# A Treaty that Dares Not Speak its Name: The Noongar Settlement in the Australian South West

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**Abstract:**
The Australian government privileges the rights of individuals and is wary of the international legal category of "Indigenous peoples" and its possible repercussions at the national level. Indeed, this category confers on the peoples claiming it the status of legal personalities and grants them collective rights which are the responsibility of States. The Australian State notably perceives the right to self-determination as likely to open the way to independence movements and refuses any idea of a treaty. In this context, to settle their native title claims and assert their place in the mainstream Australian society, the Noongars of the South West of Western Australia stand aside, in their majority, from the international discourses on Indigeneity and claims to a treaty. Instead, they have negotiated a comprehensive settlement with the State of Western Australia which is a treaty that dares not say its name. This article aims at demonstrating that it is precisely because they avoided the term "treaty" that the Noongars have been successful in securing a settlement of such a scope. It shows that the Noongars have instead resorted to the political concept of a Noongar nation—an alter/native space within the Australian nation articulating the principle of internal sovereignty—to reframe their relationship with the Australian State. This strategy is not a guarantee of unity but, despite internal oppositions, they have fashioned a Noongar identity according to the general criteria that characterise the category of "Indigenous peoples" and claim the same rights it accords.

**Keywords:**
Australia (south-west); Australian Aborigines (Noongars); Indigeneity; Nation; State relations; Treaty;

In Australia, there is a gap between, on the one hand, the apparent willingness of the State to recognise the Australian Indigenous people[1] and the legal and institutional measures it takes in this sense and, on the other hand, the mechanisms of control that it puts in place to refuse claims for recognition. It is indicative of "the ambivalence of the discourse of the rights of Indigenous peoples when it is appropriated by a State apparatus that bases its legitimacy on the elimination, at least invisibilisation, of the Indigenous presence" (Préaud 125, my translation). Indeed, the Australian State aspires to the international standards for the rights of Indigenous peoples and, as far as possible, limits its exposure to international criticism, while keeping its Indigenous people in a subordinate position that maintains their marginalisation and exclusion from the dominant Australian society (see Castejon; Merlan, *Dynamics*; Moreton-Robinson; Rowse).

Australia held a prominent place as one of the first participants in international and United Nations (UN) Indigenous issues and made institutional advances in Indigenous recognition at the national level (see Merlan, "Indigeneity"; Préaud). It stood out, however, alongside

[1] Australia counts two main groups of Indigenous peoples: the Aborigines (a multitude of groups including the Noongars) and the Torres Strait Islanders.

Canada, New Zealand and the United States (the CANZUS group) in opposing the adoption of the Declaration on the Rights of Indigenous Peoples (the Declaration) by the UN General Assembly in 2007 (143 votes in favour, 4 votes against and 11 abstentions). This antagonism is due to the fact that, while not binding on States, the Declaration legally recognises "Indigenous *peoples*", not "Indigenous *populations*" (United Nations). This distinction gives them the status of legal personalities and grants them collective rights that are the responsibility of States, rather than individual rights, as in the case of minorities (Rowse 3-27; Bellier, "Usages et Déclinaisons" 75-92). This status allows Indigenous people to establish themselves as interlocutors with States and to seek reparation for the injustices and the domination they have been suffering since they were colonised. "The international arena", as the anthropologist Natacha Gagné explains, "is used to create pressure on States by using international opinion to influence decisions at the national level" (378, my translation). The Indigenous claims, formulated in terms of collective rights, are thus perceived as a threat, especially by liberal States—such as the Australian State—that value the rights of individuals.

The "Indigenous" category is not an absolute definition; it is delimited by a set of criteria that give it a certain flexibility (see Bellier, "La Reconnaissance"; Gagné). It refers to colonised, marginalised and oppressed peoples, who are bound by historical continuity with societies prior to their invasion. These peoples, who are culturally distinct from those who dominate them, are determined to maintain and transmit their cultural specificity. Their members self-identify as "Indigenous". No list of peoples is drawn up in accordance with this criterion of self-definition firmly defended by the Indigenous representatives. It grants people who declare themselves "Indigenous" rights that aim to ensure the improvement of their social, cultural, economic and political situation. In the eyes of the peoples concerned, these rights include the right to self-determination; sovereignty over their territory and the natural resources it contains; the right to compensation for the loss, exploitation or degradation of their territory and resources; the right to revitalise, use, develop and transmit their cultural heritage.

