Chasing The Dream – Self-Determination on a Non-territorial Basis for the Noongar Traditional Owners in the South West of Australia

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Abstract

Self-determination for Aboriginal people in Australia has been a long sought after yet difficult objective to reach. The recently concluded Noongar Settlement in the state of Western Australia opens new opportunities and could potentially set a new benchmark for non-territorial autonomy and self-government for an Aboriginal community. The Noongar Settlement exceeds the more traditional settlements of a native title claim since it provides elaborate institutions for self-government albeit by way of private bodies corporate. The bodies corporate for the Noongar people would enable them to make and administer decisions; offer services; undertake management of public conservation areas; and advocate for the best interests of their community. This privatised form of self-government may not only provide new impetus to other land claim processes in Australia, it may also address the often-heard demands from Aboriginal people for a treaty to be entered into between themselves and the government of Australia.

Keywords

1 Introduction

'Self-determination', in the context of self-government and autonomy, is an often sought after, but so far a mirage for the Aboriginal people of Australia. Due to their dispersed living patterns, the massive and comprehensive disruption by colonisation on their ancient customs and laws, and the occupation of their traditional lands by farmers, pastoralists, urban developments and mining companies, Aboriginal communities today live intermingled with the rest of the Australian population. This means that any territorial form of regional or local self-government by way of reserves or territories is difficult if not impossible to achieve. In several international case studies indigenous people live adequately concentrated in specific regions to warrant a form of territorial self-government. Aboriginal people in Australia however traditionally lived in small, hunter-gatherer communities and those living patterns were disrupted and even severed by colonial settlement. Any practical form of self-government is therefore likely to be based on elements of personal rather than territorial autonomy.

1 The term 'Aboriginal people' in this article is used for reason of consistency and simplicity. It is acknowledged that Aboriginal and Torres Strait Islander people comprise a wide variety of indigenous communities with shared as well as unique laws, customs and traditions. It is incorrect to assume that there is only one Aboriginal ‘people’. The indigenous people of Australia comprise a wide variety of ‘peoples’ with unique languages, customs, traditions and land to which they belong. It is estimated that at the time of colonisation there were around 250 indigenous languages spoken, whereas today there are around 150, most of which are endangered. It is also noted that the indigenous people of Australia are sometimes referred to as First Nations and Indigenous People.

2 Personal autonomy refers to the practices of self-government whereby a community maintains and develops its laws, customs and traditions on a personal, rather than on a territorial basis or non-territorial basis. The exercise of personal autonomy can take place by way of a cultural council; an incorporated body; or another legal person that acts on behalf of the community to make decisions and administer laws. Personal autonomy entails, in essence, that the corporate body which acts on behalf of an indigenous, cultural or linguistic community, makes policy and takes decisions on behalf of the community and implements and administers those decisions via community organisations, facilities and services directed solely at members of the community, in contrast to a territorial form of government which renders services to all those who reside within its territory. See in this regard the writings of two Austrian philosophers, lawyers and political leaders, Otto Bauer and Karl Renner. They played a leading role at the end of the nineteenth century and the early twentieth century to address the challenge of how to accommodate the collective rights of cultural communities on a personal, non-territorial basis. B. De Villiers, ‘Community Government for Minority Groups: Revisiting the ideas Renner and Bauer towards developing a model for self-government by minority groups under public law’, 76 Heidelberg Journal of International
This article reflects on a promising new development in the south west of Australia in the state of Western Australia where the local Noongar Aboriginal community (numbering around 30,000 persons) have reached an agreement with the state government for a form of privatised self-government to be instituted over an area of around 200,000 square kilometres.3

Key elements of the so called Noongar Settlement are based on aspects of personal rather than territorial autonomy.4 The Noongar Settlement 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. The institutions of self-governance created by the Noongar Settlement exist alongside existing local governments. The Noongar institutions are, in effect, a type of fourth level of government albeit in a privatised form via registered Aboriginal Corporations. The Noongar Settlement is by far the most comprehensive agreement of its kind in Australia and it has the potential to be an inspirational template for other similar agreements in Australia and perhaps beyond.

The Noongar Settlement seeks to bridge the gap between public and private law by creating an institutional framework in private law which has the potential of offering public services to the Noongar community as if a form of ‘government’. In this article consideration is given to essential elements of the Noongar Settlement to highlight how it opens new opportunities for a de facto fourth level of elected self-government for the Noongar People alongside contemporary local governments.

2 Aboriginal People and Native Title

Although Aboriginal people closely associate with a particular part of ‘country’,5 the sovereignty Aboriginal people had over their lands prior to colonisation

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3 This area is larger than European countries such as Belgium, Ireland, Austria, Portugal, Hungary and Greece. See <www.nationmaster.com/country-info/group-stats/European-Union/Geography/Area/Total>, visited on 1 March 2019.

