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THE *McGLADE* CASE: A NOONGAR HISTORY OF LAND, SOCIAL JUSTICE AND ACTIVISM

Hannah McGlade*

Abstract. This essay examines recent significant political events in the context of Australian native title triggered by a Federal Court case, *McGlade v National Native Title Registrar* (2017) 340 ALR 419 brought by several Noongar people from the south west of Western Australia, and the hasty amendments to the *Native Title Act 1993* (Cth) that followed. I am writing this analysis as a Noongar researcher and academic, human rights lawyer, and the daughter of one of those Court applicants, Noongar elder Mingli Wanjurri McGlade. This essay includes dialogue between Mingli McGlade and myself, documenting and contextualising the *McGlade* case within a wider Noongar history and backdrop of racial discrimination, social justice, Noongar activism, and resistance.

[J]ust as I prefer not to embrace the terms ‘dissident’ and ‘dissenting’ as they were used in argument before the Court, so I prefer not to characterise the refusal of a person in Ms McGlade’s position as a ‘veto’ or as ‘frustrating’ an ILUA. As I have noted ... an individual who holds views different from those of the majority of the individuals constituting the registered native title claimant may nevertheless be conscientiously performing her or his representative role ... One cannot assume the motives for entering into an ILUA are any more objectively appropriate and reasonable than the motives for not doing so. There are simply different perspectives, and it is for the claim group as a whole, and the claim group only, to decide which perspective should prevail.

Justice Mortimer in *McGlade v Native Title Registrar*¹

If he is an agitator, he is in good company. Many of the great religious and political figures of history have been agitators, and human progress owes much to the efforts of these and the many who are unknown. As Wilde aptly pointed out ... ‘Agitators are a set of interfering, meddling people, who come down to some perfectly contented class of the community and sow the seeds of discontent amongst them ... Without them, in our incomplete state, there would be no advance towards civilisation’. Mr Neal is entitled to be an agitator.

Justice Murphy in *Neal v The Queen*²

Later on in 2012 and again in 2014 we set up the camp at Martigarup (around Heirisson Island) we wanted sovereignty. I was there most days for months until the police kept coming and closing the camp. A big officer one time pushed me ... We were there to talk

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¹ *McGlade (formerly Wanjurri-Nungula) v Native Title Registrar and Others* (2017) 340 ALR 419 at 523 (Mortimer J).

² *Neal v The Queen* (1982) 149 CLR 305 at 316–317 (Murphy J).

about land rights and it was a registered site, we were still fighting for land – the meetings about native title we didn't agree with. We preferred land rights to native title. Land rights means you have rights to land, you don't have to sell it and do deals for land. We feel with land rights everyone will be more equal.

Mingli McGlade, here, in this article³

This essay examines recent significant political events in the context of Australian native title triggered by a Federal Court case, *McGlade v National Native Title Registrar* ('*McGlade*'),⁴ brought by several Noongar people from the south west of Western Australia. I am writing this analysis as a Noongar researcher and academic, human rights lawyer, and the daughter of one of those Court applicants, Noongar elder Mingli Wanjurri McGlade. The case had wide-ranging implications affecting native title Indigenous Land Use Agreements ('ILUAs') across Australia.⁵ It resulted in hasty legislation in the Commonwealth Parliament,⁶ suppressing the voices and hard-won legal rights of the Noongar applicants, native title holders, and community members who opposed the ILUA negotiated by the statutory body charged with representing Noongar native title claimants, the South West Aboriginal Land and Sea Land Council with the Western Australian State government. This essay includes dialogue between Mingli McGlade and myself, documenting and contextualising the *McGlade* case within a wider Noongar history and backdrop of racial discrimination, social justice, Noongar activism, and resistance.

1.0 THE NOONGAR PEOPLE

First, I shall introduce the Noongar people, who are the Indigenous people of the south west part of Western Australia. The word Noongar refers collectively to the people and it is also the name of our language. Our Noongar ancestors and different tribal groups lived in this part of the country for thousands of years prior to the arrival of the British in 1826 and their establishment of a 'settlement' in 1827 and a colony in 1829. The Noongar people's boundary is an extensive area of approximately 200,000 square kilometres, roughly the size of the State of Victoria, that covers the city of Perth, reaches as far north to the south coast of Geraldton and as far east as Esperance. Like all Aboriginal people across Australia, the Noongar people were dispossessed of land without any Treaty agreement, in contrast with the standards of international law at the time.⁷

Colonisation forced the Noongars from traditional lands. Their way of life was being severely impacted by the colonists eager for new lands to appropriate. The British colonists did not regard Noongar people as a people exercising sovereignty

³ Mingli McGlade in this article (below).

