Chapter

Privatised Autonomy for the Noongar People of Australia: A New Model for Indigenous Self-Government

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Abstract

The Aboriginal people of Australia have for many year sought rectification of past injustices. The absence of political structures whereby Aboriginal people can communicate their views; govern themselves in regard to their traditions and culture; and promote their interests in similar way as applies to other indigenous people in the world has been identified as a major shortcoming in the institutional arrangements in Australia. It is especially since 1992 when native title had first been recognised in Australia that Aboriginal people have attempted to utilise their land rights as a basis for a form of self-government or autonomy. The shortcoming of this approach is, however, that native title only exists in certain areas; native title is a relative weak right; and native title does not entail any self-governance rights. Recently the federal state of Western Australia broke new ground when it concluded an agreement, which has been described by some as a "treaty," with a large community of Aboriginal people in the south west of the state. This agreement, referred to as the Noongar Settlement, has the potential to serve as a model not only for other parts of Australia, but also beyond the shores of Australia. It recognises the traditional ownership of the land of the Noongar people, but then it goes on to establish for the Noongar people self-governing corporations. The corporations are not public law institutions, but in effect the powers and functions they discharge are of such a nature that they form in effect a fourth level of government. The corporations can exercise powers and functions not only in regard to aspects arising from traditional law and customs, but also in socio-economic fields such as housing, welfare, land management, conservation and tourism. The Noongar Settlement places Australia in a leading position when it comes to the holistic settlement of a land claim and the recognition of Aboriginal people.

Keywords: indigenous self-determination, non-territorial autonomy, land claim settlement, native title, fourth level of government

1. Introduction

The concept of autonomy or self-government for the Aboriginal people of Australia is, generally speaking, an ideal rather than reality. Small pockets of what can be called privatised self-management of cultural and community affairs exist

by way of Aboriginal corporations, but there is no overarching, national policy or legislative framework that allows, facilitates or encourages autonomy or self-government by Aboriginal people. This state of affairs is on the one hand because Aboriginal people have been integrated into the "mainstream" of Australian political life, but on the other hand because there has been inadequate appreciation in non-Aboriginal society for the traditional governance arrangements that has regulated the lives of Aboriginal people prior to and after white settlement. Although Australia has an advanced system of human rights protection and the country is in many respects a beacon of liberty and freedom, the aspirations of its Aboriginal people to protect and promote their traditional laws and culture; to self-govern; and to be involved in matters that affect the continued existence of their ancient culture and traditions, are poorly developed. Australia represents the classical "melting pot" political culture whereby tolerance is displayed for multi-culturalism at an individual level, but where a single political identity exists with no special treatment for indigenous, cultural or linguistic minorities at a political level [1].

Although Australia is a federation, no special arrangements are made for power-sharing, self-governing institutions or consultative processes for its indigenous people at local, state or federal levels. The non-recognition of Aboriginal people finds its origin in the opinion of the original settlers that Australia was *terra nullius* (no persons land). This contrasts to other settler-nations such as New Zealand, the USA and Canada where some form of treaty, reserved seats or special advisory bodies had been instituted for indigenous people as a form of recognition of their special rights.

Australia has however since the early 1990s been in a fundamental transformation as far as its approach to Aboriginal people is concerned. This is evidenced in three major developments: firstly, the claims for land rights of Aboriginal people was recognised for the first time in 1992 in the so called Mabo-decision and since then thousands of claims for native title have been lodged and native title has been determined over large parts of Australia; secondly, proposals are being discussed by the federal parliament to give Aboriginal people an elected "Voice" to give advices to the federal parliament and cabinet; and thirdly, several of the federal states are looking at ways to better accommodate Aboriginal people within the state, for example, in Victoria discussions are underway for a "treaty" to be entered into with Aboriginal people [2] and in the state of Western Australia the Noongar Settlement (the subject of this chapter) has been enacted by the state parliament [3].

In this chapter consideration is given to autonomy-arrangements that have been developed in Australia, with specific reference to the Noongar Settlement in the south-west of the state of Western Australia. The Settlement affects around 200,000 square kilometres of land and approximately 30,000 Noongar people. In comparison to the total landmass of Australia the size of the land the subject of the Noongar Settlement may not seem large, [4] but the Settlement is unique for the following reasons: firstly, the Settlement is geographically the largest of its kind in Australia; secondly, the Settlement is not limited to areas where native title exists; thirdly, the powers and functions of the Noongar people under the Settlement are not limited to the (limited) bundle of rights that comprise native title;[1] fourthly, the state government of Western Australia is committed to make a substantial ongoing financial contribution to the Noongar people for the extinguishment of their native title; and fifthly, complex and advanced self-governing corporations are established

[1] In general the content of native title is not a standardised set of rights, but rather the rights that can be demonstrated existed at time of settlement and the rights that continue to be exercised. These rights may include camping; hunting; fishing; control of access; protection of important sites; and resource extraction.

for the Noongar people which, albeit under private law, have the powers and functions to service the interests of the Noongar people on what can generally referred to as a form of non-territorial autonomy.

The corporations formed by the Noongar are in effect akin to a fourth level of government that provide services to the Noongar people on a personal and community basis.

This chapter provides an overview, analysis and assessment of the Noongar Settlement and concludes that the Settlement is a benchmark for indigenous self-government and autonomy not only in Australia but possibly in other countries as well.

2. Essential facts and figures about the Aboriginal people

The term "Aboriginal people" is used in this chapter for purposes of consistency, but it is acknowledged that the term does not adequately reflect the richness and diversity of the different cultures, languages and traditions that make up the Aboriginal and Torres Strait communities.[2] It may be more appropriate to speak about Aboriginal "peoples" in the plural since so many identities make up the wider indigenous community. Although the respective Aboriginal peoples share some common beliefs and practices, the peoples are also diverse with different languages, cultures; beliefs; stories; and traditional country for which they are responsible.

It is estimated that at the time of colonisation in the late eighteenth century there were around 250 indigenous languages spoken with a further 800 dialects, whereas today there are around 150, most of which are endangered [5]. Aboriginal people number around 2.6% of the population of Australia at 649,000 persons [6].[3] The median age of Aboriginal people is 23 compared to the average 38 years of age of non-Aboriginal people. Ten percentage of Aboriginal people speak an Aboriginal language at home. Each state and territory has a sizeable number of Aboriginal inhabitants:

State of residence	
NSW	216,176
QLD	186,482
WA	75,978
NT	58,248
VIC	47,788
SA	34,184
TAS	23,572
ACT	6508

The collective *political* opinion of Aboriginal people is not to be confused with their *community* identity. Political opinion often reflects an overarching political ambition or agenda, whereas community identity generally relates to the specific "country" or land from where an individual or community originates. According to

[2] There is no agreement in Australia about the appropriate way to refer to the indigenous people. Whereas the term "Aboriginal people" is most widely used, there are also other terms, for example, "First Nations" and "Indigenous People." In general, federal and state legislation and policies refer to "Aboriginal people."

[3] "2016 Census shows growing Aboriginal and Torres Strait Islander population [6]."

Aboriginal customary law a community or an individual may only speak for and is responsible to care for the country from where their apical ancestors originated.

The question whether a specific person is connected to a particular country is determined by the ancestry of a person and whether they are related to an apical ancestor that resided in the country at the time of white settlement. Extensive anthropological, birth and other historical records are often used to ascertain whether a particular person is indeed connected to a particular community and/or country. The mere fact that an Aboriginal person resides in a certain area therefore does not give them the right to "speak" for the country where they currently reside. This applies particularly to cities and towns to which Aboriginal people may have migrated but without them having the right to speak for the land where the town or city is located.

The term "Aboriginal people" therefore contains a kaleidoscope of diversity of languages, cultures, traditions, responsibilities for country; and beliefs. The political accommodation of this complexity, particular by way of some form of territorial or non-territorial autonomy, is exceedingly challenging.

3. Meaning of *autonomy* and *self-government* in the context of Australia

The Australian Constitution does not contain any reference to the terms "autonomy" or "self-government" albeit that the nation is a federation. No special arrangements were made at the time of writing the Constitution in 1901 for the rights, interests or aspirations of the Aboriginal people.[4] Although several subsequent statutes at a federal and state level deal with the interests of Aboriginal people, there is also no reference in those statutes to "self-government" or "autonomy." Whereas Australia is a signatory to the *United Nations International Declaration on the Rights of Indigenous People*,[5] none of the main political parties in Australia subscribes to the enactment of separate institutions under public law for self-government of Aboriginal people. There is also no agreement within the wider Aboriginal community as to how practical content should be given to claims for self-determination and self-government.