4 See Noongar (Koorah, Nitja, Boordahwan) (Past, Present, Future) Recognition Act 2016 (WA) (Noongar Settlement Act).

5 Aboriginal people generally refer to the lands of their ancestors and the land to which they belong as their “country”.
had been lost, eroded or negatively impacted due to colonisation and subsequent events. Although the recognition of ‘native title’ in 1992 by the High Court of Australia acknowledged that in some parts of Australia the traditional rights, laws and customs of Aboriginal people in respect of their country continue to exist, these rights do not satisfy the demand of Aboriginal people for a contemporary form of ‘self-determination’, ‘self-government’ or ‘autonomy’.

It took Australia close to two centuries after colonisation to recognise in the Mabo judgment that Aboriginal people prior to colonisation had sophisticated, systematic and coherent systems of laws and customs with regard to the organisation of their society and their country. The previously held view that Australia was terra nullius (no persons land) at the time of occupation and that Aboriginal people’s laws were so poorly developed that they could not be recognised as a form of sovereignty over land and waters, was discarded when in 1992 it was accepted by the highest court that ‘native title’ continued to exist after colonisation and that the basis of native title is an orderly, pre-colonial system of laws and customs which continues to exist and the title is collectively held at a community level by the Aboriginal people who are linked to the land through their apical ancestors.

The progress that had been made in 1992 with the Mabo judgement and the subsequent enactment of the Native Title Act (1993) to give effect to the judgement, have however in the past two decades been diluted since it has

6 In Milirrpum v. Nabalco Pty Ltd (1971) 17 FLR 141 (27 April 1971) Supreme Court (NT) 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 were so uncivilised and primitive that no coherent form of proprietary title to land existed.


8 In the Mabo decision the High Court with reference to developments in international law and contemporary research and evidence, accepted that 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.” Mabo v. Queensland (No 2) [1992] HCA 23; (1992) 175 CLR 1 (3 June 1992), para. 66.

9 The Court (ibid., para. 53) 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.
been shown to be very difficult to prove the ongoing existence of native title;\(^\text{10}\) native title had been extinguished over large parts of Australia, particularly in urban centres and freehold farms;\(^\text{11}\) and even where native title has been recognised, the title has not translated into general policy outcomes of public law rights of consultation, autonomy, self-government or power-sharing.\(^\text{12}\) Barrie observes that the “initial optimism [after Mabo] in aboriginal communities has changed to frustration and disillusionment.”\(^\text{13}\)

Regardless of the recognition of native title, the ability of Aboriginal people to self-govern and to protect and promote their customs and laws in a manner consistent with international law, remains at best embryonic and aspirational.

### 3 The Proposed Aboriginal Advisory Voice and Self-Government

In recent times a proposal has been made for Aboriginal people to be given an advisory ‘Voice’ in the form of an elected body that would give advice to the federal government and parliament.\(^\text{14}\) The details of the Voice are yet to be finalised, but even if the Voice made it onto the statute books, its deliberations would only lead to ‘advice’ which is unlikely to bind any federal or state...
parliament or executive government. The Voice is also not intended to serve as a basis for autonomy or self-government.

The proposals made for the Voice focus principally on what could be seen as an informal power-sharing by way of an advisory approach, whereas self-determination for the purposes of this article refers specifically to the ability of Aboriginal people to develop policies, make decisions and administer measures with regard to their country, laws, customs and traditions. In a previous article I have argued that traditional forms of territorial self-determination are not suitable for Aboriginal people and that alternative solutions such as non-territorial forms of autonomy and personal self-government ought to be pursued.

The purpose of this article is to reflect on the quest for a form of self-determination for Aboriginal people that includes, but is not limited, to powers of self-government and autonomy. A senior Aboriginal leader has described the importance of self-determination as follows:

I would strongly contend that recognition of collective rights as indigenous peoples, including that of self-determination, is the key to our continued and distinct development. These rights complement, and indeed strengthen, our individual human rights. History has shown that it is precisely where our collective rights as peoples have been ignored, that our individual rights in areas such as equal opportunity to the provision of education, employment and health care, equity in the application of the law and justice or participation in the political process, have also been neglected.

Below, consideration is given to the standards set for self-determination pursuant to the objectives by the United Nations International Declaration on the Rights of Indigenous People and how those general principles may translate into practical measures for Aboriginal people in the Noongar Settlement. It

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15 It is noted that the concept of ‘self-determination’ is characterised by fluidity and that in its widest sense self-determination includes political and administrative rights; power-sharing and self-government; land rights and control over natural resources; and consultative rights. Tomaselli speaks about all the different facets of self-determination collectively as “composite rights”. A. Tomaselli, Indigenous Peoples and their Right to Political Participation (Nomos, Baden-Baden, 2019) p. 173.


is proposed that the Noongar Settlement provides a potential basis for the Noongar People to develop for the first time in Australia a comprehensive system of self-government over rural and urban areas through representatives that are elected and nominated in accordance with their laws and customs.

