SWALSC are having a dialogue among themselves.

But if they are serious about democracy, the SWALSC should ensure a postal ballot conducted by the State or Federal bodies responsible for such a process so all Noongars can vote without fear or favour on whether the deal should be upheld or rejected. And if they were serious they would disagreggate Noongar demographics and authenticate claimant groups and connection to the land. They are working off the 80 odd year old Tindale map, which is still a subject of division amongst the SWALSC members.

Furthermore, what is being created in the SWALSC is a simplistic holistic bureaucracy of Noongars to liaise with Government but which will be disassociated from the real cultural, social and economic aspirations of Noongar and non-Noongar peoples alike. It may well arise that this bureaucracy will never deal culturally, socially and psychosocially with Noongar peoples and in turn never have the opportunity to raise people out of impoverishment.

The whole proposal is a simplistic step to address a myriad of cultural, economic, legal and social problems and the intergenerational poverty – acute, abject, endemic and pernicious – imposed on most Noongars.

No native title settlement has provided the capacity to remedy the problems in Aboriginal communities – plagued by problems imposed by more than a century of disenfranchisement, neglect and the pain of poor policies.

Native title is so watered down and so easily circumvented by politicisation that those within the native title community argue that settlements are about getting what one can – finite outcomes while dismissing panacea and sustainable systems.

Well, they are wrong.

The Australian political and ideological landscape is changing and it may well be that in a couple of years or even decades that the Noongar peoples will be able to secure what is being denied today under this system.

If the deal goes through, future Noongars will have courts telling them that their ancestors signed their rights away. The deal should not be signed because there are still questions of sovereignty to solve, only rights issues per se, entitlements and reparations, remedies, customary and traditional ties. These don't threaten current land use, but are pivotal to generating the type of rights that will raise people out of intergenerational poverty.

The $600 million over 12 years being bandied around by the Government on offer if the deal is signed off should be spent nevertheless directly on remedying the ills that plague far too many clans of Noongar people – whose children are dying at the world's highest suicide rates, who are being incarcerated at among the world's highest imprisonment rates and who are living in overcrowded private and public housing.

The native title system has been a debacle, a missed opportunity but the disaster is compounded when Governments get in the way and further short-change the claimants of their social, economic, cultural and compensatory rights.

We were not put on this earth to watch our children die. We were not put on this earth to bury our children. We were not put on this earth to be betrayed by the trust expected of us in others, such as in Governments whom act in ways that threaten and destroy livelihoods and therefore our trust.

Native title was supposed to be remedial, humane and compensatory and not less than this, but the State Government's offer is even much less than this, and the Western Australian Government has now offered probably the worst deal ever in native title history to 40,000 Noongars – certainties of a future road littered with ill will and intergenerational conflicts for all Australians.

– *UWA's Professor Len Collard is a Noongar from the Whadjuk people. Gerry Georgatos is PhD researcher and writer on social justice issues*.