There are, however, useful examples of how some Aboriginal communities have been able to develop systems of limited self-government within the constraints of the legal system. In this chapter reference is made to two examples in the state of Western Australia where Aboriginal communities have developed self-governing institutions in regard to matters that impact on their daily lives; their culture, law and customs. The first is the Bidyadanga Aboriginal community which has a form of territorial autonomy over their community lands; and the second (and principal focus of this chapter) is the Noongar people which recently gained a form of

[4] No special representation was given for Aboriginal people to participate in the drafting process of the Constitution and no special rights or recognition arose from the drafting process to accommodate the unique cultures and identifies of Aboriginal people. In fact, until 1967 Aboriginal people were not included in the national census.

[5] See *Official Records of the General Assembly, Sixty-first Session, Supplement No. 53* (A/61/53), part one, chap. II, sect. A. The International Declaration was adopted by the General Assembly of the United Nations on Thursday 13 September 2007. It was adopted with 143 countries voting in favor, 11 abstaining and four voting against. Although Australia was one of only four countries who voted against the Declaration, Australia endorsed the Declaration on 3 April 2009. The Declaration is non-binding, but countries are expected to develop, promote and adjust policies in a manner that is consistent with the Declaration, but the "rights" contained therein cannot be enforced by a court of law.

non-territorial, personal autonomy in regard to a wide-range of matters that affect the laws, customs and socio-economic wellbeing of their community.

In its widest meaning autonomy and self-government for purposes of this chapter are terms used interchangeably to refer to the legal capacity of a community to discharge functions that are decentralised to its elected institutions within the context of public law.[6] The term "autonomy" is not a term of art with consistent meaning across all jurisdictions and in all circumstances [8]. The nature and extent of self-government and autonomy depend on the legal framework and factual circumstances of each sovereign nation.[7] Self-government and autonomy are terms that are widely used in politics, but poorly defined at law. It is therefore not surprising that international law shies away from references to a "right" to autonomy or self-government [9].[8]

In some instances, sovereign states have made reference to a right to internal self-government, autonomy and self-determination within their constitutions. But even in those cases the terms are used in a non-legally defined manner. A few examples of the developments in state constitutions where the right to self-determination, self-government and autonomy have been included are the Constitution of Ethiopia which recognises the right to self-determination of nationalities, including the right to secession;[9] the Constitution of South Africa which recognises the right to self-determination of "any community sharing a common cultural and language heritage";[10] the Constitution of Brazil which recognises the right of Indians to protect their rights collectively;[11] the Slovene Constitution which recognises the collective rights of the Italian and Hungarian groups to establish collective entities that could act on behalf of their members;[12] and the Constitution of Spain refers to the "right to autonomy" of nationalities and regions without defining "autonomy."[13]

International experience in federal and decentralised systems shows that it is relatively uncomplicated to use various forms of territorial autonomy, be it by way of regional or local governments, to provide indirect autonomy to communities. The Bidyadanga community of Western Australia falls within this category. The challenge, of which the solution remains elusive, is how to deal with communities of which the members have no geographical area of their "own" where they constitute a majority for purposes of regional or local government.[14] The Noongar community, also from Western Australia, falls within this category.

It is recognised by scholars and practitioners alike, that the range of options to protect the right of minorities to autonomy over matters that affect their culture,

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[6] "Autonomy" derives from Greek and means to "own" (*auto*) and "judicial" (*nomos*). While it is accepted that many associations, clubs and organisations manage themselves pursuant to civil law, the "autonomy" or "self-government" referred to in this chapter presupposes an arrangement in public law whereby a region or community corporation receives powers and functions by way of decentralisation to govern itself in accordance with laws or by-laws. See [7].

[7] Even in constitutions in which the term "autonomy" is used, the term is not necessary defined.

[8] Kymlicka highlights the absence of an international standard to autonomy of self-government for minority communities, but he acknowledges that as far as indigenous people are concerned there is a "right" to self-determination, but the content of the right is to be determined by sovereign states.

[9] a47 Constitution of Ethiopia.

[10] a235 Constitution of South Africa.

[11] a232 Constitution of Brazil.

[12] a64 Constitution of Slovenia.

[13] a2 Constitution of Spain.

[14] See for example, the recommendations of Lund for non-territorial arrangements in Europe in Organization for Security and Co-operation in Europe, [10] and the commentary by Malloy in regard to the de-territorialisation of minority interests in [11, 12].

language or religion cannot in all circumstances be solely based on territorial arrangements [13–16]. Hofmann observes as follows in regard to the practical application of non-territorial autonomy to minority groups:

> *"Generally speaking, the concepts of cultural autonomy or functional layering of public authority may be usefully applied in situations where a minority does not constitute the majority or a sizable minority of the population in a given region of a state but finds itself dispersed throughout the whole of a state. In such a situation (e.g., Hungary) [17][15] have opted for the introduction of a system endowing institutions established under public law with the power to regulate—or at least to have a most significant say in the regulation of—"cultural affairs," including, in particular, the running of public education institutions, such as Kindergardens and schools, or the management of their own cultural institutions and media, such a publically funded radio and TV broadcasting programmes. The important aspect here is the fact that minorities exercise, in the fields concerned, some kind of self-government—usually through representative bodies, the members of which are elected by and from the members of the minority concerned [18]." (author emphasis).*

Self-government and autonomy for Aboriginal people in Australia generally fall substantially short of arrangements that have been made in some other countries where the rights and aspirations indigenous people had to be accommodated. The examples set by the Bidyadanga community and the Noongar people may however provide fresh benchmarks for other Aboriginal communities to follow.

4. Land rights as an avenue to *privatised* autonomy

The advent of native title in 1992 in Australia has established a potential base whereupon Aboriginal communities who have instituted successful land claims, can develop limited non-governmental forms of self-government by way of the corporations registered pursuant to the federal *Corporations (Aboriginal and Torres Strait Islander) Act 124 of 2006* (CATSI Act).

The CATSI Act is specifically designed to provide a legal mechanism for Aboriginal people to register a corporation that can manage and control their own affairs [19].[16] Corporations under the CATSI Act are easy to establish by way of a template; the corporation must be not for profit; the members receive free legal advice; and the corporation operates under the supervision of a federal registrar of Aboriginal corporations. Federal funds are also made available to assist in the management of the corporations; to ensure transparency of activities of corporations; proper recordkeeping; and implement proper corporate governance procedures by

[15] To the example of Hungary can be added the recent developments in regard to cultural autonomy in Russia, Estonia, Kosovo, Hungary, Slovenia, Macedonia and Croatia. Malloy describes the range of mechanisms enacted in Slovenia for the purpose of protecting the rights of the two co-nations, Hungarian and Italian, as "an instructive example of how co-nation consociationalism might work." The arrangements include collective autonomy on the basis of a mix of territorial and cultural autonomy; participation in joint structures, mutual veto's in certain circumstances and special rights in regard to local self-government and care of the matters that affect their lives most intimately.

[16] Indigenous People may also incorporate organisations under other legislation, but the CATSI Act establishes a special basis for information and provides support to communities. The objectives of Corporations can be varied, including social, cultural, linguistic and/or economic objectives.

corporations.[17] Only Aboriginal people may register a corporation under the CATSI Act and the name of the corporation must include "Aboriginal" or/and a "Torres Strait."[18] Around 3000 Aboriginal corporations have been registered.

Registration of an Aboriginal corporation is open to any Aboriginal community, but for relevance of this chapter is that an Aboriginal community who has had a successful claim for native title, *must* be incorporated under the CATSI Act for the title to be held in trust by the Aboriginal corporation.[19] The native title holding-community can then use the corporation to manage their interests in regard to the land; to receive benefits; to negotiate; to undertake activities; to protect their heritage; and to do other actions that a legal entity is capable of doing in regard to their native title. The community as native title-owners therefore becomes incorporated for purposes of managing and controlling their native title rights.

All Aboriginal corporations, including the Noongar Corporations, operate within the sphere of private law; the corporation is a legal person that can sue and be sued; the corporation is liable only to its members; and the services are offered to members of the corporation wherever they reside.[20]

These corporations under the CATSI Act can be used for a form of autonomy or self-management within the sphere of private law, whereby the corporation can provide a wide range of cultural, linguistic, social and other services to its members. As is explained in more detail below, the Noongar people have established seven Aboriginal corporations under the CATSI Act to manage the native title settlement they have reached with the state government of Western Australia in a manner that bears the potential of far reaching privatised self-government.

The success of Aboriginal people to claim native title has been pivotal to their desire for self-determination in general, and autonomy in particular. Although the *United Nations International Declaration on the Rights of Indigenous People* does not prescribe what is meant by "self-determination," it is accepted that restoration of land rights and greater control over traditional lands are essential elements for self-determination. Access to land and restoration of rights in land constitute a basis whereupon other elements of self-determination such as autonomy, self-government, social justice, and reparation can be pursued [23].[21]

Aboriginal people have had a long and arduous struggle for land rights. The philosophy of the original settlers was that Australia was *terra nullius*, or no persons land, and therefore there was no need for the settlers or their successors to enter into any treaty or to reach any terms of settlement with the Aboriginal people they encountered. This view prevailed for close to two centuries after settlement. In *Milirrpum* v *Nabalco Pty Ltd* matter the question of "native title" was raised for the first time in Australia, but the court found that the Aboriginal people at the time of settlement was so uncivilised and primitive that no coherent form of proprietary

[17] See the on-line tools to assist members of Aboriginal corporations to manage their affairs under the [20].