4 Self-determination of Indigenous People in International Law

‘Self-determination’ is an often used term in the political arena, but in its practical application it remains vague in its meaning in public law and institutional development.18 Whereas the term is generally used to refer to the right of sovereign nations to pursue their own fate under international law,19 domestic minorities and indigenous people have also increasingly been relying on the term to refer to a form of internal self-government or autonomy without necessarily wanting to secede from their residential country.20

There is no justiciable ‘right’ in international law to domestic self-determination of indigenous people or minorities.21 International law has however developed objectives that encourage sovereign states to accommodate the self-determination aspirations of indigenous people.22 The manner in

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18 ‘Self-determination’ for purposes of this article refers to the right of an indigenous community to develop policies; make and administer decisions; and resolve legal disputes within the sphere of public law with regard to matters that are of direct relevance to protection and promotion of their culture, traditions and laws. The term self-determination is used within the context of autonomy being exercised within existing sovereign country boundaries, in other words, domestic self-determination, in contrast to self-determination by the creation of a new country through secession. Refer to M. Weller, Escaping the Self-determination Trap (Martinus Nijhoff, Leiden, 2008).

19 See International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR).

20 “In Australia self-determination is almost exclusively synonymous with the claims of Aboriginal and Torres Strait Islander people, and it is generally expressed as calls for self-government, democratic participation, land rights, cultural protection and political representation. It rarely is expressed in terms of secession, territorial break-away or renunciation of citizenship”. M. Casten, ‘Constitutional Recognition, Self-Determination, and an Indigenous Representative Body’, 8 Indigenous Law Bulletin (2015) p. 6.


22 See for example how the meaning of self-determination is in itself flexible, with some emphasising the importance of governmental institutions and autonomy, while others emphasise land management, resource control and consultative practices: J. Gilbert, Indigenous Peoples’ Land Rights under International Law (Transnational Publishes, Ardsley, 2006) p. 197. Much work lies ahead to “ensure that the promise of the Declaration is fully
which the ‘right’ to self-determination is operationalised falls within the discretion of each state, which means that a smorgasbord of self-determination options may be pursued by states, including creating territorial reserves, pursuing non-territorial self-government options, quotas in legislatures, consultative mechanisms, the protection of individual rights and freedoms to associate, recognition of land rights, restoration for past injustices, and special policies and programmes aimed at indigenous people.23

There is, in essence, no consistency in international law or within municipal law about the way in which the ‘right’ to self-determination of indigenous people ought to be operationalised within sovereign states.24 In general, for purposes of this article, two main streams of self-determination have crystalised: first, different forms of autonomy, self-government and control of land; and secondly, power-sharing, consultative mechanisms, and reparation of injustices.25

The principal international instrument with regard to the right to self-determination of indigenous people is the United Nations International Declaration on the Rights of Indigenous People (UNDIP).26

See for example how within the context of regional solutions, the Inter-American Court of Human Rights in South America have attempted to give ‘teeth’ to the rights to self-determination in judgements: yatama v. Nicaragua (Series C No. 127, Judgement of 23 June 2005) and Saramaka People v. Suriname (Series C, No. 127, Judgement of 28 November 2007).

See Official Records of the General Assembly, Sixty-first Session, Supplement No. 53 (A/61/53), part one, chap. 11, 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 favour, 11 abstaining and 4 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.
The UNDRIP, relevantly, contains the following directive principles, referred to as ‘rights’, with regard to the self-determination of indigenous people, particularly with regard to autonomy and self-government:

Indigenous peoples, in exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs, as well as ways and means for financing their autonomous functions.\(^{27}\)

Indigenous peoples have the right to maintain and strengthen their distinct political, legal, economic, social and cultural institutions, while retaining their right to participate fully, if they so choose, in the political, economic, social and cultural life of the State.\(^{28}\)

Indigenous peoples have the right to maintain and develop their political, economic and social systems or institutions, to be secure in the enjoyment of their own means of subsistence and development, and to engage freely in all their traditional and other economic activities.\(^{29}\)

Indigenous peoples have the right to promote, develop and maintain their institutional structures and their distinctive customs, spirituality, traditions, procedures, practices and, in the cases where they exist, juridical systems or customs, in accordance with international human rights standards.\(^{30}\)

The following essential principles can be distilled from the UNDRIP for purposes of this article, namely that Aboriginal people have a right to ‘self-government’ to maintain and promote their customs, laws and traditions; they have the right to maintain and develop their traditional institutions; and they have the right to promote their traditional customs and laws in accordance with international human rights standards.

