

Factsheet

# Treaty in Western Australia

2023

# ANTAR



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**“My heart is weeping with joy. We live with hope because we’ve been knocked from pillar to post for generations. We’ve always lived in hope that we would get to a point of being acknowledged as the first people of this nation ...The past is past, but we need to move forward to a better future.”<sup>1</sup>**

Noongar elder Elizabeth Hayden

**“This is an extraordinary act of self-determination by Aboriginal people and provides them with a real opportunity for independence.”<sup>2</sup>**

Premier Colin Barnett

**“[The Settlement] will have a massive and revitalising effect on Noongar people and culture”<sup>3</sup>**

Glen Kelly, CEO of the South West Aboriginal Land and Sea Council and Noongar lead negotiator

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<sup>1</sup> Australian Associated Press, [‘WA introduces Bill Recognising Noongar people as Traditional Owners’](#), *The Guardian*, October 14, 2015, 1.

<sup>2</sup> Government of Western Australia, [‘Noongars vote to accept historic offer’](https://www.wa.gov.au/government/media-statements/Cook-Labor-Government), accessed June 18, 2023, <https://www.wa.gov.au/government/media-statements/Cook-Labor-Government>.

<sup>3</sup> Katheryn Diss, [‘Claimants Ink \\$1.3 billion Western Australia Noongar Native Title Deal’](#), *ABC News*, March 30, 2015, 1.

# What is Treaty?

Australian governments and First Nations communities across the continent have signed many agreements.<sup>4</sup> These include significant arrangements about land rights, native title, and co-management of resources. But these are not treaties. A treaty is a special kind of agreement.

Treaty involves three elements: recognition of Indigenous people as polities, negotiation in good faith, and lastly a settlement of claims that provides for Indigenous self-government.<sup>5</sup>

The conditions are important. A treaty is an instrument that is meant to reconcile the past with the present and make for a better future for all. A Treaty should also improve the lives of First Nations communities and aim to secure the foundations for a just relationship between First Nations peoples and the State.

Some people think a treaty must be signed between two or more independent countries. Tony Abbott and John Howard oppose treaties between Aboriginal people and Australia on this basis.<sup>6</sup> They say that a Country does not make a treaty with itself.

It is true that in international law a treaty is between two independent countries. But there is no need to be limited to international law when thinking about negotiated agreements between Indigenous peoples and governments in Australia.<sup>7</sup> If we step back, we can see that a treaty is simply a formal, legally binding instrument reached through a process of respectful negotiation in which both sides settle outstanding claims.

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<sup>4</sup> [Harry Hobbs & George Williams, 'Treaty-Making in the Australian Federation', \*Melbourne University Law Review\*, no. 1 \(2019\): 178.](#)

<sup>5</sup> 'Australian Public Law', '[Australia's First Treaty](#)', accessed June 18, 2023, <https://www.auspublaw.org/blog/2018/04/australias-first-treaty>.

<sup>6</sup> Anna Henderson & Eliza Borrello, 'John Howard, Tony Abbott lock in against treaty with Indigenous Australians', *ABC News*, September 8, 2016, 1.

<sup>7</sup> 'Agreements, Treaties, and Negotiated Settlements', *Treaties With Indigenous Peoples*, accessed June 18, 2023, <https://www.atns.net.au/treaties-landing>.

## What is the history of Treaty in Western Australia?

The British negotiated treaties with the Indigenous peoples they met in North America and Aotearoa New Zealand, but they did not do so on this continent. The lack of treaty meant that Australian law disregarded the rights and interests of First Nations peoples. After many years of activism and protest, Australian governments began to rectify some of the problems arising from the absence of any treaty. Beginning in 1966, governments legislated to provide land rights to First Nations peoples. Western Australia was slower than other jurisdictions. By 1991, statutory land rights regimes had been enacted in all states except Western Australia and Tasmania. The *Mabo (No 2)* decision and the introduction of the *Native Title Act 1993* (Cth) provided the first recognition of First Nations land rights in Western Australia.<sup>8</sup>

In the 1990s and early 2000s, the South West Aboriginal Land and Sea Council (SWALSC) oversaw the coming together of six native title claims to encompass the entirety of the Noongar Country.<sup>9</sup> This claim area was divided by the Federal Court of Australia into two parts: Part A encompassing Perth and the surrounding non-urban areas; and Part B covering the rest of the claim.