[18] The Registrar receives annual reports from corporations; ensures compliance with the CATSI Act; and may even prosecute if there had been failure to comply with the provisions of the CATSI Act. For more information see [21].

[19] The federal *Native Title Act 1993* mandates that upon successful determination of a claim for native title, the title is held in trust by an Aboriginal corporation. See office of Registrar of Aboriginal Corporations, [22].

[20] See [7] for a brief comparison between the Aboriginal corporations in Australia and the non-governmental cultural associations that can be established under Russian law.

[21] The concept "self-determination" is fluid. In its most general application it includes political and administrative rights; powers-sharing and self-government, land rights and control over natural resources; and consultative rights. Tomaselli refers to the various facets of self-determination collectively as "composite rights."

title to land existed [24]. The court therefore continued to give effect to the opinion of the original settlers that Australia was for all practical purposes unoccupied by any society capable of entering into a treaty or agreement.

The antiquated and racist approach expressed in Milirrpum caused serious embarrassment to Australia in international fora and in its domestic relationship with Aboriginal people. There was however no appetite in the general electorate to pursue a land reform scheme to address the concerns of Aboriginal people.

The High Court of Australia ultimately broke the mould of the *terra nullius*–doctrine when in 1992 it relied on developments in international law and on advanced in anthropological research to find in the Mabo-judgement that native title continued to exist in Australia. In the Mabo decision the court accepted that the common law had to adjust by acknowledging the native title of Aboriginal communities in circumstances where "a clan or group has continued to acknowledge the laws and (so far as practicable) to observe the customs based on the traditions of that clan or group, whereby their traditional connexion with the land has been substantially maintained, the traditional community title of that clan or group can be said to remain in existence [25]." Native title, in effect, continues to exist in Australia unless it had been extinguished by some act of government (for example, granting of freehold).

The essence of the judgement for purposes of this chapter was that for the first time the judiciary accepted that Aboriginal people prior to colonisation had systematic and coherent systems of laws and customs according to which they managed their society; their country; their traditions and social relationships and that those systems in some instances continue to be adhered to.[22] The Noongar settlement attempts to restore aspects of those traditional systems of government within a modern day context.

The *Native Title Act (1993)* was enacted by the federal parliament to provide a statutory base for native title to be claimed; for claims to be registered; for native title to be held by an Aboriginal corporation; and for matters associated therewith. The Native Title Act was never intended for native title to provide basis for autonomy of self-government.[23] Native title is seen as a "bundle of rights" which relate principally to the proprietary interests an Aboriginal community has in land, for example, caring of country, but not to self-government or autonomy as understood in a public law sense.

Although the advent of native title was initially widely praised by Aboriginal people, scepticism and disappointment soon set in due to the complex and adversarial process to prove native title; the opposition to native title claims by governments, pastoralists and resource companies; the limited scope of the bundle rights once determined; the lack of practical benefits that arise from native title; the inability of native title to address wider socio-economic and social justice needs; and unfulfilled reparation demands of Aboriginal people [29, 30]. Barrie comments that the "initial optimism [after Mabo] in aboriginal communities has changed to

[22] The Court [26] observed that the original settlers "were ignorant of the fact that, under pre-existing local law or custom, particular tribes or clans had established entitlements to the occupation and use of particular areas of land," but increasingly a realisation developed about the social cohesion and organisation albeit that no title to land was recognised.

[23] In Mabo the court ruled by way of obiter that native title does not deliver "sovereignty" to the claimants and hence that the rights recognised under native title do not challenge the sovereignty of the Crown in regard to the governance of Australia under the Constitution. See [27] 53 ALRJ 403 at 408. For discussion about the pre-colonial sovereignty exercised by Aboriginal people and the impact thereupon by colonisation since no treaty had been entered into and the potential remnants of such sovereignty, refer to [28].

frustration and disillusionment [31]." Kelly describes the rights gained under native title as "hollow and fragile" [32].[24]

It is accepted that the determination of a valid native title claim does not challenge the sovereignty of the Constitution and therefore does not give to the Aboriginal community a right to sovereignty, autonomy or self-government under common law over the land affected. Self-government and autonomy under public law can only be bestowed under the Constitution.

Where does this conundrum leave Aboriginal people's desire to self-govern?

The option that arguably bears the most potential for autonomy is for Aboriginal people to utilise the provisions of the CATSI Act to establish a private corporation for a specific community and for that corporation to undertake activities; develop proposals; offer programmes; make policy inputs; undertake lobbying; and deliver services that are relevant to the members of the community. Although more than 3000 Aboriginal corporations have been registered under the CATSI Act, the 7 Noongar corporations registered pursuant to the Noongar Settlement are probably the most advanced as far as self-governing potential and competencies are concerned.

The success achieved in native title may therefore provide a basis for Aboriginal communities to privatise self-government and autonomy to the community that are the native title holders. In this way autonomy of a personal rather than a territorial jurisdiction can be achieved albeit in civil law rather than public law. The sovereignty of the Constitution therefore remains unchallenged, but through private initiative supported by privatisation and agency arrangements, an Aboriginal corporation can become a *de facto* government with non-territorial jurisdiction.

5. Territorial autonomy—managing (small parcels) community land

There is no general legislative or policy scheme in Australia for Aboriginal people to become autonomous or self-governing in a manner akin to territorial arrangements in the USA, Finland and Canada with respect to reserves for indigenous people.

The state of Western Australia has, however, enacted legislation that gives Aboriginal communities at a local level the ability to self-govern in regard to matters that impact on their communal land, in regard to who accesses the land, and in regard to matters of importance to their local community. The *Aboriginal Communities Act 1979* (WA) is aimed to assist Aboriginal communities to manage and control their community land [33]. "Aboriginal community" refers to the "original inhabitants of Australia and to their descendants [34]." The question whether a person is "Aboriginal" is resolved by way of an objective and subjective test, namely that the person must be descended from the "original inhabitants of Australia" and must be "accepted as such in the community in which he lives [35]."

The Aboriginal Communities Act empowers the state government of Western Australia to declare that the Act applies to a specific community, but only if the government is satisfied that the community has a constitution under which it operates; if there is a proper consultative mechanism to ascertain the views of community members; and if there is a desire of the community to be responsible for local self-government.[25] When the government declares that the Act applies to a particular community, the proclamation also identifies the community land to

[24] Native title rights have been described as "hollow and fragile."

[25] a4(2) Aboriginal Communities Act. The government may also revoke the application of the Act to a specific community if the government is of the view that the community no longer operates within the framework of its constitution a5(2) Aboriginal Communities Act.

which the declaration applies.[26] This is, in effect and albeit only at a community level, an example of territorial self-government for an Aboriginal community.

If the Aboriginal Communities Act applies to a community, the council of the community may make by-laws similar to those of a local government in regard to the matters that falls within its competence. The community therefore has a status as "government," and not merely as a private association that organises its own cultural affairs.

The Aboriginal Communities Act does not prescribe how a community council is to be nominated or elected. It is left to the community to devise a structure that reflects their culture and customs and to request the government to recognise the constitution pursuant to the Aboriginal Communities Act. The government must, however, be satisfied that the council in effect is responsible and accountable to its community, regardless of the system of representation that is used. Decision-making within the council is by way of an absolute majority. Once a decision is made, it is submitted to the government and when it is published in the Government Gazette is becomes a formal by-law of the community.[27] The by-laws are limited to the lands of the community and persons who reside on the land or visit the land.

Some of the typical functions that fall within the powers of an Aboriginal community council in regards to its lands are: regulation of people, vehicles and animals; management of animals and vegetation; development and maintenance of infrastructure; management of community meetings; regulation of alcohol and firearms; regulating conduct; and any other matter of relevance to the decency, order and good conduct in the community.[28] The community council may also authorise the police to enter the lands of the community and to enforce the by-laws.

One of the Aboriginal communities in the state of Western Australia that has taken up the self-government option under the Aboriginal Communities Act is the Bidyadanga Aboriginal Community. The community lives in the Broome area, which is about 1600 km to the north of Perth in the Kimberley remote area of the state [36]. The community numbers around 800 persons and is considered as one of the most remote Aboriginal communities in Australia. The community comprises persons from four different language groups.[29] The community self-manages principally by way of government grants and income derived from commercial activities on their land. The council of the community comprises two persons from each language group and elections are held every 3 years.