Among the contentious issues for Australia in particular, and the CANZUS group in general, was the question of self-determination (see Gagné and Salaün; Merlan "Indigeneity"). Australia was reluctant to accept the notion of "people". It tended to regard the Australian Indigenous people as individuals formally included in the Australian population and whose civil rights were therefore not violated. Moreover, as stated in the Declaration, the right to self-determination was seen as likely to pave the way for independence movements, despite assurances to the contrary. Indeed, the vote of the Declaration by the UN General Assembly was preceded by an intense period of dialogue and the introduction of nine amendments which guarantee the national and territorial integrity of the States (see Gagné; Merlan, "Indigeneity"; Préaud). In particular, article 46 states that nothing in the Declaration may be "construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States" (28-29). Another problem was the overly broad formulation of territorial rights that could destabilise existing Indigenous land claim processes. Australia finally revised its position and supported the Declaration in 2009, as it did not affect its existing policy and limited its exposure to international criticism as far as possible.[2]

[2] New Zealand, Canada and the United States did so, respectively, in April, November and December 2010.

In this context, marked by the mistrust of the Australian State towards the universal category of Indigenous peoples and its possible repercussions at the national level, the Noongars of the South West of Western Australia have negotiated a comprehensive agreement with the State of Western Australia to settle their native title claims and assert their place in the mainstream Australian society.[3] This article shows that the Noongar settlement is equivalent to a treaty, but a treaty that dares not speak its name. I argue that it is precisely because they avoided the term "treaty" that the Noongars have been successful in securing an agreement having the scope of a treaty. Instead, despite the internal conflicts that mark their community, the Noongars have resorted to the political concept of a Noongar nation—alter/native space within the Australian nation that will allow them to reframe their relationship with the Australian State.

**The Noongar Settlement**

Since the customary land rights and interests of the Australian Indigenous people were translated and enshrined in the Australian legislative system in 1993 by the *Native Title Act* (*NTA*),[4] the Aboriginal group of Noongars of the South West of Western Australia have been seeking the legal recognition of their native title over their territory.[5] Between 1994 and 2000, 78 overlapping and intersecting native title claims were initiated by various Noongar families (Bradfield 212-213). The South West Aboriginal Land and Sea Council (SWALSC)—the regional organisation officially recognised by the Federal State to represent the Noongars' land claims—worked to bring them together into a single native title claim. SWALSC proceeded in stages, initially registering six intermediate claims with the Federal Court. Then, in September 2003, the organisation filed the *Single Noongar Claim* (*SNC*) on behalf the Noongar community. This unique claim was intended to cover the Noongar territory, an extensive area of nearly 200,000 $km^2$ comprising a Noongar population of approximately 27,000 people divided in 218 family groups (Bradfield 208). However, it was never officially registered because the Federal Court considered that SWALSC had not obtained permission from the entire Noongar community. It therefore remained composed of the six intermediate claims: Yued, Ballardong, Wagyl Kaip, South West Boojarah, Gnaala Karla Booja and Whadjuk.

At the request of the State of Western Australia and the Federal State, the main Noongars' respondents, the *Metro Claim* (see *Bennell v Western Australia 2006*)—the claim corresponding to the Perth metropolitan area—was judged before the Federal Court, separately from the rest of the *SNC*. In his verdict of September 19, 2006, Justice Wilcox rendered a decision in favour of the Noongars. He recognised eight Noongar native title rights, the details of which were to be later specified:

(a) to live on and access the area;
(b) to use and conserve the natural resources of the area for the benefit of the native title holders;

[3] For more information on native title, the *Single Noongar Claim* and the negotiation process, see Bernard, *Quand l'État*; Bernard, "The Single Noongar Claim"; and Bernard, "Antagonist Representations".

[4] The legal native land claim process in Australia started in the 1970s. The decisive step was the case *Mabo v Queensland* [No.2] when, in 1992, the High Court recognised the existence of Indigenous land rights.

[5] While recognising the existence of Indigenous land rights, the *NTA* confirmed the non-Indigenous land rights granted prior to 1993, and private property is excluded from native title claims.

(c) to maintain and protect sites within the area, that are significant to the native title holders and other Aboriginal people;
(d) to carry out economic activities on the area, such as hunting, fishing and food-gathering;
(e) to conserve, use and enjoy the natural resources of the area, for social, cultural, religious, spiritual, customary and traditional purposes;
(f) to control access to, and use of, the area by those Aboriginal people who seek access or use in accordance with traditional law and custom;
(g) to use the area for the purpose of teaching, and passing on knowledge about the area, and the traditional laws and customs pertaining to it;
(h) to use the area for the purpose of learning about it and the traditional laws and customs pertaining to it (*Bennell* §841).