⁴ *McGlade (formerly Wanjurri-Nungula) v Native Title Registrar and Others* (2017) 340 ALR 419.

⁵ *Native Title Act 1993* (Cth) pt 2 div 3.

⁶ *Native Title Amendment (Indigenous Land Use Agreements) Act 2017* (Cth), which amended the *Native Title Act 1993* (Cth).

⁷ Hannah McGlade, 'Native Title, "Tides of History" and Our Continuing Claims for Justice – Sovereignty, Self Determination and Treaty' in Aboriginal and Torres Strait Islander Commission *Treaty: Let's Get It Right!* (Aboriginal Studies Press 2003) 118 at 123.

and having an ancient system of law and governance, and the *Western Australian Act 1829* (UK) simply supported the ‘settlement’ in Western Australia of ‘wild and unoccupied lands’.⁸ Governor James Stirling in his communication to the British government, however, referred to the physical occupation of Noongar lands as ‘an invasion’.⁹ Noongar people opposed the wrongful appropriation of Noongar lands as evident in 1829 when Captain Fremantle raised the Union Jack flag and claimed the lands for the British, knowing that the Noongars had called out to him ‘Warra warra’ which he understood rightly to mean ‘Go away’.¹⁰ Noongars fought against land incursions without the benefit of the colonisers’ weapons and spoke against the injustice of their treatment. As Noongar warrior Yagan, along with his countrymen, asked the colonist George Fletcher Moore in 1833:

You have driven us from our haunts and disturbed us in our occupations. As we walk in our own country we are fired on by the white men. Why should the white men treat us so?¹¹

Aboriginal resistance was dealt with harshly through the use of frontier violence and colonial laws. Historian Neville Green documented that in 1838 *The Perth Gazette* announced that Rottnest Island, a small island off the coastline of Western Australia, known as Wadjemup to Noongars, would be converted to ‘a place of security for the confinement of such of the native inhabitants as may be guilty of any offence’.¹² In 1841, the colonial legislature in Western Australia, with the Governor’s casting vote, passed a statute establishing Rottnest as a prison. The purpose of the prison was to instruct the Aboriginal people ‘in useful knowledge and gradually be trained in the habits of civilized life’.¹³ For over 100 years, at least 3670 Aboriginal men from Noongar country, and elsewhere throughout the State, were incarcerated at Rottnest Island. Some were children as young as eight years and others were elderly in their seventies. Green and Moon state that ‘More than 370 men never left Rottnest’. They died on the island, with deaths resulting from disease, poor living conditions and also executions.¹⁴

As noted by historian Lois Tilbrook, early colonisation also resulted in a number of ‘unions’ between non-Aboriginal settlers and Noongar women and a growing population of children of mixed racial descent and origin.¹⁵ While some relationships were consensual, Aboriginal women were also regarded as the property of the

⁸ This is available at South West Aboriginal Land & Sea Council, *Kaartdijin Noongar –Noongar Knowledge* (online) <<https://www.noongarculture.org.au/list-of-wa-legislation/>> (last accessed 16 June 2017).

⁹ As above.

¹⁰ Tom Austen, *A Cry in the Wind: Conflict in Western Australia 1829–1929* (Darlington Publishing Group 1998) 1.

¹¹ As above at 14.

¹² Neville Green and Susan Moon, *Far From Home: Aboriginal Prisoners of Rottnest Island 1838–1931* (University of Western Australia Press 1997) 14.

¹³ As above at 16.

¹⁴ As above at 8, 58–67. See further Eversley Ruth Mortlock, *An Island Solution: Rottnest Reveals our Colonial Secrets* (Livelihood Creative Spaces 2016).

¹⁵ Lois Tilbrook, *Nyungar Tradition: Glimpses of Aborigines of South-Western Australia 1829–1914* (University of Western Australia Press 1983) 4.

colonists with sexual exploitation and abuse commonplace.¹⁶ According to Tilbrook, both Noongar people and the settlers considered there was a distinction between people of Aboriginal descent, namely those who continued an identification and association with the traditional Aboriginal culture and life (as much as possible) and those who adopted the lifestyle of the settlers merging into settler society.¹⁷