The community enacted by-laws for self-government in 2004 [37]. The by-laws determine that all persons, Aboriginal or not, are bound by the by-laws when they enter or reside on the land of the community.[30] The community established an association which is responsible for the practical government of the land. All Aboriginal people who originate from the land may be a member of the association. The association elects a council to be responsible for the day to day government of the land.[31] The council have wide governing powers that include organising access to the land; identification of places where no access is allowed because of cultural significance; traffic and driving regulations; general conduct rules; and firearms registration and control. [32]

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[26] a6 Aboriginal Communities Act.

[27] a8 Aboriginal Communities Act.

[28] a7 Aboriginal Communities Act.

[29] Karajarri, Juwalinny, Mangala, Nyungamarta and Yulpartja Aboriginal language groupings.

[30] By-law 1(5) Bidyadanga Community By-laws. Non-Aboriginal persons may only enter the land with approval or a permit. By-law 4 Bidyadanga Community By-laws.

[31] By-law 3 Bidyadanga Community By-laws.

[32] By-laws 4–11 Bidyadanga Community By-laws.

The association formed by the community pursuant to the *Associations Incorporations Act (WA)* regulates matters such as a council; membership; meetings and the general operations of the community.[33] The objects of the association include general support of the community; provision of education and employment opportunities; assist and encourage member to promote their culture; and to seek and receive grants for its operations.[34] Membership of the association is open to any Aboriginal person who resides in the community.[35] A governing council that comprises between 5 and 10 members is responsible for the day to day management of the association. Each of the language groups must be represented by at least two persons in the council.[36] The council may appoint employees and an executive officer to undertake practical management and operational activities. The association must meet at least once per year, but special meetings may also be convened.[37]

The association operates like a local government with a territorial jurisdiction that includes cultural objectives. It provides municipal services to the community, including services such as road maintenance; landscaping; pet control and other essential services. In addition, the association has a partnership with the local school to offer culturally appropriate courses. Various other cultural activities are also on offer for the community. The association also provides home-based support services such as meals on wheels and poverty relief.

The Bidyadanga arrangement is one of only a few examples, in Australia where an Aboriginal community can self-govern on a territorial basis. The remote location of the community and the fact that the community resides on their traditional lands have contributed to the arrangement receiving government support. No similar arrangement can be pursued in urban areas since Aboriginal people live intermingled with other communities.

The experience of the Bidyadanga highlights the benefits that may arise when native title is determined and a community lives on their traditional lands. The territorial dimension does facilitate self-government since the jurisdiction of the association can be clearly defined over a certain territory; services with a territorial component can be delivered; and all individuals entering into the territory are bound by the by-laws. On the other hand, it must be noted that few Aboriginal communities reside on their traditional laws; even those who live on traditional lands may not have exclusive control over the land; many Aboriginal people have urbanised or live intermingled with the rest of the population; and as a result territorial forms of autonomy are not appropriate for the vast majority of Aboriginal people.

6. The path for the Noongar people to the Noongar settlement

6.1 Background

The Noongar people live predominantly in the south west part of the state of Western Australia. This has been the traditional land of the Noongar people but their sovereignty over the land has been highly impacted by events that, according to Mabo, extinguished native title, for example, granting of freehold land in cities;

[33] *Constitution and Rules of the Association Bidyadanga Aboriginal Community La Grange Inc*. (Constitution of the Bidyadanga community). The articles of incorporation are under review at the time of writing.

[34] r 6.1 Constitution of the Bidyadanga community.

[35] r 8 Constitution of the Bidyadanga community. The person must also be a member of one of the language groupings.

[36] r 9 Constitution of the Bidyadanga community.

[37] r 15 Constitution of the Bidyadanga community.

towns; industrial areas, farms and infrastructure development. Only relatively small pockets of native title remain in the area since on so much of native title had been extinguished.

The different communities that make up the Noongar people lodged claims for native title over different parts of the south west area. After protracted litigation and negotiation a settlement was reached whereby all the native title claims where relinquished in exchange of a package of rights and benefits for the entire area.

This settlement is the most ambitious yet in Australia and provides a benchmark not only for other Aboriginal communities in Australia but also for indigenous people and minority groups in other parties of the world. The settlement has been described as the first "treaty" between Aboriginal people and an Australian government since it aims to rectify an injustice that has been ongoing since the time of colonial settlement [3].[38] It must however be noted that the treaty-power of the Constitution falls within the ambit of the federal government, which means that the Noongar Settlement may in literature be described as a "treaty," but at law it is a native title settlement pursuant to the Native Title Act [38]. The Settlement can best be described as a statutory contract, which given the subject matter is seeks to regulate, is akin to a constitution for the Noongar people. The settlement provides for a wide spectrum of benefits, self-governance and autonomy which, according to this chapter, constitutes a form of privatised autonomy not previously seen in Australia.

6.2 Profile of the Noongar people and their land

The Noongar people comprise several sub-communities or family groups whose apical ancestors lived in the south west area at the time of arrival by the settlers. The Noongar people currently number around 30,000. The larger community comprise 14 different language groups which pursuant to the Settlement are for practical reasons organised into six sub-communities, each with an area of land for which they are responsible.[39] It is estimated that the forebears of the Noongar people had been in occupation of the area for more than 45,000 years [39].

Since the area occupied by the Noongar people is large with diverse vegetation; climate; geography and rainfall, the respective communities that make up the Noongar had different practices in regard to the land they occupied albeit that they were also related to one another and shared common customs and language that separated them from other neighbouring Aboriginal communities. Noongar communities that lived close to the ocean had as their main source of food the ocean and river and estuary systems that ran into the ocean, whereas other communities lived in semi-arid areas, while others where principally forest dwellers. Although the Noongar community was bound together by language, ancestry, customs and traditional laws, the respective groupings had their own sub-regional customs and responsibilities to the land they occupied. The association of families with a particular part of country has remained intact albeit that urbanisation, mining and agricultural developments have had a massive disruptive impact on the traditional living patterns [40].

Whereas early white settlers where of the view that Aboriginal people in general were hunter-gatherers who endlessly roamed the country without any specific

[38] H. Hobbs and G. Williams the authors conclude that the Noongar Settlement can be described as in its very nature a "classic treaty" which implies "a coming together between two nations to agree on certain things, and in doing so, finding a way forward together and recognising each other's sovereignty." (p. 23).

[39] The six communities are: Ballardong, Gnaala Karla Booja, South West Boojarah, Wagyl Kaip & Southern Noongar, Whadjuk and Yued groups.

pattern, social organisation or area where they called "home," contemporary research shows that although the communities hunted and collected to feed themselves and traversed widely, they were generally located in a certain area which they regarded as their country and for which they had responsibility. Their understanding of land ownership was not that the land belonged to them, but rather than they belonged to the land and had to take care of it.

The Noongar view of ownership or control of land is summarised in the following way:

> *"Traditional Noongar rights and interests in boodja (country) are not the same as the Western concept of land ownership. For Noongar people, to have connection to country is to have a responsibility to the land. Duties and responsibilities for country also include protecting sites of spiritual significance and family heritage. Different Noongar groups have custodial status over certain parts of the south-west. Within these areas are moort boodja or family runs. These are the areas in which Noongar family groups traditionally travel and enjoy special privileges relating to that part of our country. We consider it our traditional land owner's right to have use and access to these areas. Those who do not share rights in that part of the land should seek permission before they enter or use it. Traditional Noongar lore and custom does not dictate that custodians remain permanently within their territorial borders to be on country. Traditionally, Noongar people travelled widely and we accepted that our territories would be occupied by others during our absence [41]."*

The area affected by the Noongar settlement is about 200,000 square kilometres in size[40] and it covers the entire south-west of the State of Western Australia [43].[41] Within the area are major cities and towns, for example, Perth, Geraldton, Albany, Bunbury and Margaret River. In excess of 2 million people live in the area, of which around 30,000 are Noongar.

The challenge for policy makers and the Noongar people at the time when the settlement of the native title claims was negotiated was therefore obvious: how does one within an area that is occupied by so many non-Noongar people and where the traditional livings and customary patterns of the Noongar people had been to fundamentally been impacted upon by settlement and subsequent events, make legal, financial and practical arrangements for the Noongar people to protect and promote their language, culture, traditions and customs for purposes of a form of self-government?

6.3 Noongar native title claims

The enactment of the Native Title Act in 1993 gave rise to several native title claims being lodged in the south west area of Western Australia. The various claims sought to represent the interests of the respective family groupings that make up the Noongar people. Many of the claims were overlapping and competing with around 78 claims lodged for parts of what is now the single Noongar area.[42] This was not dissimilar to many other parts of Australia where the introduction of native title saw a scramble to lodge claims. This process took some time to settle across Australia and for claims to be combined and harmonised.

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[40] This is larger than the territory of countries such as Belgium; Ireland, Austria, Portugal, Hungary and Greece. See [42].

[41] See enclosed map of the area at Annexure 1.

[42] Ultimately the single Noongar claim was lodged to represent around 218 families, and substituting six registered and 12 unregistered claims.