These rights can be described as aspirational in character and cannot be enforced by legal remedy. According to Barrie the challenge remains with

\(^{27}\) Art. 4 UNDRIP.
\(^{28}\) Art. 5 UNDRIP.
\(^{29}\) Art. 20(i) UNDRIP.
\(^{30}\) Art. 34 UNDRIP.
the implementation of the **UNDI**p.31 The spirit of the Declaration as far as Australia is concerned is however emphatic, namely that Aboriginal people are entitled to recognition of their traditional laws, customs and practices by contemporary Australian law, and more specifically that Aboriginal people are entitled to maintain, develop and promote institutional arrangements whereby their right to self-government with regard to their traditional laws, customs and practices is recognised.

The political discourse between political parties in Australia in general has struggled to develop consistency with regard to giving practical content to the right to self-determination by Aboriginal people. The same lack of consistency also applies to debates within the Aboriginal community.32 Self-determination has in many respects become a slogan for mobilisation of Aboriginal people, of which the content remains unclear. Gardiner-Garden aptly summarises the development in the debate concerning self-determination in Australia as follows:

Along this road debate has moved from how best to effect cultural and biological assimilation, to explorations of the concepts of ‘self-management’, ‘self-determination’, ‘self-government’, and ‘sovereignty’, to grappling with the possibility of a ‘treaty’, ‘compact’ or ‘makarrata’. In more recent years the debate has progressed on to the issues surrounding a possible ‘social justice package’, ‘document of reconciliation’ and ‘an apology for past policies’.33

The Noongar Settlement is, arguably, the most ambitious practical embodiment of self-government yet to be pursued in Australia. Whereas the Noongar Settlement only impacts on a relatively small geographical part of Australia and whereas it only affects the Noongar community, the principles underlying


32 There is no agreement amongst Aboriginal people about the content of self-determination. For example, whereas some Aboriginal people demand that a ‘treaty’ be entered into between the national government and Aboriginal people; others emphasise that local agreements ‘on country’ are essential because it reflects the reality of Aboriginal sovereignty which is held by local Aboriginal communities; whereas others propose national power-sharing and advisory mechanisms whereby the voice of all Aboriginal people can be heard as well as reparatory arrangements and truth and reconciliation processes.

the settlement may prove to be beneficial to other Aboriginal peoples across Australia and perhaps internationally.

Five main principles, as discussed below, arise from the Noongar Settlement, namely: (a) a comprehensive settlement that affects an entire region and not just land held pursuant to native title; (b) potential rights of autonomy, self-government, political rights, and promotion of law, culture and customs by way of privatised Aboriginal Corporations; (c) consultation rights with state and local governments in policy areas that affect the Noongar People; (d) government recognition, support and empowerment for the Noongar Aboriginal Corporations; and (e) discharge of rights pursuant to public law and private law.

5 The Noongar Settlement: What Is it All About?

The Noongar People of Western Australia recently entered into a comprehensive settlement of their native title claims with the government of Western Australia. The Noongar Settlement has been described as the first real ‘treaty’ between an Aboriginal community and a government of Australia.

The Noongar Settlement involves a community of around 30,000 Noongar People; who comprise six sub-communities who together constitute the Noongar People; it covers an area of around 200,000 square kilometres in the south-west of the State of Western Australia; and it establishes a network of self-governing institutions for the Noongar People.

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34 The six communities had complex land claims that involved many parcels of land where native title had not been extinguished. Due to the highly urbanised area in which the communities reside, including the capital city of Perth, much of their traditional lands had been impacted by extinguishment of native title. The wide-scale extinguishment meant that even if their claims for native title had been successful, the outcome would have left the Noongar People with an area that represented the moon landscape with pockets of native title and large areas of extinguishment. The Noongar Settlement adopted an holistic approach by recognising that the entire area is their ‘country’.

35 H. Hobbs and G. Williams, ‘The Noongar Settlement: Australia’s First Treaty’, 40:1 Sydney Law Review (2018) pp. 1–42. 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).

36 The six communities are: Ballardong, Gnaala Karla Booja, South West Boojarah, Wagyl Kaip & Southern Noongar, Whadjujk and Yued groups.

37 See the map of the area, South West Native Title Settlement at: <www.dpc.wa.gov.au/swnts/South-West-Native-Title-Settlement/Pages/default.aspx>, visited on 10 March 2019.
The Noongar Recognition Act and the Noongar Land Administration Act, which were enacted by the Parliament of the federal state Western Australia, together with an Indigenous Land Use Agreement for each of the six areas, are arguably the most comprehensive statutory settlement of native title claims in Australia.

The Noongar Settlement, which surrenders native title for the entire area which is the subject of the settlement, 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 funds and the management of their affairs, joint management of conservation areas, access to Crown (public) land, a housing and land package, employment opportunities, and support for Noongar commercial and entrepreneurial activities.

