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- 1 In 2003, 80 Aboriginal Noongar, represented by the South West Aboriginal Land and Sea Council (SWALSC), lodged the 'Single Noongar Claim' (WAG 6006 of 2003), an application for native title, on behalf of all Noongar people, over the South West of Western Australia, including the Perth metropolitan area.
- 2 At the request of the State of Western Australia and the Commonwealth, the hearing over the Perth area commenced first in 2005 before Justice Wilcox, who handed down his judgement in 2006. He recognised the existence of a single Noongar community, governed by a normative system of laws and customs at the date of settlement in 1829, and confirmed the continuity of that community and normative system to the present day. He identified eight surviving native title rights that should be recognised, subject to extinguishment.
- 3 The State and Commonwealth governments appealed this decision. In 2008, the full Federal Court confirmed the existence of a single Noongar society at sovereignty. However, the full Court overturned the positive determination and sent the case back to another court for reconsideration. In consultation with the Noongar, SWALSC decided to pursue the Single Noongar Claim through negotiations with the State government. These negotiations should soon be concluded.
- 4 The concept of history and its interpretations, rather than culture, tradition or practice, played a central role in the prosecution of the separate proceeding and its subsequent appeal, and is still central to the negotiations with the State government. I will illustrate how history as such as has been instrumentalized by the various parties involved in the Single Noongar Claim. The applicants used historical evidence to prove the continuity of the Noongar community, a view adopted by Justice Wilcox. On the contrary, the State and Commonwealth argued that, due to the history of dispossession in the South West, the maintenance of 'traditional' laws and customs to the present day was impossible. The judges of the full Court accepted their claim that continuity had not been proved for each generation and were dissatisfied with Justice Wilcox's

consideration of the historical context as an explanation for change. Eventually, to prepare themselves for the negotiations with the State of Western Australia, SWALSC used history again as an empowering tool proving the continuity and strength of the Noongar community.

## Recognising history

- 5 As Smith and Morphy (2007: 14) have noted “[the] *Yorta Yorta* case made it clear that Aboriginal claimants – in particular those in the ‘settled south’ of Australia – would be subject to extremely conservative and limited grounds for recognition of their law and custom, although the recent finding in the Noongar case makes it clear that, in some cases at least, native title is able to be recognised in the ‘south’, albeit in extremely limited forms.”
- 6 SWALSC were perfectly aware of the difficulties of native title and envisaged it as a struggle. They considered the ‘Single Noongar Claim’ as a strategy that would empower the Noongar and manoeuvred accordingly to aggregate the 78 individual family claims, that had been lodged over the South West since 1994. Glen Kelly, SWALSC CEO, explained to me that the Single Noongar claim was “a good legal strategy, it [was] a very good case concept and it[d] got a far better chance of succeeding in court [than individuals claims].” (Glen Kelly, interview 08/05/2012) It would have been impossible to run all of the 78 claims so, withdrawing them to lodge a single application, placed the Noongar in a more advantageous position and presented them as a unified community.
- 7 SWALSC hired the services of an anthropologist, a historian and a linguist, whose complementary reports were grounded in the history of the South West. They stressed the existence of a single Noongar community and its survival, continuity, and resilience, thanks to its capacity to adapt. Historical evidence was used as a tool, a key element to argue for the inevitable changes undergone by the Noongar community.
- 8 One of the preliminary questions listed by Justice Wilcox in the separate proceeding was to determine whether the 1829 society continues to exist today. The point was to establish if there was a discontinuity with a recent revival, or a continuing practice. Discontinuity would have entailed the failure of the native title claim.
- 9 The Applicants’ evidence on the continuity of the 1829 Noongar laws and customs was based on the conclusions by Kingsley Palmer, their expert anthropologist: “the rights and duties of the Noongar people in respect of their country have not changed in their *fundamentals* and the normative system upon which an owner is understood to relate to his or her country, remains founded upon the same principles as it did at sovereignty.” (*Bennell*: §704, my emphasis) The applicants stressed that it was a question of degree as to whether native title was satisfied. They said that “the question is likely to be whether the community or group, as a whole, has *sufficiently* acknowledged and observed the relevant traditional laws and customs.” (Original emphasis) (*Bennell*: §776)
- 10 Justice Wilcox embraced that definition of continuity. He interpreted *Yorta Yorta* as conceding that, as long as traditions had been substantially maintained by the community, a certain degree of change was unavoidable and not fatal to native title, since European settlement had a profound impact on Aboriginal societies. What had to

be determined was whether the changes, brought by that specific historical context, were adaptations to the new conditions it had created or a departure from 'tradition'.