In order for a native title claim to be successful, the following essential requirements must be met: the claimants bear the onus of proof to satisfy the court that they are connected to the land being claimed[43] and to the society that resided on the land at the time of settlement through shared apical ancestors [45, 46]; that they continue to hold and practice the customs and traditions of their apical ancestors [47]; and that the bundle of rights they claim continue to exist.[44] The essence is that the native title rights as claimed must have originated from a normative system which regulated the traditional observance of laws and customs at the time of British settlement. The laws and customs could have been adapted over years, but if the laws and customs had been extinguished for whatever reason, they could not be revived. The society or community that claims native title must be connected to those that occupied the area at the title of settlement and although it is accepted that changes of population and inter-group mixing may occur, the core identity of the claiming community must be capable of being traced back to the identity of the original community.[45]

The multiple claims lodged initially by various family groupings of the Noongar community, were ultimately amalgamated into what became known as the single Noongar claim. The decision to amalgamate the claims was for tactical and empirical reasons. Tactically it was thought that the likelihood of success of any native title determination with so many competing and overlapping claims would be diminished, whereas empirically there was strong research that supported a larger integrated claim for all of the Noongar people to lay claim to the entire south west region, but with acknowledgement that smaller family groupings had closer connection to certain parts of country [50].

This idea of a single claim for the Noongar people as a "society" became a key element of dispute between the Noongar and those who opposed the claim, with the Noongar contending that they were a single society, whereas the state government claiming that each of the family groupings that now purportedly make up the Noongar people, in effect had their own laws and customs and country for which to care [51].[46]

The hearing of the single Noongar claim commenced on 11 October 2005 [52]. Evidence of the Noongar witnesses and experts called on their behalf, was in essence that the Noongar people constituted a "society" that shared common belief, language and customs and that differences in dialect were not adequate to conclude that separate languages and therefore different societies existed. The Noongar witnesses, supported by experts, said that there was an ongoing spiritual and where possible physical connection to the lands of their apical ancestors, and that the laws and customs continued to be adhered to albeit in the context of contemporary society. Those who opposed the claim, most notably the state and federal governments, challenged the proposition that there had been a single Noongar society at the time of British settlement. The notion of a single Noongar identity was according to the state government a modern construct that in itself was indicative of the breakdown of Noongar traditional laws and customs rather than an affirmation thereof.

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[43] The "connection" need not be physical by the community living on the land being claimed, but it must be spiritual and the knowledge transmitted but be evidenced of the knowledge, understanding and caring of the land in question. See *Members of the* [44].

[44] For a useful overview of requirements to prove native title see [48].

[45] See for example, [49] 404 in which it is explained that once the connection had been severed, it cannot be restored.

[46] See [51] Observations on the Richtersveld litigation route followed in South Africa versus the Noongar settlement route followed in Western Australia.

Whereas it is not within the scope of this chapter to analyse in depth the nature of the Noongar native title claims, a pertinent question that arose during the litigation process was whether the respective claims groups that fell within the general category of "Noongar," could indeed be regarded as a single society of people with a shared identity and language. The linguistic expert who gave evidence for the Noongar people found that if the wordlists that were recorded by the early settlers were compared to words that have been recorded from within what is now referred to as the Noongar area, there is an adequate similarity to conclude that the respective communities that make up the Noongar claims had more in common with each other than they shared with neighbouring language communities. The Noongar people therefore had a sufficient level of distinctiveness that allowed them to be called a single society and that the language they speak predates colonisation [53].

In his judgement of 19 September 2016 Wilcox accepted the evidence of the Noongar witnesses and opinions of experts called by them and said, in summary, as follows:

> *"I have reached the conclusion that the Single Noongar applicants are correct in claiming that, in 1829, the laws and customs governing land throughout the whole claim area were those of a single community. My principal reasons for that conclusion are as follows:*
>
> i. this conclusion best accords with the information left to us by the early writers;
>
> ii. I am satisfied, on the evidence of Dr Nicholas Thieberger, an expert in Aboriginal languages, that in 1829 there was a single language throughout the whole claim area, albeit with dialectic differences between various parts of that area;
>
> iii. the evidence establishes some important customary differences between people living within the claim area and those living immediately outside it (Yamatji to the north and Wongai to the north east);
>
> iv. there is evidence of extensive interaction between people living across the claim area;
>
> v. there is no evidence of significant differences within the claim area, as regards the content of laws and customs relating to land [54]."

The judgement of Wilcox was appealed to the Full Federal Court in the matter known as *Bodney v Bennell*.[47] The appeal was successful on various grounds and remitted to a single federal court justice for reconsideration.[48] Since the single Noongar claim had not been dismissed but had been referred back for what in effect would be a re-hearing, the parties to the dispute agreed to enter into settlement negotiations.

[47] 2008 FCAFC 63.

[48] Some of the reasons of relevance to this chapter given by the Full Court for setting aside the judgement of Wilcox J was that he had not given adequate attention to expert evidence that supported the opinion of the state namely that continuing connection had been severed and there was inadequate evidence to conclude that a Noongar society or nation had existed at the time of settlement (par 123).

The negotiations, which commenced around December 2009 continued until 2016 when the *Noongar Recognition Act* and the *Noongar Land Administration Act* [55],[49] were enacted by the Parliament of the state Western Australia, together with an Indigenous Land Use Agreement for each of the six areas.[50] The agreement reached sought to strike a midway between the propositions put to the court—on the one hand the notion of a single Noongar society was accepted, but on the other hand the principle of smaller family groupings bearing responsibility for sub-regions was also endorsed.

6.4 Outline of the Noongar Settlement

A brief outline (see in depth discussion below) of the Noongar Settlement is that an integrated settlement has been entered into between the Noongar people and the state of Western Australia whereby the native title claims are surrendered in exchange for a package of rights that includes financial support; joint management of land; transfer of land and houses; cultural programmes; and heritage protection.

The Settlement is managed via seven Aboriginal Corporations of which six represent the main communities in the sub-regions and one Corporation provides general centralised services to the six corporations.

It is the proposition of this chapter that these Noongar Corporations constitute, in effect, a potential fourth level of government whereby the Noongar people can manage and control their own cultural, heritage and linguistic interests on a non-territorial basis, while at the same time entering into service agreements with state and federal authorities to act as agent for the delivery of public services in areas such as health, education, infrastructure and conservation.

The Settlement has quite correctly been described by the then Premier of Western Australia as most comprehensive statutory settlement of native title claims in Australia.[51]

7. The Noongar Settlement—the essential elements for privatised self-government

7.1 Introduction

The Noongar Settlement refers to three main legal instruments that lay the basis for the resolution of the respective Noongar claims, namely the *Noongar Recognition*

[49] Preamble item three of the Noongar Land Administration Act provides that the agreement compensates the Noongar people for the "loss, surrender, diminution, impairment and other effects" of their native title rights and interests.

[50] On 17 October 2018 the National Native Title Registrar accepted the Indigenous Land Use Agreement for registration. This followed some opposition from within the Noongar community for the settlement to be ratified and the decision of the Federal Court in *McGlade v Native Title Registrar* (2017) FCAFC 10 that the indigenous and use agreements could not be registered until consent from all affected native title groupings had been obtained. The federal parliament introduced amendments to the Native Title Act that enabled the registration of the settlement to be finalised.

[51] Premier of Western Australia, Colin Barnett, described the Noongar Settlement as "the most comprehensive native title agreement" in Australia. Western Australia *Parliamentary Debates* Legislative Assembly, 14 October 2016, 7313.

Act;[52] the *Noongar Land Administration Act* [55],[53] and an *Indigenous Land Use Agreement* registered pursuant to the *Native Title Act* for each of the six sub-regions (jointly referred to herein as Settlement).

The Settlement, according to which the Noongar people surrender native title for the entire area the subject of the agreement, includes in return a compensation package of benefits that involves a combination of recognition of traditional land ownership; annual payments by the State government to the Aboriginal communities for a future fund; the management of their cultural and traditional affairs; joint management of conservation areas; access to Crown (public) land; a housing and land package; employment and business opportunities; and support for Noongar commercial and entrepreneurial activities.[54]

The Settlement, for purposes of this chapter, comprises the following essential elements:

Firstly, the Settlement covers all lands the subject of the agreement and it is not limited to areas where native title had been claimed or determined;

Secondly, the Settlement is encased in statute and it is the outcome of negotiations rather than litigation;[55]

Thirdly, the larger Noongar region is divided into six smaller sub-regions where the Noongar families that are associated with that specific area take responsibility by way of a registered corporation to discharge the duties and functions arising from the Settlement;[56]

Fourthly, the jurisdiction of the six corporations over their respective communities is of a non-territorial nature in the sense that public services are rendered by the corporations on a community and personal basis within the sub-region, and those services do not exclude the territorial jurisdictions of local government; and

Fifthly, the corporations are a hybrid of civil and public law bodies since they are created pursuant to a statute; they offer services of a personal, community, social and economic nature; and they may act as agent to deliver services on behalf of government departments. The corporations are, in effect, a form of fourth level of government that service the interests of their members on a community basis but not to the exclusion of other governments.