The Noongar Settlement is wide-ranging in letter and restorative in spirit since it has been the outcome of negotiations rather than litigation. The main elements of the Noongar Settlement are as follows.

5.1 Recognition as Traditional Owners
The Preamble of the Noongar Recognition Act recognises the Noongar People as the original owners of the land which is the subject of the Noongar Settlement. 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”. The area of land is set out in Schedule 3 of the Noongar Settlement Act and it includes farming areas, towns, villages and cities in the area. The settlement area is divided into six sub-areas of which each is made up of the families whose apical ancestors originate from those areas.

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38 Land Administration (South West Native Title Settlement) Act 2016 (WA) (Noongar Land Administration Act). Preamble item 3 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.

39 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, 733.


41 S. 5 Noongar Recognition Act.

42 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
Each area has its own Indigenous Land Use Agreement registered under the Native Title Act that sets out the terms of the Settlement.\textsuperscript{43}

It is important to note that whereas other native title settlements in Australia are generally limited to the areas where native title has been determined, the Noongar Settlement is unique in that it encompasses an entire region including areas where native title had been technically extinguished. The principle underlying this recognition is that the Noongar People prior to colonisation had sovereignty over the entire region and even though at law the sovereignty may have been fettered, by working of this statute it is again recognised that this is the traditional country of the Noongar People.

The approach adopted in the Noongar Settlement is “unprecedented” and therefore far more comprehensive and holistic than otherwise envisaged in the recognition of native title in 1992.\textsuperscript{44} Whereas native title in effect entails a bundle of rights which is limited in scope (it only applies to the area of native title) and application (it only entails certain rights), the Noongar Settlement accommodates the needs and aspirations of an entire community, culturally, politically and socio-economically.

The Noongar Settlement is much closer to the letter and spirit of the International Convention on the Rights of Indigenous People than any other native title agreement previously entered into by an Australian federal or state government.

5.2 \textit{Legal Structure of the Noongar Corporations}

The Noongar Settlement provides that a basic governance structure is established for the Noongar People.\textsuperscript{45} The governance structure comprises six
Noongar Regional Aboriginal Corporations (Noongar Corporations) for the family groupings that make up the Noongar Settlement. The respective Corporations are legal persons in civil law, that can sue, be sued, and act on behalf of their members. The Regional Corporations are supported by the Central Services Corporation (Central Corporation), which is responsible to provide services, coordination, collective bargaining and negotiation, and advice to and on behalf of the six Noongar Corporations. The nature of the legal framework has a ‘federal’ element to it whereby each of the Noongar Corporations is autonomous in its operations, but with joint support services being made available via the Central Corporation and cooperation taking place between the Corporations on the basis of subsidiary.\textsuperscript{46} This arrangements gives recognition to the historical reality that although the Noongar People share common language, law and customs, the caring of country is something done at a local level by families who are responsible for the land.

The Noongar Corporations are registered pursuant to the federal Corporations (Aboriginal and Torres Strait Islander) Act 2006 (\textit{CATSI} Act). The \textit{CATSI} Act enables Aboriginal people to register corporations that can undertake activities and ventures on behalf of its members.\textsuperscript{47} Many Aboriginal communities have become incorporated with the objective to promote their language, culture, laws and customs.\textsuperscript{48} The \textit{CATSI} Act is closely related to the protection and promotion of land rights of Aboriginal people, but a corporation may also be registered for non-land related activities. The Aboriginal Corporations are essentially non-profit and must refer in the name of the Corporation to it being an “Aboriginal” and/or a “Torres Strait” Corporation. In order to assist Aboriginal people with the setting up and management of these Corporations, the federal government has developed easy-to-access templates that guide communities through the process of incorporation, membership, election of office bearers, the requirements for proper corporate governance, management

\textsuperscript{46} In essence, whatever function or activity cannot be effectively discharged by one of the six regional Corporations, can be devolved upward to the Central Corporation to perform.

\textsuperscript{47} Indigenous People may also incorporate organisations under other legislation, but the \textit{CATSI} Act establishes a special basis for information and provides support to communities. Act 124 of 2006: <www.legislation.gov.au/Details/C2017C00055>, visited on 2 February 2019. The objectives of Corporations can be varied, including social, cultural, linguistic and/or economic objectives.