- 11 Historical conditions hence played an important role in Justice Wilcox's judgement. He acknowledged the Noongar's history of dispossession and oppression and was ready to accept a high degree of change. He argued that: "[...] one should look for evidence of the continuity of the society, rather than require unchanged laws and customs" and that "significant change [was] readily understandable [if] [it] was forced upon the Aboriginal people by white settlement". (Bennell: §776; §785)
- 12 Justice Wilcox was convinced that external causes for change had to be taken into account; he was impressed by the Noongar's survival in the face of the drastic conditions imposed on them by colonisation and maintenance of some of their customs. He decided to focus on the adaptability of the Noongar community rather than its unchanging character. Hence, he accepted that the Noongar were part of the history of the South West and were not a fixed social entity, frozen in time. Social and cultural change could thus be perceived as a normal response to their changing historical contexts and was inevitable.
- 13 Moreover, Justice Wilcox did not endeavour to establish evidence for continuity, generation by generation since sovereignty. Despite many factors of fragmentation, he found that family members had remained connected through a 'noongar network'. Continuity at all times could not be proved, but could be inferred. Requiring the applicants to prove continuity for each and every generation would have added another hurdle to the already extensive burden of proof they have to confront with.
- 14 To establish continuity, Justice Wilcox relied on writings from the time of sovereignty and Statements provided by Noongar witnesses, especially older people. They could give evidence about customs and traditions and assert they had been observed without interruption. Justice Wilcox also noted that caution had to be taken as the witnesses knew it had to be proved that they constituted, in the past and the present, a single society. He nevertheless inferred that being a Noongar was learnt from childhood and this identity had not been conditioned for the court appearance.
- 15 In the Statement preceding his judgement, Justice Wilcox made the following remark:
- 16 Undoubtedly, there have been changes in the land rules. It would have been impossible for it to be otherwise, given the devastating effect on the Noongars of dispossession from their land and other social changes. However, I have concluded that the contemporary Noongar community acknowledges and observes laws and customs relating to land which are *a recognisable adaptation* to their situation of the laws and customs existing at the date of settlement. (Bennell: 7; my emphasis)
- 17 The particular history of the South West was fundamental to Justice Wilcox's conclusions, external causes had to be considered otherwise a native title claim in the South West, or any heavily settled area could not even be envisaged. The Noongar had been dispossessed but had survived because of their capacity to adapt to changing historical conditions.

## Denying history

- 18 On the other hand, the State of Western Australia and the Commonwealth had a different approach to history, since they were eager to see the claim for Native Title

fail. Ironically, while usually reluctant to acknowledge the Aboriginals' dispossession and oppression that colonisation had caused, they argued that devastation was so great that the Noongar could no longer be 'traditional' and had departed from traditional laws and customs.

- 19 Instead of focusing on 'substantial continuity', the State and Commonwealth grounded their argumentation on the report by their expert anthropologist Ron Brunton, and argued for 'fundamental transformation'. According to Brunton, one example of the breakdown of the normative system was that, at sovereignty, rights in land were patrilineal, whereas at present, they also combine matrilineality, birth and marriage. Counsel for the Commonwealth submitted that: "[a] shift from patrilineal descent to cognatic descent is a *radical shift* in which the norms governing group composition and the acquisition of rights and interests in land have *changed in a fundamental way*." (Bodney: §736, my emphasis)
- 20 The State and the Commonwealth rejected the argument by the applicants' anthropologist that the exercise of rights was a long-life social process of assertion and negotiation, submitted to a normative system, at least since sovereignty. Brunton affirmed that at sovereignty the acquisition of rights in land was patrilineal and that other means of acquisition had developed in the absence of a normative system.
- 21 In their appeal, they advanced that Justice Wilcox had failed to prove continuity and had asked the wrong questions: he incorrectly concentrated on the continuity of the Noongar 'society'. He should have endeavoured to prove, for each generation, the continuity of the laws and customs forming a normative system, giving rise to rights in land. The full Court accepted the submission of the State and the Commonwealth. The judges admitted the notion of change as long as the rights in land remained 'traditional', otherwise, change would be 'unacceptable'. (Bodney: §74) The full Court found that Justice Wilcox had not established whether the elements he had identified, related to the current land tenure system, were 'acceptable adaptations' or 'unacceptable changes'. The full Court concluded that some evidence even suggested discontinuity.
- 22 Lisa Strelein, director of the Native Title Research Unit (NTRU) at AIATSIS has argued that:
- The language of the full Court [...] is problematic, but it is illustrative. Instead of focusing the inquiry around the seemingly objective test of 'traditionality', the Court introduced overtly judgemental language as to what is 'acceptable' and 'unacceptable' change and adaptation in Indigenous society and determined that it is the Court's role to judge this. (Strelein, 2009: 102)
- 23 By accepting the State and Commonwealth arguments and focusing on the normative system of the society to prove continuity, the full Court once again deprived the Noongar of their capacity to adapt to changing historical conditions. They were no longer considered as a social entity but were reduced to a system of rights and interests, which degree of change the Court could accept or reject as it pleased.
- 24 Justice Wilcox was also criticised for 'disregarding' works by late 20<sup>th</sup> century writers. Indeed, he had judged they did not provide factual evidence of the 1829 situation. The full Court argued this evidence could have established continuity for each generation, which was essential for a positive native title determination. As Strelein has demonstrated, this is a question of interpretation of the *Yorta Yorta* requirement of 'substantial uninterrupted' and in the Noongar case, "the Federal Court has