7.2 Area of land covered

A unique aspect of the Settlement is that it covers the entire region, including waters and rivers, and is not limited to pockets of land where native title continues to exist. The area of land is set out in (**Figure 1**) Schedule 3 of the Noongar Settlement Act and it includes farming areas; towns, villages and cities in the area.

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[52] The Act recognises the Noongar people as the traditional owners of the south-west of the state of Western Australia.

[53] Preamble item three of the Noongar Land Administration Act provides that the agreement compensates the Noongar people for the "loss, surrender, diminution, impairment and other effects" of their native title rights and interests.

[54] For a summary of the settlement package refer to [56].

[55] It must be noted, however, that the Settlement is unlikely to have eventuated had it not been for the litigation and court actions that preceded it. It is arguably only after the parties had fully grasped the complexity and risk of litigation that they resorted to a negotiated outcome.

[56] The six communities are: Ballardong, Gnaala Karla Booja, South West Boojarah, Wagyl Kaip & Southern Noongar, Whadjuk and Yued groups.

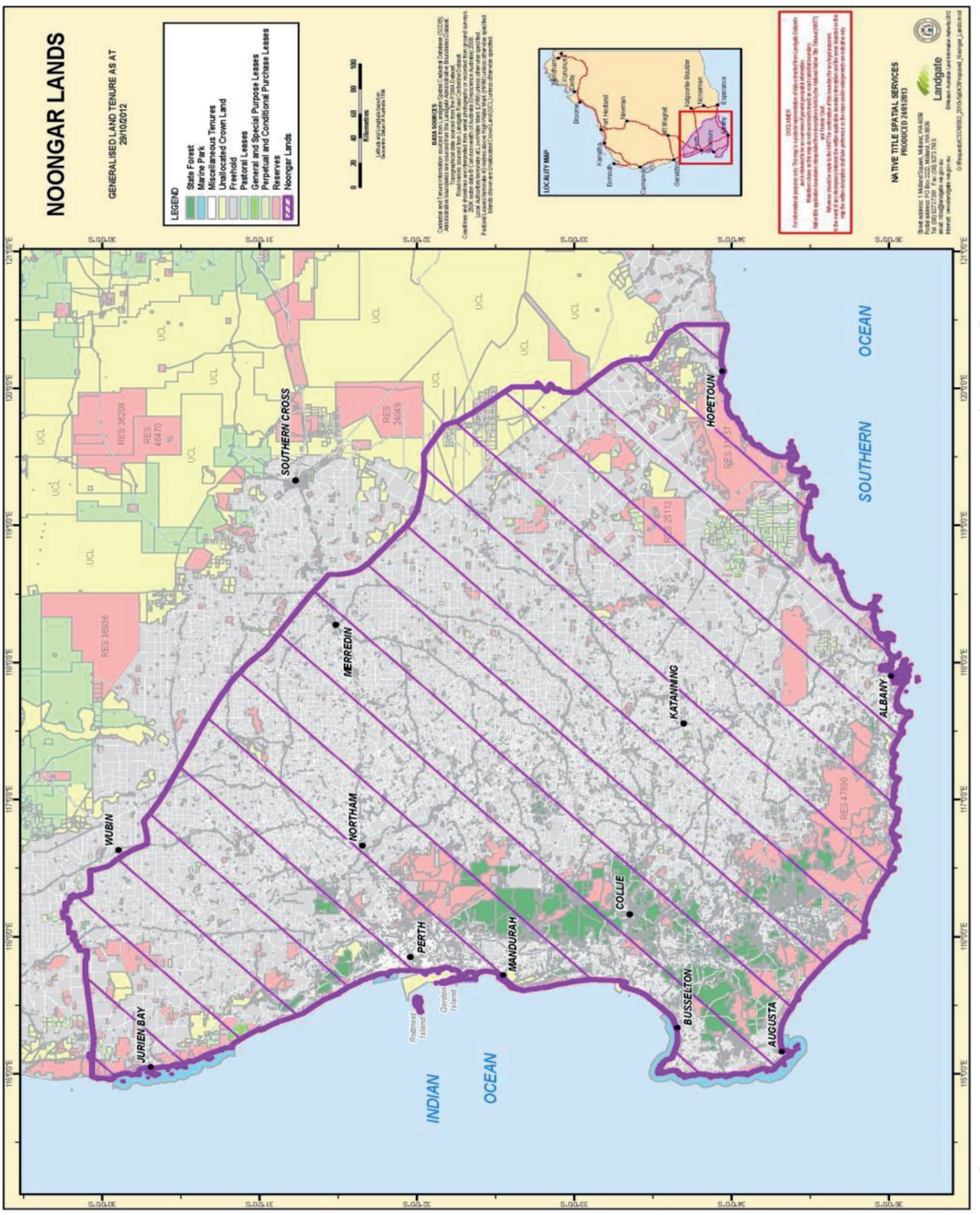

Figure 1.
Schedule 3, Noongar Recognition Act, 2016: The area subject to the Noongar Settlement.

The settlement area is divided into six sub-regions of which each is made up of the families whose apical ancestors originate from those areas.[57]

This is arguably the most reconciliatory aspect of the Settlement since it is acknowledged by law that the Noongar people used to occupy the entire area prior to British settlement; that regardless of other interventions the Noongar people continue to regard the entire area at their country; and that the powers, functions, and

[57] A Land Use Agreement (ILUA) is entered into pursuant to the *Native Title Act 1993*. The six ILUAs were registered on 17 October 2018. Jeanice Krakouer, a senior representative of the Noongar people, described the registration of the ILUAs as follows: "This is a great opportunity for the Noongar People to come together, to control our own destiny, and to build a solid future for generations to come [57]." For more information about the registration of an ILUA see [58]. See the respective ILUAs for the six areas at [59].

authorities that they discharge in regard to their customs, laws and traditions are not limited to areas where native title exists, but to the entire region on a personal and community basis. The Recognition Act acknowledges that the Noongar people are the traditional owners of the entire region, but this recognition does not conflict with the rights and interests that had been granted to other persons by way of, for example, freehold.[58] The special relationship between the Noongar people and their land is acknowledged as them having a "living cultural, spiritual, familial and social relationship with the land."[59]

The holistic approach to recognise an Aboriginal community's traditional ownership to an entire region is ground-breaking and is the first of its kind in Australia.[60]

In contrast to other successful determinations of native title whereby Aboriginal people only have jurisdiction of areas where native title had not been extinguished, the Noongar Settlement set the Noongar people and their institutions as a parallel, private authority to the state and local governments for the entire region covered by the Settlement. The full implications of the Settlement will be revealed over time, but it can be foreshadowed that in future elected governments at federal, state and local levels may be required by law, legal proceedings and by practical circumstance to negotiate with the Noongar corporations about key policy issues that affect the land, their laws, culture and customs.[61]

It is not surprising that the Settlement has been described as the first real "treaty" between an Aboriginal community and a government of Australia [3].[62] The Settlement entails in essence that two governing systems have agreed on a settlement that is reflected in a binding legal instrument that exhibits strong elements of a founding constitution for the Noongar people.

The Settlement reflects a type of federal arrangement whereby community corporations in each of the sub-regions are responsible for the management of their own cultural, social and traditional affairs, whereas matters that require cooperation are coordinated by a central services corporation for the entire region.

7.3 Legal basis of Settlement

The legal basis of the Settlement is found in three instruments namely the *Noongar Recognition Act*; the *Noongar Land Administration Act*, and an *Indigenous Land Use Agreement* registered pursuant to the *Native Title Act* for each of the six areas. The Indigenous Land Use Agreement (ILUA) for each sub-region sets out the terms of the Settlement.[63]

The Noongar Recognition Act recognises the Noongar people as the traditional owners of the land; it acknowledges the special contribution they have made and

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[58] s4 Noongar Recognition Act.

[59] s5 Noongar Recognition Act.

[60] See enclosed map of the area at Annexure 1 [60].

[61] s6 of the Noongar Recognition Act seeks to remove any potential rights that may be claimed in future other than what has been explicitly agreed to. This statutory provision may not necessarily preclude a future court to interpret the Settlement in an expansionist manner in favour of consultation, procedural and substantive rights not necessarily provided for in the Noongar Recognition Act.

[62] The authors are of the opinion that the Noongar Settlement is a "classic treaty" which implies "a coming together between two nations to agree on certain things, and in doing so, finding a way forward together and recognising each other's sovereignty." (p. 23).