In 2006, Justice Wilcox of the Federal Court examined Part A. Justice Wilcox determined that the Noongar people held native title rights to occupy, use and enjoy the lands and waters of the region.<sup>10</sup> The case was celebrated as the first decision recognising native title over a capital city. However, the decision was overturned by the Full Federal Court in 2008.

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<sup>8</sup> 'AIATSIS', [About Native Title](https://aiatsis.gov.au/about-native-title), accessed June 18, 2023, <https://aiatsis.gov.au/about-native-title>.

<sup>9</sup> Harry Hobbs & George Williams, '[The Noongar Settlement: Australia's First Treaty](#)', *Sydney Law Review*, no. 1 (2018): 40.

<sup>10</sup> 'Australian Human Rights Commission', Native Title Report 2008 - Chapter 3, accessed June 18, 2023, <https://humanrights.gov.au/our-work/native-title-report-2008-chapter-3>.

The Noongar decided not to appeal to the High Court. Instead, in December 2009, the SWALSC and the State Government agreed to pursue a negotiated outcome. In July 2013, the State Government released the terms of its settlement offer concerning the native title rights of the Noongar people. By October 2014, the SWALSC Noongar Nation Negotiation team, and the Western Australian Government reached an agreement in principle on the text of the settlement.<sup>11</sup>

Between January and March 2015, a series of authorisation meetings were held to approve the settlement, which took the form of the 6 Indigenous Land Use Agreements (ILUA).<sup>12</sup>

At this time, each individual ILUA was authorised by the native title holders of six areas including that of:

- **Yued People** (Jurien, Moora, Lancelin and Gingin)
- **Gnaala Karla Boodja** (Mundurah, Bunbury and Donnybrook)
- **South West Boojarah** (Busselton, Dunsboroughm Margaret River, Pemberton and Nannup)
- **Wagyl Kaip and Southern Noongar** (Katanning, Gnowangerup and Albany)
- **Ballardong People** (York, Northam, Hyden and Kondinin) and
- **Whadjuk People** (Perth Metropolitan area).

As part of the Agreement, in 2016 the Western Australian Parliament enacted the *Noongar (Koorah, Nitja, Boordahwan) (Past, Present, Future) Recognition Act 2016 (WA)*.<sup>13</sup> This was the first piece of legislation in Western Australia to include the Noongar language and recognises the Noongar people as the traditional owners of the land and their continued relationship with Country.

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<sup>11</sup> 'Government of Western Australia', South West Native Title Settlement Timeline, accessed June 18, 2023, <https://www.wa.gov.au/government/publications/south-west-native-title-settlement-timeline>.

<sup>12</sup> 'South West Aboriginal Land and Sea Council', Settlement Agreement, accessed June 20, 2023, <https://www.noongar.org.au>.

<sup>13</sup> 'Western Australian Current Acts', The Noongar (Koorah, Nitja, Boordahwan) (Past, Present, Future) Recognition Act 2016, accessed June 20, 2023, [http://www8.austlii.edu.au/cgi-bin/viewdb/au/legis/wa/consol\\_act/nnpfra2016645/](http://www8.austlii.edu.au/cgi-bin/viewdb/au/legis/wa/consol_act/nnpfra2016645/).

The six Indigenous Land Use Agreements (ILUAs) comprising the Settlement were conclusively registered on 27 January 2021. The Settlement formally commenced on 25 February 2021.