transformed a ‘definition’ into a strict requirement of proof.” (Strelein, 2009: 105) This test increases the amount of proof that the applicants to native title have to provide and confront them to an even more arduous procedure.

25 Moreover, once again in a questionable language, the full Court said:

[...] in reaching his conclusion that Noongar laws and customs of today are traditional, his Honour’s reasoning was *infected by an erroneous belief that the effects of European settlement were to be taken in account* – in the claimants’ favour – by way of mitigating the effect of change. (Bodney: §97, my emphasis)

26 They rejected external causes for change in considering whether change was an ‘acceptable adaptation’ or a departure from tradition.

27 Smith & Morphy (2007: 13) have pointed out that: “[...] the forms of ‘repressive authenticity’ demanded by native title displace the burden of historical extinguishment from the expropriating agency of the State to the character of the claimant group.” The State, Commonwealth and full Court turned history upside down, invoking it on certain occasions and denying it on others, in order to define a lost authenticity and continuity, and overturn Justice Wilcox’s positive determination. The devastating effects of colonisation were therefore used to prove the Noongar’s impossibility to remain ‘traditional’.

## Writing history

28 Another approach yet again was adopted by SWALSC, the South West Aboriginal Land and Sea Council. To be in a strong position to negotiate with the State, SWALSC had to counterbalance the decision of the full Court and build on the positive determination. One of the means was to use history as an empowering device. On their website, SWALSC published “An Introduction to Noongar History and Culture”, an eleven-page document revisiting history. It focuses on the Noongar’s survival, their connection to country and the continuity of their laws and customs despite colonisation.

29 This reinterpretation reflects a widespread desire among the Noongar for a reappropriation of history that I often noticed during my fieldworks. For instance, Glen Stasiuk, a Noongar filmmaker, directed *The Forgotten*, a documentary exploring the Aboriginals’ contribution to the Australian Armed Forces. He is currently producing *Wadjemup: Black Prison – White Playground* devoted to Rottnest Island, the site of the largest number of deaths in custody in Australia, now a popular tourist destination. As he told me, his films focus on healing and remembrance and aim to promote awareness and reconciliation. The Collards, a Noongar family I am also working with, tried to acquire a farm through the Indigenous Land Corporation (ILC) but their project was refused. Clifford Collard told me:

the farm had so much history, truthful fact history that was still there, the Noongar lived there. [But ILC] didn’t believe there was so much history there, that there would have been an impact for the Noongars and the Wadjellas. They just wouldn’t believe it, they couldn’t believe it. (Clifford Collard, interview 30/04/2012)

30 What the Noongar witnessed and transmitted orally has now been turned into written words. SWALSC claim their intention to revisit historical writings in “Noongar Connection to Country”, another document published on their website:

SWALSC are developing and producing materials and resources to provide a more accurate history of the south west and the Noongar people. [...] Yes colonization did

affect Noongar people, yet the Noongar People have accommodated the new arrivals *and* sustained traditions and culture. A remarkable achievement given the pressures experienced over almost two centuries. SWALSC then, is creating more accurate narratives that show Noongar people were here 40 000 years ago, were here when the Europeans came, are still here today and shall remain here forever. (SWALSC (2): 2, original emphasis)