[63] For sake of convenience the Ballardong ILUA (in excess of 800 pages) is used as a basis since the other five ILUAs contain similar terms and conditions. *See* [61]. The native title rights are dealt with in accordance with s 24CB(e) and s 24EB(1)(d) Native Title Act.

continue to make to the heritage, cultural identity, community and economy of the state; and it confirms that the package of measures included in the Settlement are in full and final settlement of any native title claim they may have in the region.[64] The Act also defines the region to which the Settlement applies and includes a map of the area.[65]

The Noongar Land Administration Act contains the detail of land to be transferred to the Noongar people; reserves to be created for their enjoyment; and related arrangements to ensure land management and access. These actions are termed a Land Base Strategy to reflect the holistic and all-inclusive nature of the Settlement.[66] The Act confirms that the Settlement is in full and final compensation for any claim that may arise now or in the future in respect of native title.

The ILUAs entered into for each of the six sub-regions contain the detail of the Settlement for the particular area. An ILUA is a creature of the Native Title Act to enable Aboriginal people to enter into a binding agreement with other persons about their lands and waters. An ILUA binds all persons in regard to the land and the rights affected, even persons who were not part of the agreement. An ILUA can cover any aspect of native title, including the way in which land is managed; areas that are protected; authorisation for works to take place on land; heritage protection; negotiation protocols and compensation. An ILUA is advertised for public comment and then registered by the National Native Title Tribunal to form part of the public record.

The Ballardong ILUA was registered on 17 October 2018.[67] It acknowledges that the Settlement is "unprecedented" in Australia and that the Settlement "provides a significant opportunity for the Noongar people to achieve sustainable economic, social and cultural outcomes."[68] The Settlement is clearly not only aimed at the mere establishment of a cultural club or association, but it is intended to provide a basis for self-determination; autonomy; and self-fulfilment of the Noongar People. It is also confirmed that the Settlement forms the basis for extinguishment of all native title claims and for fair and just compensation for any rights or interests forfeited. The ILUA then sets out all the details of the Settlement in a legally binding format.

The Noongar Recognition Act; the Noongar Land Administration Act, and the ILUA for each of the six sub-regions together form what could be seen as a "constitution" for the recognition and establishment of the Noongar self-determination and self-governing institutions. Whereas native title is often referred to as a "bundle of rights,"[69] the Settlement offers a holistic outcome whereby the entire Noongar community is acknowledged; where cultural, spiritual, linguistic, social and economic needs and interests are recognised; and where the rights apply to an entire region. The Settlement is as much a political, founding constitution as it is a statement of cultural recognition.

7.4 Noongar self-governing institutions

The institutional arrangements for the Noongar people reflect the nature of their linkage to the apical ancestors of the region. Although the Settlement covers the

[64] Preamble, Noongar Recognition Act.

[65] See Schedule to this Chapter.

[66] See Schedule 10, item 8 of the Ballardong ILUA.

[67] The Indigenous Land Use Agreements for the other five sub-regions were registered at the same time.

[68] See Preamble, Ballardong ILUA.

[69] Native title in effect comprises a bundle of rights such as hunting, fishing, camping, and caring for country which, depending on the circumstances of each claim group, is limited in scope as to the area to which it applies and the specific rights that form part of it. This very legalistic process leave some groups with a sense of disillusion because of the scope and/or content of their rights.

Figure 2.
The main cities and towns in the Noongar settlement area as well as the sub-regions for the six Noongar Corporations.

entire region, provision is made for six sub-regions for families who hold the closest ties to those respective areas. Each of these six sub-regions has its own institutional arrangement and the six corporations work together in a federal-type structure in a common central services corporation for the entire region. There is an element of subsidiarity in these arrangements since whatever functions cannot effectively be discharged by the sub-regional corporations can be delegated to the common central services corporation for decision-making. These arrangements reflect the historic reality that the Noongar People on the one hand shared a common language, law and customs, but on the other hand the caring of country was done at a local level (**Figure 2**).

The federal-type Central Services Corporation is responsible to coordinate the activities of the six sub-regional Noongar Corporations; to undertakes collective negotiations with federal, state and local government agencies; to initiate and coordinate major projects; to advocate on behalf of the Noongar people; to develop training and other material for leadership development; to undertake heritage protection and a heritage protocol for the entire region; to develop a cultural advice

policy; and in general to promote the interests of the Noongar People. [70] The seven Corporations are registered under the CATSI Act.

This institutional design is unique to the Settlement and has not previously been pursued in Australia.[71]

The self-governing corporations are not created by the federal or state constitutions but pursuant to a statute. The corporations do not operate within the sphere of public law but rather as corporations in civil law. Legally this may render the corporations not apt to be described as a "government," but a proper analysis of the functions and objectives of the corporations supports a proposition that in fact the corporations may be regarded as a form of "government" with jurisdiction over a wide range of matters that affect the culture, laws, social development and economic status of the Noongar people.

The membership of the six sub-regional Noongar Corporations are open to all Noongar persons who associate with a specific sub-region through their apical ancestors.[72] A person need not live in the area to be a member of the local Corporation.[73] Association with a Noongar Corporation is voluntary and there is no obligation on a Noongar person to be a member of a Corporation; to receive any benefits; to accept a service or to participate in activities of a Corporation. A member may also resign when they wish to.[74]

The Noongar Corporations are *sui generis* in character since they are, on the one hand, private entities under civil law, but on the other hand they provide services to their members that are akin to the type of services a government would provide. It is envisaged that as the Noongar Corporations develop in stature, credibility and legitimacy, that they would also become agents for local, state and federal governments to perform functions and deliver services of a governmental nature to the Noongar people in areas such as health, education and welfare.

7.5 Institutions and powers of the Noongar Corporations

The institutional arrangements of the six Noongar Corporations are the same, whereby a council comprising two to four directors are elected for each corporation by its members.[75] A maximum of two additional directors are appointed by the elected directors of each Corporation for reason of their expertise in areas such as law, finance, business or social matters. The directors are responsible for the day to day operations of the Corporation. Special meetings may be convened of members to vote on or discuss matters of importance to the community.

The federal-nature of the Noongar Corporations is reflected in the composition of the Central Corporation. Each of the sub-regional Noongar Corporations can nominate one director to serve on the Central Services Corporation. The Central Services Corporation may also nominate two additional directors for reason of their expertise in areas such as law, finance or business development. The Central Services Corporation is responsible for functions and activities that exceed the expertise of the sub-regional Corporations; or activities that are

[70] Ballardong ILUA, Schedule 10, item 4.

[71] For a detailed outline of the legal structure to manage the settlement refers to *Noongar Governance Structure Manual* (2016) by law firm [62].

[72] A membership-expression form is available for the detail of the person who wants to be admitted. In order to assist potential members, detailed anthropological reports are available to ascertain if a person is connected to a sub-region via an apical ancestors. See [63].

[73] *See* Ballardong ILUA, Schedule 2 which sets out the list of apical ancestors for the Ballardong community.

[74] For general background information about the Corporations and operations see [64].

[75] To facilitate participation the elections take place via postal vote.

of interest to all six Corporations; or that are delegated to the Central Services Corporation by the sub-regional Corporations. The composition and functions of the Central Services Corporation reflects the federal elements of subsidiary and joint rule.

The responsibility and accountability of the Noongar Corporations are at two levels: firstly, the directors are accountable to the members of the Corporation and special meetings can be called to discuss policy issues; and secondly, the Corporations fall under the general supervision of the registrar of Aboriginal corporations.

The powers and functions of the respective Corporations are set out in their founding instruments of incorporation. The six sub-regional Noongar Corporations are responsible to manage and implement the Settlement within their region.[76] This allows the sub-regional Corporations some discretion, again in a federal-type manner, to pursue projects, undertake negotiations and develop policies that are relevant to the members of their corporation. Each Corporation can decide how it wishes to discharge its functions in areas such as to promote the traditional laws, culture and customs of their community; to manage any lands that may fall within its jurisdiction; to participate joint management activities; to provide services; to cooperate with state and local governments; to advocate on behalf of their members; and to undertake any activities on behalf of its members. The respective sub-regional Noongar Corporations can therefore experiment with their powers and enter into different type of arrangements with federal, state and local governments.

The powers and functions of the Corporations are not of a constitutional nature but are exercised under civil law. The nature of some of the services provided, for example, in the socio-economic field, in management of land, in housing and employment, are however akin to governmental functions. In addition to the wide objectives of the Noongar Corporations, the individual Corporations and the Central Services Corporation may also enter into agreements or contracts with government agencies whereby a Corporation becomes an agent of a government department to provide services to the Noongar people. The respective Corporations therefore provide services that cover a wide range, from cultural and family affairs, to socio-economic and commercial activities.

This again highlights the *sui generis* character of the Noongar Corporations whereby they are incorporated in civil law, but deliver services in the public sphere akin to a government.

7.6 Elements of the Settlement

The uniqueness of the Settlement is reflected in the wide scope of outcomes that arise from it. Whereas native title settlement are usually linked to the area of native title and aspects of the bundle of rights, the Settlement deals with a broad spectrum of benefits that include socio-economic development; joint management of conservation areas; education and training; housing; advocacy; and the potential for self-government over matters that impact on the culture, traditions and laws of the Noongar people.[77]

The respective elements that make up the Settlement are unprecedented in Australia and include the following:

[76] Ballardong ILUA, item 8.1.