In April 2007, the State of Western Australia and the Federal State appealed this decision to the Full Federal Court (*Bodney v Bennell 2008*). On April 23, 2008, the judges of the Full Federal Court rendered their verdict in which they found errors in the interpretation of the *NTA* legislation and ruled that the *Metro Claim* should be retried before another federal judge.

After consulting the Noongar claimants, SWALSC decided not to appeal, but urged the State of Western Australia to resolve the *SNC* through a formal negotiation process. At the end of 2014, SWALSC and the State of Western Australia reached a definitive agreement consisting of six Indigenous Land Use Agreements (ILUAs), one per intermediate region covered by the *SNC* (see Government of Western Australia, "The South West Native Title Settlement, Noongar Corporations: Factsheet"). These ILUAs do not transfer ownership of natural resources to the Noongars but grant them procedural rights to negotiate with people who want access to their land. The settlement includes an official recognition of the Noongars as "traditional owners" of the South West through an Act of Parliament, the establishment of a Noongar governance system to ensure the management of the rights, interests and property obtained, the creation of a financial capital and of a land estate, the co-management of the conservation area, access to Crown land, the review of the Noongar heritage protection regime and regional strategic development plans to replace the future acts.[6]

The financial capital will consist in a blocked fund for a period of twelve years, which will receive yearly instalments of AUD $50 million. During this period, the Noongars will receive AUD $10 million annually for the functioning of their governance system—six regional corporations supported by a central corporation—and AUD $6.5 million to establish the corporation offices. The land allocated to them will amount to 300,000 hectares classified as reserves or leasehold and up to 20,000 hectares of freehold land. To address the Noongars' housing problems, 121 properties will also be transferred by the State along with AUD $10 million to develop and refurbish them. The Noongars have also negotiated AUD $5.3 million and up to two hectares of land in the city of Perth towards the development of a Noongar cultural centre. All assets that the settlement will allocate to the Noongars will be transferred to the Noongar Boodja Trust (see The Government of Western Australia, "The South West Native Title Settlement, Noongar Boodja Trust: Factsheet"). For the twelve years following its creation, this perpetual trust will be managed by a professional trustee jointly appointed by representatives of the State and the Noongar community. The Noongars will then have the possibility to take it in hand by creating a company which will only be dedicated to its administration. This transition will also need to be approved by the State.

[6] Future acts refer to development proposals that may affect native title rights and interests.

The ILUAs contain points that are common to the six underlying claims and are included in each of them (such as the creation of financial capital), and others that are specific to them. In exchange, the Noongars have agreed to surrender any native title rights and interests that exist in the area covered by the settlement. From January to March 2015, SWALSC organised six authorisation meetings at which the Noongars claimants voted by majority in favour of the ILUAs and validated the settlement. They were signed by Prime Minister Colin Barnet on 8 June 2015 and submitted to the National Native Title Tribunal for registration. The Department of the Premier and Cabinet of the Government of Western Australia describes the settlement as "the most comprehensive native title agreement proposed in Australian history, comprising the full and final resolution of all native title claims in the South West of Western Australia" (Government of Western Australia, "The South West Native Title Settlement, About the Settlement: Factsheet" 2).

**Is the Noongar Settlement a Treaty?**

The Noongar settlement is unique in the sense that it is the most far-reaching agreement to be entered into between the government of Australia and an Australian Indigenous community. It has even been described as Australia's first treaty by Harry Hobbs and George Williams. With a view to foster a "holistic approach to understanding treaties that avoids marginalising agreements struck between Indigenous and non-Indigenous political communities", Hobbs and Williams propose a three-criteria standard by which agreements can be assessed as treaties (5).[7] According to the first criteria, a treaty must recognise that "Indigenous peoples were prior owners and occupiers of the land now claimed by the State" (7). Hobbs and Williams add that Indigenous people must also be recognised as "polities", that is to say "distinct political communities composed of individuals collectively united by identity" (7). The second considers that, as a political agreement, "a treaty must be reached by way of negotiation" (8). For Hobbs and Williams, "[negotiations] will not occur on a level playing field", but it is crucial they must be fair to allow the Indigenous people to reach an acceptable agreement that redefine their relationship with the State in the long-term (10). The third criteria establishes that a treaty must include substantive outcomes, not a mere symbolic recognition. It must incorporate some form of recognition of Indigenous self-government, even if it is limited. It must also constitute a full and final settlement of Indigenous and State claims (12-13).