- 31 In this Statement, SWALSC assert the Noongar's presence and continuity, not only from sovereignty to the present day, but through time. The Noongar were already there, as far away in time as scientists can demonstrate, and will never disappear, as the use of the modal verb 'shall', rather than 'will', testifies.
- 32 "An Introduction to Noongar History and Culture" begins by attesting the Noongar's presence in the South-West for at least 50,000 years, a presence supported by scientific dating. (SWALSC (1): 1) It then strives to retrace their history from the first half of the 17<sup>th</sup> century to the present day, in a chronological form punctuated by important dated events and 'heroes', recognizable by Western criteria. The history of the South West is thus told from a Noongar perspective. It continues with the history of the successive expeditions by the Dutch and the French to assert that the Noongar inhabited the South West before the British arrival and had their own history.
- 33 It seems important for SWALSC to demonstrate that British sovereignty was never accepted by the Noongar. The document refers to the 11<sup>th</sup> June 1829 as "the day that sovereignty was "assumed" over Noongar country by what is now the State of Western Australia. The 11 June 2011 marks the 182nd anniversary of the dispossession of Noongar country from the Noongar people." (SWALSC (1): 2)
- 34 The succession of dates aims to write down a westernized form of history of the South West, one that reintroduces Noongars as central protagonists. It is also meant to create a depressing sensation of a never-ending process of dispossession and oppression and raise the reader's empathy. These dates list the massacres, the creation of the so called 'Protectors of Aborigines', institutions, missions, programs to 'civilise' the Noongar, the Rottneest Island prison and so on.
- 35 A series of repressive governmental policies started in 1886 and progressively deprived the Aboriginal people of Western Australia of their liberties, segregated them and placed them in fringe camps. The 1905 Aborigines Act, labelled as the 'most insidious' legislation, "set up a bureaucratic structure for the control of Aboriginal people whereby they all [became] "wards of the State"." (SWALSC (1): 4) Children were forcibly removed and placed in institutions and in 1936, the Native Administration Act introduced eugenic measures.
- 36 Despite all these policies, the Noongar managed to adapt and survive. SWALSC attempt to prove it through the use of various historical evidence of the Noongar's continuing presence. With regard to the Moore River settlement opened in 1918, it is noted that "[ironically], and despite the appalling conditions, Moore River kept Noongar people together where aspects of law and custom could be shared and continued." (SWALSC (1): 4) Photos are also used throughout the document to assert a continuous presence through their visual impact and Noongars' testimonies provide the document with more personal and vibrant touches.
- 37 Conditions started to improve by the second half of the 20th century, but many inequalities still had to be overcome. In 1968, Stanner's Boyer lecture is mentioned as a landmark when "[histories] of Noongar people [started] being written and oral



histories [started] being recorded, revealing aspects of a previously hidden history. Noongar people [talked] of how they and their tradition, law and culture survived and how they avoided “the welfare.” (SWALSC (1): 6)

- 38 Despite the fact that their history started being written down and recorded in the 1970s by social scientists, the Noongar still had to fight for the recognition of this history and their rights. The battle for Native Title started in 1983 and is retraced to the negotiations in 2010/2011. The chronology ends on an optimistic note and the word ‘future’. (SWALSC (1): 7)
- 39 “An Introduction to Noongar History and Culture” concludes with the promotion of the book *“It’s still in my heart, this is my country”*: *The Single Noongar Claim History* and the website “Kaartdijin Noongar – Sharing Noongar Culture”, devoted to Noongar history and culture. The book is based on the historical report by John Host, the applicants’ expert historian in the Single Noongar Case. It is meant to reveal “the true history of the resilience of the Noongar people”. (SWALSC (1): 10) It is interesting to note that during the trial of the separate proceeding, it was the anthropological report that was principally relied upon. Now that the existence of a single Noongar community is formally established, history has become central. It is through this evidence that the Noongar can prove their capacity for resilience and continuity, and adopt a powerful position to confront the State in the negotiations.

## Conclusion

- 40 To conclude, Justice Wilcox understood the symbolic importance of native title for the Noongar. He accepted their arguments for continuity and considered them as a changing social entity adapting to its historical context. By allowing a high degree of change imposed by colonisation, he recognized that the Noongar had a history and where part of the history of the South West. He thus found that native title continued to exist over the Metro claim area.
- 41 The State of Western Australia, Commonwealth and full Court endorsed a completely different interpretation of history. They harshly resisted a positive native title determination by requesting proof of continuity for each and every generation and refusing to take external causes for change into account. They deprived the Noongar of their capacity to adapt and defined them as a frozen-in-time social entity and thus denied the fact that they were part of history.
- 42 Eventually, SWALSC exploited history to build on Justice Wilcox’s positive findings and overthrow the full Court judgment. They undertook to write down a recognizable Noongar history that would prove their survival and continuity and would place them in a powerful position to negotiate with the State.
- 43 I would finally say that in the Noongar case, native title was in fact more than symbolic, it was used as a social and political reconstruction process by the Noongar. They started this process as part of the Metro claim proceedings and seized the opportunity offered by Justice Wilcox to fully implement it. History was one of their means of reconstruction as they transformed this form of narration into a tool, a social and political means of action. By proving their survival and continuity, they re-established their existence as a social entity and asserted their political existence. This allowed



them to force the State into making an advantageous offer and to start preparing themselves for the outcomes of the negotiations.

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