\textsuperscript{48} Non-indigenous people cannot register corporations under the \textit{CATSI} Act.
issues, resolution of complaints, legal advice, and other forms of training.\textsuperscript{49}

The federally funded office of Registrar of Indigenous Corporations is responsible for managing the operation of the Act, ensuring compliance with the Act, and dealing with issues arising under the Act.\textsuperscript{50} The Aboriginal Corporations operate within the sphere of private law, membership is voluntary, and services are offered to members of the Corporation wherever they reside.\textsuperscript{51}

The Noongar Corporations are therefore registered pursuant to a federal statute. The Corporations function under civil law as non-governmental corporations that are liable only to its members. Although the Noongar Corporations in some sense appear to be a fourth level of government that operates within the sphere of, or compliments local governments, they are not accountable to the general electorate in a manner similar to local government. The Corporations are not recognised by the federal or state constitutions as a ‘government’.

The functions performed and services delivered by the Corporations are, however, more than those of a mere community club or association. Some of the functions fall within the domain of what would ordinarily be seen as governmental services, for example management of land, providing housing and rendering educational services (see below).

The Noongar Corporations have a \textit{sui generis} character whereby at law they appear to be entirely private entities, but in practice they have the potential to function as a form of government that provides public services to its members that otherwise would be the responsibility of state and local government agencies. This is a unique form of non-territorial self-government whereby the private, statutory Aboriginal Corporations are not rendering a service on a geographical basis to all those who reside in an area, but rather only to those Noongar persons who wish to attend and participate in the activities of the particular Corporation regardless where they reside.


\textsuperscript{50} The Registrar receives annual reports from corporations; ensures compliance with the \textsc{catsi} Act; and may even prosecute if there had been failure to comply with the provisions of the \textsc{catsi} Act. For more information see \langle www.oric.gov.au/ \rangle, visited on 7 January 2019. There are around 3,000 Aboriginal Corporations registered.

5.3 Membership of the Noongar Corporations
Membership of the six Noongar Corporations is open to all Noongar persons who are associated with the specific area through their apical ancestors.\textsuperscript{52} There is no requirement to be resident in the area or to be actively involved in the practice of Noongar laws and customs.\textsuperscript{53} Association with a Corporation is voluntary, which means that even if a person is entitled to be part of a specific Corporation, there is no obligation to associate with the Corporation, to receive any benefits, to accept a service or to participate in the activities.\textsuperscript{54} A person may also relinquish their membership of a Corporation.

5.4 Governance Structures of the Corporations
Each of the six Noongar Corporations has its own governance structure which is elected by the members of the Corporation. Each Corporation has between two and four directors who are elected by postal vote of registered members on an annual basis. In addition, two expert directors are appointed by each Corporation on the basis of the expertise, for example legal or financial, they can offer to the Corporation. Each of the Corporations can nominate one director to serve on the Central Services Corporation which in turn coordinates activities and provide special support and services to the six Corporations. The Central Services Corporation may also nominate two directors for reason of their expertise. The Corporations are required to convene an annual meeting of members and an extraordinary meeting can also be called by members.

The Noongar Corporations are in this respect more accountable to their members than ordinary local governments since the elections are annual, special meetings can be called by members, and the registrar of Aboriginal Corporations oversees the operations of the Corporations. The meetings of the directors of Corporations are, however, not open to members to attend as is the case with local governments which may be attended by members of the public.

\begin{itemize}
\item \textsuperscript{52} A membership-expression form is available for the details of the person who wishes to be admitted. Individuals can also access detailed anthropological reports to ascertain what, if any, connection they have with the apical ancestors of each region. \textit{See <www.noongar.org.au/formal-docs>}, visited on 6 January 2019.
\item \textsuperscript{53} \textit{See Ballardong ILUA, supra} note 43, Schedule 2 that sets out the list of apical ancestors for the Ballardong community.
\end{itemize}
5.5 **Powers and Functions of the Noongar Corporations**

The six Noongar Corporations are responsible for managing and implementing the Noongar Settlement within their sub-region.\(^{55}\) Each of the Corporations must promote the interests of its members; advance activities and offer services that serve the members; promote the traditional laws, culture and customs of the community; manage any lands that fall within its jurisdiction; participate in joint management activities; render services; cooperate with state and local governments; advocate on behalf of their members; and undertake activities on behalf of their members.

The Corporations do not have inherent powers of a government. The Corporations are civil entities regulated by civil law. The Corporations may however enter into agreements or contracts with government agencies whereby a Corporation acts as the agent of the government agency by providing a service to the Noongar People that a government agency would normally provide.

The *sui generis* character of the Noongar Corporations is highlighted by their being simultaneously entirely private associations, but also a form of parastatal or agent for government.