Australia is the only British colony not to have signed a treaty with its Indigenous peoples, a formal written agreement that would have recognised the sovereignty of the latter over their ancestral lands. The acquisition of sovereignty by the British Crown was made without conquest or treaty because Australia was interpreted as *terra nullius*, an uninhabited land because it supposedly had no real "owners" (see Banner; Hiatt; Langton et al.; Langton and Palmer; Reynolds). The British land laws, heirs of a long tradition of thought going back to antiquity, advocated an evolution of humanity through different stages of civilisation: hunting and gathering, livestock, agriculture, trade. In *Commentaries on the Laws of England*, William Blackstone, an influential English jurist of the eighteenth century, described land ownership as an exclusive right emerging with agriculture, the repetitive work of the land and the delimitation of fields to cultivate (Blackstone). According to this definition, the Australian Indigenous people, who hunted and gathered, did not know agriculture and thus had not developed land rights. As a result, they did not have a legal presence in Australia. The

[7] The definition of a treaty as understood in international law not being the subject of this article, my analysis relies on Hobbs and Williams' study.

continent could then be considered *terra nullius* and be annexed and colonised despite the presence of the Australian Indigenous people: "The traditional legal view is that Australia became British by occupation on the day (or days) that annexation took place while the Aborigines in thousands of years of leaving in the continent had never acquired sovereignty over it. In all that time they had not become the legal occupiers" (Reynolds 90). Far from challenging it, the Australian legal system confirmed the doctrine of *terra nullius* (Reynolds 1-15). Indeed, "it was more advantageous to regard Aboriginal people as unworthy of treaty like arrangements than to make commitments that might have become obstacles to the unfettered land appropriation in colonial Australia" (Langton and Palmer 41). The doctrine of *terra nullius* remained in place until the *Mabo v Queensland Native Land Claim [No.2]* in 1992.

The discussions around the possibility of a treaty in the 1970s and 1980s have recently been reinvigorated. Nevertheless, the Australian State still rejects the idea of a treaty (or treaties) with the Australian Indigenous people(s) as it considers it divisive and a threat to the Australian public law system (Castejon 152, 195; Falk and Martin; Hobbs and Williams 3; Langton et al.; Merlan, *Dynamics* 212-247; Moreton-Robinson). Instead, it favours recognition initiatives focusing on "priority of occupation and national community", key terms that have "understated, even submerged, what might be seen as the more political side of indigenous-nonindigenous contention; that is position/s that emphasize indigenous political engagement and capacitation" (Merlan, *Dynamics* 224). In that context, officially, the Noongar settlement is not a treaty. It has been negotiated as part of the native title legislation. Nonetheless, Hobbs and Williams consider that the Noongar settlement goes far beyond the settlement of a native title claim (34-37). They conclude that, as it respects their standard by which agreements can be assessed as treaties, it is Australia's first treaty between Indigenous peoples and the State.[8]

Indeed, according to the three criteria proposed by Hobbs and Williams, the Noongar settlement can be considered as a treaty. First, the Noongars have been recognised as the "traditional owners" of the South West through an Act of Parliament, namely the *Noongar (Koorah, Nitja, Boordahwan) (Past, Present, Future) Recognition Bill 2016*. It is the first Western Australian law to include an Indigenous language. In schedule 1, the first part of the text—in Noongar with a translation in English—was written by a group of Noongar Elders from all over the South West and the second part by Kim Scott, a Noongar writer. They describe the Noongars' relationships with their *boodja*, (their "country", their land) and affirm the continuity of their culture and their survival. The Noongars have been recognised as a distinct political entity since, as will be seen, they have presented themselves as a nation and they have elaborated their own system of governance. Secondly, after years of litigation before the Courts, the Noongars and the State of Western Australia have eventually agreed to resolve the Noongars' claims by way of fair and respectful negotiations. Finally, the Noongars have surrendered their symbolic native title rights and interests in exchange for a package of concrete benefits. But the Noongar settlement is a treaty that dares not say its name. And it is precisely because the term "treaty" was avoided by SWALSC during the

[8] In Victoria, the *Traditional Owner Settlement Act 2010 (Vic)* (*TOSA*) also offers an alternative to the native tile regime. It enables Australian Indigenous people and the Victorian State to negotiate settlement agreements. Nevertheless, agreements finalised under the *TOSA* legislation cannot be considered as treaties since the process recognises an Indigenous self-government which is only limited to the joint management of national parks and reserves (Hobbs and Williams 27-29).

negotiations with the State of Western Australia that an agreement having the same scope as a treaty was eventually reached.