[77] The Noongar people "surrender" any claim to native title as part of the Settlement [65] and in exchange the benefits received pursuant to the Settlement constitute "full and final compensation." Ballardong ILUA, item 13.

7.6.1 Land access and management

The *Noongar Land Estate* is created to manage 320,000 hectares of land for purposes of cultural enjoyment; education; and related uses for the benefit of the Noongar people.[78] The purpose of the Land Estate is to enable the Noongar people to "achieve sustainable economic, social and cultural outcomes."[79] The philosophy of a Noongar Estate is linked to Land Base Strategy that reflects the practical steps to be taken to establish and further expand the land base of the Noongar people. The land forming part of the Estate is to be used exclusively to promote and develop the culture and traditions of the Noongar People. A Noongar Land Fund is also established to assist the respective communities to acquire land in their sub-regions. The state is to make available $46,850,000 over a 10 year period for the implementation of the Land Fund.[80] Adding to the Land Estate transferred to the Noongar people, the Settlement also grants access to the Noongar people to crown (public) land for purposes of cultural and traditional activities.[81]

7.6.2 Joint management of land

An important other element of the Noongar Settlement is the opportunity for the Noongar to jointly manage national parks and the conservation estate of the settlement area. These are often areas that a close to the heart of the Noongar people since the environment sought to be protected is also of unique significance to the local Noongar community. As a result of the Settlement joint bodies are formed between state agencies and respective Noongar Corporations to manage the conservation estate within the settlement area and to employ as far as possible Noongar people to work within those conservation areas.[82]

7.6.3 Housing and development programme

A number of houses (121) which are occupied by Aboriginal people, are transferred to the Noongar people together with financial support to maintain the houses. In addition, an assistance package has been put in place to help members of the Noongar community to develop business and entrepreneurial skills; and a general community development programme[83] is implemented aimed at improving the standard of living of the Noongar people.[84] In addition to these initiatives, a major capital works programme has also been launched whereby the state government funds the Noongar to establish administrative offices for the seven Noongar Corporations.[85] Aspects of the Settlement are clearly aspirational, with detail to be developed over time,[86] but at the same time the essence of the settlement is reflected namely that it is not only the cultural aspirations of the Noongar that are addressed, but the socio-economic ideals of the community as well.

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[78] Ballardong ILUA, Schedule 10, item 8.

[79] Ballardong ILUA, Schedule 10, item 8.1(b).

[80] Ballardong ILUA, Schedule 10, item 9.

[81] Ballardong ILUA, Schedule 10, item 13.

[82] Ballardong ILUA, Schedule 10, item 12.

[83] Ballardong ILUA, Schedule 10, item 17.

[84] Ballardong ILUA, Schedule 10, item 14.

[85] Ballardong ILUA, Schedule 10, item 15.

[86] See for example, the Economic Participation Framework and the Community Development (Schedule 10, items 16 and 17) which contain objectives of future initiatives and activities.

7.6.4 Heritage protection

A standard heritage protocol is set out to regulate access to Noongar lands and traditional sites of importance.[87] The protocol sets out the manner in which heritage surveys are conducted; the persons to be involved; the object of the surveys; and the possibility to review the protocol from time to time.

7.6.5 Noongar Boodja Trust

The *Noongar Boodja Trust* is established as an overarching trust to hold, manage and control all benefits that accrue from the Noongar Settlement on behalf of the Noongar people. The objects of the Trust include support of the seven Noongar Corporations; to hold and manage Noongar land; to hold and manage the Future Fund on behalf of the Noongar; to manage a land and housing fund on behalf of the Noongar; and to make investments on behalf of the Noongar people.[88] The Trust is also responsible to promote and facilitate good corporate governance of the seven Noongar Corporations and effective communication between the Noongar people and the Corporations.[89] The Trust is also responsible to oversee and manage the contributions received from government for the operations of the Trust and projects for the Noongar people. The government of Western Australia contributes A$50 million per annum for 12 years towards future funds for the Corporations. The Trust may use its income to undertake projects; initiative activities; make investments and do whatever it deems to be in the interest of the language, culture and general wellbeing of the Noongar People. In addition, the government of Western Australia also contributes A$10 million per annum to the operations funds to the operating costs of the offices of the Corporations.[90]

8. Reflection on the privatised self-government of the Noongar Corporations

The Noongar Settlement is ground-breaking in many respects. It demonstrates how a non-litigated outcome can be achieved albeit that the evidence that arose from the process of litigation facilitated the agreed-outcome; it highlights the importance of an holistic claim-settlement agreement that takes into account the total needs of the Noongar people and not just narrow cultural needs; it lays the basis for a system of autonomy whereby the Noongar people can manage their own traditional and cultural affairs, as well as becoming involved in contemporary land management, socio-economic and environmental protection initiatives; and it highlights how a statutory contract to resolve a land claim can enable the Noongar community to take responsibility for social, health, welfare, economic, and educational services that far exceed what would traditionally be understood within a bundle of native title rights.

The Noongar Settlement is in effect an agreement to self-govern. The Settlement does not however set up a parallel system that excludes the Noongar people from the Australian institutional and policy arrangements. The Settlement rather supplements the operations of existing governments. It is therefore foreseen that the respective Noongar Corporations will in future provide a wide range of services to

[87] Ballardong ILUA, Schedule 10, item 18.

[88] cl 2.3 Noongar Boodja Trust, at [66].

[89] cl 3.3 Noongar Boodja Trust.

[90] Ballardong ILUA, Schedule 10, item 5.

the Noongar people—including as agents for other government departments—in parallel and not to the exclusion of local, state and federal governments.

The Noongar Corporations are registered under civil law and do not in the realm of public law constitute "governments." They are, at law, akin to any other non-governmental association or corporation. In practice however, the nature of the Noongar Settlement and the intention of the parties to settle native title by way of an all-encompassing legally binding agreement, places the Noongar Settlement in a different category than ordinary corporations and associations. The Noongar Settlement is clearly intended and structured to provide a basis of self-government and autonomy to the Noongar people. The nature of objectives of the Noongar Settlement; the spirit underpinning the Settlement; and the sizeable contribution by the state of Western Australia to the ongoing operations and future fund of the Noongar, give rise to a *sui generis* corporation which is created under civil law but operates in the field of public law. The Noongar Corporations are not mere cultural clubs or associations. They have the legal right to access and manage public land; to jointly manage national parks; to protect their cultural heritage; to initiate socio-economic upliftment programmes; and to be consulted in regard to matters that impact on the Noongar people.

In addition to the functions bestowed on the Noongar Corporations pursuant to the Settlement, as legal entities they may also contract with government departments to become service delivery agents for specific departments. Since the Noongar Corporations speak for and on behalf of the respective Noongar communities, the ability of the Corporations to deliver and manage services to Noongar families may be far better suited than those of ordinary government departments. In areas such as health, education, tourism, land management, social services and care of the elderly, the Noongar Corporations may become essential delivery agents and policy formulating voices.

The nature of the Noongar Settlement will inevitably place the respective Noongar Corporations in an important bi-lateral relationship with the state and local governments of Western Australia. This relationship is in itself unparalleled in Australia. It is inevitable that federal, state and local governments would have to liaise and consult with the Noongar Corporations in regard to policy formulation; new legislation; the budget; and administration of policies to ensure that the interests of the Noongar people are adequately considered. Whereas at a federal level Australia continues to search for a way to establish an advisory body to reflect the views of Aboriginal people, the Noongar Settlement establishes not only a legal base for self-government, but also a forum with which future local, state and federal governments would have to negotiate and consult—typical governance by the Noongar for the Noongar.

The Noongar Corporations is, in effect, a fourth level government. As *de facto* government the Noongar Corporations exercise civil and public powers over the Noongar people by way of incorporated bodies, of which the directors are elected pursuant to the Noongar Settlement, exercising powers and functions on a non-territorial basis, in areas such as educational, health, welfare, housing, employment, tourism, and land care, but not to the exclusion of other government agencies.

9. Conclusion

The Noongar Settlement is a unique benchmark for a native title settlement in Australia. The nature and detail of the Settlement opens new ground for similar agreements in Australia and beyond. The privatised nature of the Settlement illustrates how within the constraints of three levels of government and challenges

of dispersed communities, self-government arrangements under private law can be developed with possible overflow into the public law arena. The Settlement also highlights how research undertaken as part of litigation can be positively used in settlement negotiations. Ultimately the Noongar Settlement was made possible by the research and evidence supporting the native claim by the Noongar people as the traditional owners of the land.

The Noongar Settlement is a truly *sui generis* outcome and serves as a practical example of privatised autonomy as an avenue for indigenous self-government.

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