5.6 **Noongar Settlement Package**

The Noongar Settlement entered into between the parties is impressive and comprehensive when compared to other native title settlements that have been reached in Australia. Whereas other native title-type settlements were primarily limited to an area where native title has been determined and limited to the bundle of rights that make up native title, the Noongar Settlement covers an entire region regardless of the existence of native title and the package of rights includes items that exceed typical native title rights and interests.\(^{56}\)

The Settlement deals not only with native title-related issues, but also with 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.\(^{57}\)

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55 Ballardong *ilua*, *supra* note 42, item 8.1.
56 The Noongar People “surrender” any claim to native title as part of the Settlement. Ballardong *ilua*, *supra* note 43, item 6.2.
57 It must be noted, however, that the Settlement constitutes “full and final compensation” for the extinguishment of native title. This may, in generations to come, become a controversial part of the Settlement. Ballardong *ilua*, *supra* note 43, item 13. On the other hand, it must also be acknowledged that the state agencies would not have been able to agree to such a wide-ranging Settlement, had it not been for an agreement that no further claims for compensation may arise.
A few of the key elements of the Noongar Settlement package are explained below.

5.6.1 Noongar Boodja Trust
The establishment of the Noongar Boodja Trust which is responsible to hold, manage and control all benefits that accrue from the Noongar Settlement on behalf of the Noongar people. The government of Western Australia will contribute AUD 50 million per annum for 12 years towards a future funds for the six 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 will also contribute AUD 10 million per annum to the operating costs of the offices of the Corporations.58

5.6.2 Central Services Corporation
The Central Services Corporation coordinates the activities of the six Noongar Corporations, undertakes collective negotiations with state and local government agencies, initiates and coordinates major projects, does advocacy on behalf of the wider Noongar community, develops training and other material for leadership development, undertakes heritage protection for the entire area, develops a cultural advice policy, and in general promotes the interests of the Noongar People.59

5.6.3 Noongar Land Estate
The Noongar Land Estate which manage 320,000 hectares of land for purposes of cultural enjoyment, education and self-government as a local government on the land.60 This parcel of land is to be used exclusively for the development of cultural and traditional activities of the Noongar People. In addition to this transfer of land, the Noongar Settlement also grants access to the Noongar people to crown (public) land whereby members of the Noongar Corporations can access public lands for purposes of cultural and traditional activities.61 Another element of the Noongar Settlement is the joint management of national parks and the conservation estate whereby joint bodies are formed between the state agencies and Noongar Corporations to manage the conservation

58 Ballardong ILua, supra note 43, Schedule 10, item 5.
59 Ibid., item 4.
60 Ibid., item 8.
61 Ibid., item 13.
estate within the settlement area and to employ as far as possible Noongar people to work within those conservation areas.\textsuperscript{62}

5.6.4 Housing, Economic Participation and Community Development Programme

The \textit{housing, economic participation and community development programme} whereby 121 properties (mainly houses) are transferred to the Noongar Boodja Trust accompanied by funding to upgrade and maintain the properties, an assistance package to help members of the Noongar community to develop business and entrepreneurial skills, and a general community development program\textsuperscript{63} aimed at improving the standard of living of the Noongar people.\textsuperscript{64}

The wide scope of the Noongar Settlement package illustrates how this is much more than a mere agreement with regard to native title. This Settlement seeks to address wider socio-economic aspects of the Noongar people’s needs. It is therefore not surprising that the Settlement has been described as akin to a ‘treaty’, since it seeks not only to recognise traditional ownership of all of the land within the region, but also to address historic injustices and to establish a basis for cooperation between the Noongar people and the rest of the Australian society residing within the settlement area. The Settlement is therefore in effect an agreement between the Government of Western Australia and the Noongar People.

5.7 Relationship between Noongar Corporations and Other Governments

The Noongar Corporations are non-governmental entities which are not intended to replace or to compete with local or state government agencies. It is intended that the Noongar Corporations will, as community NGOs, work alongside existing governmental agencies to supplement the services offered to the Noongar people.\textsuperscript{65} It is however apparent from the wide range of items included in the Noongar Settlement, that the activities of the Noongar Corporations will inevitably be more extensive than those of a mere cultural club or association. The Corporations have wide range of functions that exceed what would normally be expected of cultural associations, for example the Corporations can manage land, they can jointly manage national parks, they can undertake socio-economic upliftment programmes, they can negotiate access to

\textsuperscript{62} Ibid., item 12.
\textsuperscript{63} Ibid., item 17.
\textsuperscript{64} Ibid., item 14.
\textsuperscript{65} See for example ibid., item 11 with regard to “cooperative management” of lands.
their lands, they can receive special grants from governments, and they can self-govern land that belongs to them.

It is envisaged that the Noongar Corporations may also in future provide basic health, educational, land management and other services to its members in a culturally appropriate way that is more suitable to the Noongar people than may otherwise be the case. Such functions could be provided by the Corporations on behalf of Commonwealth, state or local government agencies by way of service agreements akin to privatisation.

The Noongar Corporations could, in due course in addition to the activities foreshadowed in the Noongar Settlement Package, individually and collectively become agents for Commonwealth, state and local governments to implement and administer policy programmes of relevance to the Noongar people in areas such as health, education, tourism, land management, social services and care of the elderly. The Noongar Corporations may as a result become essential partners and even agents to the respective Commonwealth, state and local governments.