**An Alter/Native Space**

While recognising the existence of Indigenous land rights, the *NTA* also protects non-Indigenous land titles. Those granted before the coming into force of the *NTA* were confirmed and private and administrative properties were excluded from native title claims. As a result, the recognition of native title ceases where Indigenous land rights are legally considered to be extinguished by other land rights and uses. Moreover, the *NTA* does not grant a land title but a bundle of rights that must be individually demonstrated to be recognised (see Glaskin; Strelein, *Compromised Jurisprudence*). The notion of partial extinguishment and the codification of native title rights do not reflect the character of the holistic relationships that the Australian Indigenous people have with their environment. As Deborah Bird Rose points out, they consider their "country" as:

> a living entity with a yesterday, today and tomorrow, with a consciousness, and a will toward life. … Country is multi-dimensional—it consists of people, animals, plants, Dreamings;[9] underground, earth, soils, minerals and waters, surface water, and air. … Country is the key, the matrix, the essential heart of life. (7-8; 11)

Humans, as well as all elements of their environment, are incarnations of the Noongar land. They are made of the same essence, there is an interrelatedness between body and land (Brewster 244). Their ancestral lands are inalienable, contrary to the fact that the *NTA* considers that their relations with them can be partially or even completely extinguished. Also, native title is the translation of the Indigenous land laws and customs into the Australian law. This translation is not a direct process: an inevitable partial transformation takes place for these laws and customs to become recognisable (see Glaskin; Mantziaris and Martin; Smith and Morphy). The *NTA* "strives to make commensurable concepts that derive from two systems of social meaning which may be wholly or partially irreconcilable" and the concept of native title grants a predominance to the Australian legal system (Mantziaris and Martin 7). According to Aileen Moreton-Robinson, "[what] Indigenous people have been given, by way of white benevolence, is a white constructed form of 'Indigenous' proprietary rights that are not epistemologically and ontologically grounded in Indigenous conceptions of sovereignty" (4).

Through the negotiations, SWALSC sought to bypass the limitations of native title, while building on what it stands for, namely the recognition of the distinct identity of the Australian Indigenous people and the special place they occupy (Strelein, "Symbolism and Function"). It was a means to escape the essentialised model of an imagined "tradition" that the native title legislation imposes on the Indigenous claimants who want to obtain the recognition of their customary land rights and interests (see Bernard, "Antagonist Representations" and *Quand l'État*). Moreover, beyond a simple symbolic recognition, SWALSC intended to reach an agreement comprising a set of concrete economic, social, financial and political measures that would allow the Noongars to improve their situation and decide on their future. As Glen Kelly, chief executive officer of SWALSC from 2006 to 2015, told me in private

[9] "Dreaming" is a generic term for all religious beliefs and practices of Indigenous peoples in Australia. It does, however, reflect a multitude of local concepts (e.g. Nyitting for the Noongars), applying to mythic-ritual complexes that admit significant differences beyond their similarities (hence the use of the plural in this quote) (see De Largy Healy et al.).

conversation: "Native title is not a real title. ... It is very symbolic. ... You go to the court, you don't get land. You do an alternative settlement, you get land" (Kelly). But, he also considered that getting land was not enough: "We'll resolve the native title claims and we'll provide extra so that Noongar people can have a stake, skin in the game so to speak, a stake in the world as it works today. That's the foundation of this negotiation" (Kelly).

SWALSC drew from the experiences of other Indigenous groups. The organisation was particularly inspired by the Iñupiat of Alaska and the Ngāi Tahu of New Zealand who settled their land claims through negotiations in 1971 and 1998, respectively. At a SWALSC information meeting, Glen Kelly declared: "They settled their claims, they secured their rights to country, they've become an economic power-house, they've put the money into the people and now, they run the state. This is the most important point to get to because that's the vision. My argument is: Why not there?" (SWALSC, "Information Meeting"). These two Indigenous groups were set up as success models by SWALSC, because they had managed to strengthen their culture, become first-class economic players and achieve a certain amount of political autonomy.

Bertus De Villiers suggests that "[the] uniqueness of the Noongar Settlement justifies the using of a term that refers to peacemaking that is inherently part of the Noongar People and their language and culture, rather than 'treaty' which causes so much confusion" (192). In fact, during the negotiations, SWALSC neither used the term "treaty" nor a Noongar term. To be heard by the State of Western Australia and stand as a strong partner, SWALSC undertook instead to concretise the idea of a Noongar nation.[10] This concept is the political strategic tool on which the negotiation process was based. The modern nation reflects, as Patrice Canivez defines it, "[a] historic community characterised by a culture of its own, a collective consciousness and a claim to political sovereignty" (27, my translation). This conception of the nation goes beyond the classical opposition between ethnic or cultural nation and civic or political nation (see Canivez; Patez). For the sociologist Fabrice Patez, the "ethno-democratic" nation embodies the ideal-type of the modern nation because it is "imagined both as an ethnic community—the people *ethnos*—and as a modern and democratic society—the people *demos*" (8, original emphasis, my translation). The question of sovereignty is the defining element of this concept.