## Where are we up to?

Western Australia has not committed to a treaty process. However, some academics have described the Noongar native title agreement as 'Australia's First Treaty', although it doesn't recognise the Noongar Peoples' right to self-government. As we have seen, the Agreement involved the Noongar people receiving a \$1.3 billion package relating to land, resources, governance, finance and cultural heritage in exchange for surrendering native title rights and interests.<sup>14</sup>

The Noongar agreement also included the transfer of 320,000 hectares of land to the Noongar nation over five years, and the granting of certain rights to land that was not transferred. Similarly to the Gunaikurnai and Dja Dja Wurrung settlements in Victoria, the Noongar people will be invited to co-manage land and resources in land outside their territory. A key element of the Settlement was enhanced socio-economic opportunities and increased employment.

The Noongar Settlement is the largest and most comprehensive agreement to settle Aboriginal interests in land in Australian history. Other significant native title settlements in Western Australia have followed. In 2019, for example, the Yamatji Nation received a \$442 million package in exchange for settling their native title claims over 48,000 square kilometres of Country.<sup>15</sup>

The Noongar Settlement also has an important consequence for future treaty debate. In registering the comprehensive political agreement as six Individual Land Use Agreements, the Noongar Agreement shows that treaties can be

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<sup>14</sup> Harry Hobbs and George Williams, 'The Noongar Settlement: Australia's First Treaty', *Sydney Law Review*, no. 1, (2018): 40.

<sup>15</sup> 'Government of Western Australia', 'Yamatji Nation Indigenous Land Use Agreement', accessed June 18, 2023, <https://www.wa.gov.au/organisation/department-of-the-premier-and-cabinet/yamatji-nation-indigenous-land-use-agreement>.

achieved in a manner consistent with Australia's existing public legal system. The concerns of people like John Howard and Tony Abbott can safely be put to one side. Treaty is achievable in Australia.

On 27 April 2023, the Noongar Boodja Trust had its third annual payment of \$68 million.<sup>16</sup> This is the third of 12 annual payments and includes a \$50 million plus indexation towards a Future Fund, strengthening the Trust's security for future generations of Noongar persons.<sup>17</sup> The WA Government and Noongar Corporations are preparing plans for partnership regarding conservation, Aboriginal heritage, economic and community participation.<sup>18</sup>

In June 2023, long time Labor Premier Mark McGowan resigned and Roger Cook was elected by the party as the new leader and Premier of WA.<sup>19</sup> Premier Cook is a former president of ANTA National and has a long interest in Aboriginal and Torres Strait Islander affairs.<sup>20</sup> It is hoped that with the leadership change there will be a new opportunity to explore treaties with First Nations peoples of Western Australia in that State.

As at July 2023, there has been no change to the Western Australian Government's position on treaty negotiations in Western Australia.

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<sup>16</sup>Government of Western Australia', South West Native Title Settlement Timeline, accessed June 18, 2023, <https://www.wa.gov.au/government/publications/south-west-native-title-settlement-timeline>.

<sup>17</sup>'Government of Western Australia', State Government pays \$68 million to Noongar Boodja Trust, accessed June 19, 2023, [https://www.wa.gov.au/government/media-statements/McGowan-Labor-Government/State-Government-pays-\\$68-million-to-Noongar-Boodja-Trust-20230428](https://www.wa.gov.au/government/media-statements/McGowan-Labor-Government/State-Government-pays-$68-million-to-Noongar-Boodja-Trust-20230428).

<sup>18</sup>Giovanni Torre, 'WA government pays \$68 million to Noongar Boodja Trust', *National Indigenous Times*, April 28, 2023.

<sup>19</sup> Keane Bourke, 'Roger Cook, Rita Saffioti endorsed by WA Labor as premier and deputy, with David Michael joining cabinet', *ABC News*, June 6, 2023.

<sup>20</sup>David Presptipino, 'Incoming WA Premier Roger Cook has long association with Aboriginal advocacy', *National Indigenous Times*, May 31, 2023.

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**ANTAR is proud to acknowledge and pay our respects  
to First Nations Peoples as the traditional owners  
of the lands on which we work across the continent.**

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