The Noongar people had all aspects of their lives interfered with by successive colonial governments on a highly discriminatory basis under various policies and legislation, such as the notorious *Native Welfare Act 1905* (WA) which purported to 'make provision for the better protection and care of the Aboriginal inhabitants of Western Australia'.¹⁸ Historian Anna Haebich argued this law instead 'laid the basis for development of repressive and coercive state control over the state's Aboriginal population'.¹⁹ The '*1905 Act*' as it is known, governed and restricted people's living arrangements, forcing people onto designated 'reserve' lands and ensuring segregation from white citizens. It regulated Noongar people's movements, prohibited people from designated township areas after dark, interfered with their right to work and employment, and prohibited relationships including marriages that were deemed interracial. The *1905 Act* also permitted the widespread 'removal' of Noongar children from their families in a process the Australian Human Rights and Equal Opportunity Commission later found constituted genocide,²⁰ and which has particular implications to this day in the form of intergenerational trauma, incarceration, and child removal practices.²¹

Noongar people continue to experience widespread violations and breaches of individual and collective human rights, and remain marginalised as racial discrimination – direct, structural, and systemic – denies the community the realisation of human rights, particularly the right to self-determination and governance in internal affairs. Indigenous affairs remain driven by non-Aboriginal government departments and policymakers with little knowledge or experience of the complexity of Aboriginal lives. Notwithstanding billions of dollars spent every year on Indigenous programs, in 2017 Prime Minister Malcolm Turnbull reported that Aboriginal inequality had either stagnated or was widening in key areas of health, education, and employment.²² Noongar people remain challenged to find ways to secure the wellbeing of all our

¹⁶ Hannah McGlade, *Our Greatest Challenge: Aboriginal Children and Human Rights* (Aboriginal Studies Press 2013) 40–44.

¹⁷ Tilbrook above note 15 at 4.

¹⁸ *Native Welfare Act 1905* (WA), long title.

¹⁹ Anna Haebich, *For Their Own Good: Aborigines and Government in the South West of Western Australia 1900–1940* (University of Western Australia Press 1988) 83.

²⁰ National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from their Families, *Bringing Them Home: Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from their Families* (Human Rights and Equal Opportunity Commission 1997).

²¹ Hannah McGlade, 'Reading Follow the Rabbit Proof Fence: Aboriginal Child Removal in 2017' *Reading Australia* (online) 2017 <<https://readingaustralia.com.au/essays/follow-rabbit-proof-fence-2/>> (last accessed 18 October 2017).

²² Isabelle Higgins, 'Closing the Gap Set for Overhaul After Failing to Improve Outcomes for Indigenous Australians' *ABC News* (online) 23 October 2017 <<http://www.abc.net.au/news/2017-10-23/closing-the-gap-strategy-overhaul/9076650>> (last accessed 18 October 2017).

community within a dominant society that routinely fails to accord respect for human rights principles set out in the *Declaration on the Rights of Indigenous Peoples*, adopted by the United Nations a decade ago and agreed upon by Australia in 2009.²³

2.0 LEGAL AND POLITICAL FRAMEWORKS

2.1 *Native Title and Mabo v Queensland*

Up until 1992, Australia was said to be *terra nullius*, meaning an ‘empty land’, with Indigenous people having no rights to the lands that our ancestors had lived on, cared for, and owned since time immemorial.²⁴ Aboriginal people’s property rights to land were only recognised by the High Court in the seminal case of *Mabo v Queensland*²⁵ in which the High Court rejected the legal fiction of *terra nullius* as steeped in racial bias. As Justice Brennan stated:

The theory that the indigenous inhabitants of a ‘settled’ colony had no proprietary interests in land ... depended on a discriminatory denigration of indigenous inhabitants, their social organisation and customs.²⁶

The High Court did not give native title an equivalent status to non-Indigenous property rights. It failed to recognise Aboriginal sovereignty, finding instead that the Crown acquired sovereignty over Australia upon colonisation and that this could not be challenged in an Australian court. The Crown gained ‘radical title’ to the land and Aboriginal people had ‘native title’ that survived. However, the Crown’s acquisition of sovereignty meant that native title could be extinguished by acts of the Crown inconsistent with the continuance of native title. The Crown, in granting freehold title over land, extinguished native title. Native title (where it survives) is ascertained by reference to the laws and customs of the Indigenous people and will be extinguished if the Indigenous people are deemed to have ceased to acknowledge those laws and customs.²⁷ The Crown is the beneficial owner of any native title once extinguished. There is no obligation to compensate Aboriginal people for the extinguishment of native title that occurred before the introduction of the *Racial Discrimination Act 1975* (Cth).²⁸

The High Court’s recognition of native title in the *Mabo* case resulted in legislation from the Commonwealth government: the *Native Title Act 1993* (Cth). The recognition of native title could have led to comprehensive negotiations, such as the

²³ *United Nations Declaration on the Rights of Indigenous Peoples* General Assembly resolution 61/295 UN Doc A/RES/61/295 (13 September 2007).