The concept of nation thus allowed SWALSC to keep at bay the spectrum of an idealised Aboriginality and to be in a position of strength to negotiate a contemporary Noongar identity with the ability to assert its place, but also its special status. The development of the Noongar nation operates, on the one hand, through the affirmation of the Noongars as a historical community, that remains deeply attached to its ancestral lands and shares a distinct "culture", but also as a community of blood. Through various media—documents (see, for example, SWALSC, "An Introduction", "Connection", "Living Culture"), website (see SWALSC, "Kaartdijin Noongar"), Facebook page (see SWALSC, "South West")—SWALSC has formalised and disseminated the definition of a Noongar identity articulated around three pillars: "Culture", "Country" and "People". The notion of "culture" mobilised by SWALSC is part of a political strategy, it is primarily thought of as a tool of identity distinction. SWALSC

[10] Although its employment may be traced back to the influence that Native American activism had on the Australian Indigenous people in the 1960s and 1970s, Manuhuia Barcham notes that the term "Noongar Nation" began to be increasingly used by the Noongar leaders in the 1990s, when they were given the opportunity to obtain the recognition of their native title (271).

sought to reinforce the idea of a Noongar community, presented as being natural (a people *ethnos*) because the Noongars would share a specific "culture" since time immemorial.

On the other hand, the interest in the concept of nation that SWALSC resorted to mostly resides in its political potential as an alter/native space within the Australian nation, articulating the principle of internal sovereignty (see Bellier, "Usages et Déclinaisons" and "La Reconnaissance"; Falk and Martin; Gagné and Salaün) to reframe the Noongars' relationship with the Australian State. It is a strategic instrument that has the potential to lead the Noongars beyond the simple resolution of their land claims and allow them to solve the difficulties they face. SWALSC strived to develop and establish the societal aspect (a people *demos*) of a nation, to give the Noongars the means to take control of their future. The concept of nation allowed SWALSC to require some degree of personal, rather than territorial autonomy, which "empowers Noongar People to perform a wide variety of self-government, cultural, consultation and policy initiatives for the benefit of their community regardless of the scattered residential patterns of the respective members of the community" (De Villiers 173). The organisation defended the idea of a Noongar nation enjoying relative autonomy within the Australian nation, and not a totally sovereign and independent Noongar nation. In a video posted on SWALSC Facebook page, Glen Kelly declares:

> Self-determination is … an important reason for this agreement. This means having the ability to have control of our own affairs without having to rely on government. This agreement provides a giant step forwards towards self-determination and it has the potential to empower Noongar people to the point where we become self-reliant for the things that matter most to us (SWALSC "Vision").

To give the Noongars a place in the Australian nation while giving them responsibility for the areas that concern them, SWALSC guided the content of the negotiations so as to combine bureaucratic and financial demands (the establishment of a system of governance, the creation of a monetary fund), in parallel with the requirement of an official recognition of the Noongars as traditional owners of the Southwest, the constitution of a land estate or the co-management of the conservation area. For SWALSC, the establishment of a system of governance would enable the Noongar community to remain united and politically organised, to become a prosperous nation (see Bernard, "Antagonist Representations" and *Quand l'État*; De Villiers). This system also appears as a means for the organisation to present a familiar and reassuring structure to the Australian State that it can recognise and approve. The Noongars, according to SWALSC, would thus take their future into their own hands and be able to manage their financial capital and land estate and develop cultural, social and economic programs according to their vision.

**Internal Oppositions**

The Noongar community is nonetheless marked by internal conflicts. The concept of a Noongar nation within the Australian nation and the settlement with the State of Western Australia do not rally all the Noongars and remain the object of criticism. SWALSC has resolved most of the family conflicts that undermined the claims and compromised their smooth functioning but oppositions persist.