The Noongar Corporations may also in future become important advisory bodies and policy setting bodies through their interaction with government agencies and legislators to give advice about policies and legislation that impact on the Noongar people. It is likely that the Noongar Corporations and the Central Corporation will at state and national level become important advocates for their members whenever new policies are developed or existing legislation is being reviewed.

It can reasonably be expected that the Noongar Corporations could evolve over time into a form of fourth level government which delivers services to the Noongar people on a personal basis within the area for which each of the Corporations is responsible. The services provided may only be directed at Noongar people by ways of educational, health, welfare, housing, employment, tourism, land care and other activities. The Noongar Corporations may therefore in due course take the form of a de facto organ of government with social services, that ordinarily are provided by the state and local governments, being delegated or outsourced to the Corporations.66

6 Reflection of Noongar Settlement and UNDRIP

The International Declaration on the Rights of Indigenous People does not contain binding principles or detailed guidelines about the way in which the rights and interests of indigenous people ought to be accommodated. The “rights” identified in the Declaration are not justiciable, but are nevertheless important indicia of what ought to be pursued within state constitutional and legal arrangements.

The following essential principles were identified above arising from the Declaration, namely that Aboriginal people have a right to ‘self-government’ with regard to maintaining and promoting their customs, laws and traditions, they have the right to maintain and develop their traditional institutions, and they have the right to promote their traditional customs and laws in accordance with international human rights standards.

The Noongar Settlement is arguably the most extensive and promising package of rights that has been negotiated between government and an Aboriginal community in Australia. The Settlement is seen as a “contract as well as a socio-political exercise”. The Settlement holds much promise not only for the Noongar People, but also for other Aboriginal communities across Australia and even beyond the shores of Australia. The Settlement package shows that indigenous self-government can coexist with other levels and agencies of government. In fact, the respective spheres of authority can complement and enhance each other to better serve the Noongar people. The Noongar Corporations may in time become essential service delivery bodies because they may be able to reach the Noongar community in a more culturally appropriate way than local and state government agencies. The Noongar Corporations may even undertake non-culture business ventures in fields of infrastructure, tourism and conservation that serve the interests of the wider community and not only those of the Noongar People.

The Noongar Settlement meets the standards set in the UNDRIP by providing to the Noongar People a basis for self-government, a framework within their laws and customs that can be protected and promoted, an opportunity to elect representatives to their own governing institutions, and the basis to address broader socio-economic issues that affect the Noongar community.

The nature of the Noongar Settlement as a de facto fourth level of government is unique. On the one hand it may be said that the Settlement falls below the requirements of the UNDRIP, but on the other hand it may be argued that

67 Barrie, supra note 14, p. 359.
the UNDRIP is flexible enough to provide for and even encourage such unique arrangements. The author subscribes to the latter proposition. Flexibility is required to find practical ways to implement the UNDRIP and in this case, a form of privatised corporation that straddles the fields of private and public law may be novel and ideally suitable for the Noongar and other communities.

A question that inevitably arises is whether the Noongar Settlement is a ‘treaty’ for purposes of international law? Although the characteristics of a treaty as understood in international law is not the subject of this article, it is proposed that the proper description of the Noongar Settlement ought to be found in an Aboriginal concept such as ‘makarrata’ or ideally in a word that originates from the Noongar language to express the sentiment of settlement or agreement. 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.

The practical operation and implementation of the Noongar Settlement is underway. Time will tell if it lives up to the optimism underlying this article. The legal and policy framework has been developed for a Noongar system of self-government that can become a national and international benchmark. Many factors would however impact on the implementation of the Noongar Settlement, for example leadership, community cohesion, training, community support and buy-in of activities undertaken, and intergovernmental relations with local, state and federal agencies.

7 Conclusions

This article has shown that the Noongar Settlement is consistent with the principles contained in the International Declaration on the Rights of Indigenous People. The Settlement affords the Noongar People greater scope for self-government than exists anywhere in Australia. The dream of a form of self-government is close to becoming reality for the Noongar people. The self-government may take many forms and range from typical functions of a non-governmental cultural association, to advisory and advocacy powers, to

68 ‘Makarrata’ is used in the Yolngu Aboriginal language in Arnhem Land in the upper north east of Australia to refer to the coming together of people after a conflict or struggle in order to make peace. The Noongar People may prefer to use a word to refer to peace-making that originates from their language.
powers of an agent to deliver public services, to a fully-fledged organ of government, albeit in privatised form.

The state of Western Australia and the Noongar People may soon be at the forefront to give new context and meaning to the Aboriginal self-determination and autonomy in Australia and abroad.