Following the announcement of the first official offer of the State of Western Australia by Prime Minister Colin Barnett on 8 February 2012, a group of Noongar opponents erected a

Nyoongar Tent Embassy on Heirisson Island, an island on the Swan River which runs through Perth. The Nyoongar Tent Embassy refers to the Aboriginal Tent Embassy, a group of tents erected in a semi-permanent way since 26 January 1972—the official national day of Australia—on the lawn of the Federal Parliament in Canberra to protest against the government's refusal to recognise the Australian Indigenous people' land rights (see Foley et al.; Lothian; Robinson). Through their action, the members of the Nyoongar Tent Embassy wanted to commemorate the fortieth anniversary of the Aboriginal Tent Embassy. They decided to settle on Heirisson Island, or Matagarup in Noongar, because they considered this island to be a sacred place. However, Glen Stasiuk, one of my Noongar interlocutors supporting the settlement with the State of Western Australia, explained to me that it was a wrong interpretation on the part of the people of the Nyoongar Tent Embassy. According to him, the area was sacred, but Matagarup itself was not a sacred site or even a "traditional" island as it was the result of extensive development works undertaken by the settlers (Stasiuk).

Several people occupied the island permanently in a makeshift camp. Authorities had cut running water and closed public toilets to dissuade them from staying. Police force raids—including federal and mounted police officers, canine squads and Perth rangers—regularly took place to dislodge them. Each time, the camp was dismantled and the tents confiscated, but the members of the Nyoongar Tent Embassy returned to set up the camp again after the police had left. The movement regularly attracted the attention of the media. The releases focused on native title rights, but also on the illegality of the camp and the heavy-handed police raids. On the one hand, this had the effect of depicting the members of the Nyoongar Tent Embassy as troublemakers and a threat to public order. On the other hand, this virulent reaction drew them the financial support of certain unions and a favourable media coverage by the radical left press (see Bainbridge; Westbrook).

Once the initial federating movement had passed, the diverging interests of the members of the Nyoongar Tent Embassy grew stronger and some of them disassociated themselves from the movement. Nevertheless, all these protesters continued to oppose the settlement and advocate the sovereignty of the Noongars, but also of the Indigenous peoples as a whole. Their commitment also turned to denouncing the injustices suffered by the Australian Indigenous people in general, such as the forced closure of communities and deaths in custody. Since 2012, camps have been maintained on Heirisson Island despite regular police evictions.

After the approval of the settlement by a majority of the Noongar claimants, four Noongar opponents applied for a court order with the High Court of Justice to prevent the registration of four of the six ILUAs.[11] The case, *McGlade v Native Title Registrar*, was remitted to the Federal Court, which issued a verdict in favour of the plaintiffs on 2 February 2017. It held that all native title claimants had to agree before an ILUA could be registered (see *McGlade v Native Title Registrar [2017] FCAFC 10 (2 February 2017)*). This decision triggered a climate of uncertainty across the country since it questioned previously registered ILUAs. To clarify the situation, a proposed amendment of the *Native Title Act*, tabled by the federal government with the support of the opposition, was voted on 14 June 2017 by the Parliament. As a result, the registration of these ILUAs was confirmed, those entered into prior to the Federal Court verdict were registered and future ILUAs will be able to be registered without the signature of all claimants. The validity of the four contested Noongar ILUAs was thus

[11] Wagyl Kaip and Southern Noongar, Ballardong People, Whadjuk People and South West Boojarah.

ratified and they were again submitted to the National Native Title Tribunal on 22 August 2017. The six ILUAs will be implemented only when, and if, all legal remedies are settled.

The Noongar opponents, along with SWALSC, advocate the gathering of the Noongars to achieve their goals. Canivez notes that "[in] the same situation, the members of the nation share problems that they can solve only together, even if they disagree on the interpretation of the causes and the choice of solutions" (26, my translation). In general, the Noongars agree on the causes of their dispossession, the interpretation of history and on their current marginalisation: they attribute them to the colonisation of their lands by the British Crown. It is on the solutions to be adopted to remedy them, and therefore on the vision of the future, that they disagree. Indeed, the Noongar opponents clearly relate to the international discourses about Indigenous peoples. They claim the recognition of their sovereignty on their ancestral lands, but never define what sovereignty means for them. The position of the Nyungar Tent Embassy is the following:

> We are still the owners of this land. The government illegally occupy land they stole and are breaching international law. … We have sovereignty. It was never ceded. We have to get the government to do what's right and build a nation that has respect for our people instead of racism and ignorance (Nyungar Tent Embassy).

The opponents consider that the settlement with the State of Western Australia consists in the irrevocable sale of their territorial rights in exchange for a sum of money, which they regard as derisory. Instead, they ask for a new trial or support the idea of a treaty as, in their view, such a recognition would allow the Noongars to position themselves as equal to the Australian State and to obtain justice.

From the point of view of Glen Kelly, the Chief Executive officer of SWALSC from 2006 to 2015, the reasoning of these opponents is wrong and unrealistic. He maintains that they talk about retaining their customary land rights and interests without realising that under the native title legislation, the latter are considered virtually extinct in the Southwest. In his view the legal recognition of their native title would only be symbolic and it would not give them back their land and would not restore their sovereignty:

> They're all talking about: 'No, we will never give away our rights!' and this is the idiotic theme because they don't exist, they're gone, they finished. Native title does not secure Noongar tradition. … Once again, there's two choices here: an out-of-court agreement or to go through the Court. If you go through the Court, you're agreeing to the Native Title Act. A foundational principle of the Native Title Act at the Mabo decision is that the Crown is the sovereign. So, if you say: 'No deal, we're going through the Court!', you're tacitly agreeing that the Crown is the sovereign. It's a dumb-ass back-to-front argument that's theirs! (Kelly)

In pursuing this path, Kelly considers that the opponents only sanction the sovereignty of the British Crown that they claim to challenge.

Besides, Glen Kelly claims that the opponents to the settlement only think of their personal interests, rather than trying to find a solution that all the Noongars would benefit from. For

him, it is not by rejecting the British sovereignty that the Noongars will get their own sovereignty back:

> The way to take power is not to try and invalidate the whole system because the system protects itself very very well. You take power by recognising how the system works, getting in there and being part of it but at the same time, reinforcing these strong cultural values to make sure that when you become part of it, you don't forget who you are, you don't forget what your connection to country is and take all those values where that power resides. (Kelly)

Glen Kelly is deeply convinced that only an agreement with the State will give the Noongars access to some form of self-government. Instead of claiming sovereignty—a concept resonating as a threat for many non-Indigenous Australians—SWALSC argues for the Noongars' capacity to self-determination and their ability to occupy a real place in the Australian society while consolidating their "culture". SWALSC does not seek the independence and secession of the Noongar nation by advocating absolute sovereignty. Instead, to reframe the Noongars' relationship with the Australian State, the organisation defends the idea of a form of an internal sovereignty, which translates into a degree of autonomy granted by the governments in place and respects the territorial integrity and political sovereignty of the latter.

**Conclusion**

To settle the Noongars' native title claims and assert their place in the mainstream Australian society, SWALSC restrained, at least in appearance, from the international discourses on Indigeneity and claims for Indigenous sovereignty and treaty. The aim was to ensure that the State of Western Australia did not consider itself threatened by the Noongars' demands and relaxed its mechanisms of control. But, although pretending to distance itself from the UN framework, SWALSC relied on the symbolic power of the Indigenous identity. The organisation shaped a Noongar identity according to the general criteria that fall under the category of "Indigenous peoples" (colonisation, marginalisation and oppression, historical continuity, cultural specificity and vitality, self-identification) and claimed the same collective rights that the Declaration grants to the latter (self-determination, territorial sovereignty, reparation, specificity and cultural transmission, etc.). The threat of the generic category of Indigeneity, the definition and effects of which may no longer be controlled at the national level, favoured the approval by the State of Western Australia of the formalised and negotiated—thereby acceptable and contained—Noongar nation, an alter/native space within the Australian nation.

This strategic political tool allowed SWALSC and the State of Western Australia to bring their perspectives and objectives closer together during the negotiation process. This is in line with what Patrick Sullivan describes as a "consolidated approach": on the one hand, this approach considers the peculiarities and specific needs of the Australian Indigenous people, while on the other hand, it acknowledges that their future and the future of the descendants of the settlers and of the immigrants are inextricably linked. Sullivan writes that "consolidation requires recognizing what is shared, as well as what is distinctive" (17). The State of Western Australia agreed to question the nation-state/sovereignty relationship by recognising the Noongars' place in the contemporary Australian society and granting them some political autonomy. In doing so, it consolidated its legitimacy and its national history. For its part, SWALSC secured a comprehensive agreement, which can be considered as a treaty that dares

not say its name. Indeed, the Noongars have been formally recognised as the "traditional owners" of the South West and as a distinct political entity, the agreement has been reached by way of fair and respectful negotiations and reframes their relationship with the Australian State in the long-term and the agreement also constitutes a full and final settlement of both parties' claims as the Noongars have surrendered their symbolic native title rights and interests in exchange for a package of concrete benefits.

Beyond the Australian Southwest, the Noongar settlement shows that the sovereignty of the Indigenous Australian peoples is not a threat to the sovereignty of the Australian State. On the contrary, these different layers of sovereignty can be complementary and have the potential for establishing new relationships between Indigenous and non-Indigenous Australians. The Noongar settlement has set up a pattern for the negotiation of other Indigenous agreements across the continent that, far beyond symbolic native title rights and interests, can recognise Indigenous polities and meet their specific demands and needs.

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