²⁴ McGlade above note 7 at 118.

²⁵ *Mabo v Queensland (No 2)* (1992) 175 CLR 1.

²⁶ At 29.

²⁷ See *Native Title Act 1993* (Cth), ss 223 and 225.

²⁸ *Native Title Act 1993* (Cth), pt 2 div 5. In general terms, the right to compensation arises in respect of what are called ‘past acts’ (i.e. acts that affect native title which generally occurred before 1 January 1994) and ‘future acts’ (i.e. acts that affect native title which generally occur after 1 January 1994). See also Heather McRae, Garth Netheim, and Laura Beacroft, *Indigenous Legal Issues* (LBC 1997, 2nd edn) 211–212.

Treaty of Waitangi in New Zealand or modern-day treaty making in British Columbia, Canada, but the Federal government rejected this approach. According to native title expert Professor Richard Bartlett, the intense lobbying by governments and industry that took place after the *Mabo* decision ‘has put non-Aboriginal interests to the fore by providing a regime of dispossession as much as of protection of native title’.²⁹

2.2 *Noongar Native Title in the Courts*

After the introduction of the *Native Title Act 1993* (Cth), Noongar people lodged an application for a determination of native title, which was a claim soon contested by the Western Australian State government who argued in the Federal Court that Noongars had departed from the traditional laws and customs, such that there was no continuing community of native title holders.³⁰ Justice Wilcox rejected this offensive claim in *Bennell v Western Australia*,³¹ where he held that there had been continuity of Noongar laws and customs from 1829 to the present. Despite the impact of colonisation, including the breaking up of families, people had remained in contact with each other, and Noongar families throughout the claim area were a ‘present-day Noongar network’.³² There was also a high degree of consistency in the widespread beliefs that were held by Noongar people and families. Noongar society had continued to the present day with Noongar people continuing to have shared and extensive cultural beliefs of a spiritual nature which ‘illustrate a rich and active spiritual universe and one that admitted of mysteries’.³³ Justice Wilcox also implored the State to reconsider its approach to Noongar people:

This is litigation ... that deals with matters of great importance to the indigenous people of south-west Western Australia and, indeed, to all Western Australians. This litigation has significant implications for what has recently been called ‘reconciliation’ between indigenous and non-indigenous Australians. It ought not be conducted like a game, where one side must triumph over the other.³⁴

The Western Australian State government did not accept the Federal Court decision or the advice of Wilcox J and appealed to the Full Federal Court who overturned the initial decision. The Full Court held that the fact that Noongar society had continued to exist until recent times was not enough to prove the existence of native title. The Full Court said that in order to obtain a native title determination, Noongar people were required to establish that their acknowledgement and observance of traditional customs had continued substantially uninterrupted since

²⁹ Richard Bartlett, ‘Native Title in Australia: Denial, Recognition and Dispossession’ in Paul Have-mann (ed) *Indigenous People’s Rights in Australia, Canada and New Zealand* (Oxford University Press) ch 15 at 426 as cited in McGlade above note 7 at 121.

³⁰ *Bennell v Western Australia* (2006) 153 FCR 120.

³¹ As above.

³² As above at 266.

³³ As above at 278 citing Dr Host describing what was revealed by Mokare to Barker. See also Editors, ‘*Bennell v Western Australia* [2006] FCA 1243: Case Summary’ (2006) 10(4) *Australian Indigenous Law Review* 35.

³⁴ *Bennell v Western Australia* (2006) 153 FCR 120 at 353.

sovereignty.³⁵ Following this decision, the South West Aboriginal Land and Sea Council ('SWALSC') and the Western Australian government agreed that a negotiated land settlement process would be pursued rather than further litigation in the courts.

2.3 *The South West Native Title Settlement*

The *Native Title Act 1993* (Cth) establishes the process whereby agreements are made between the State, industry, and native title holders in relation to native title lands, and acts inconsistent with native title. This process, known as Indigenous Land Use Agreements or ILUAs, most commonly involves Indigenous people surrendering their native title rights in exchange for agreed upon commercial and other benefits.³⁶ It is through this process that SWALSC and the Western Australian State government negotiated an agreement resulting in the 'South West Native Title Settlement' package.³⁷ This included a range of benefits, such as the establishment of the Noongar Boodjah Trust into which AU\$50 million would be paid annually for 12 years.³⁸ Other benefits included the establishment and funding of several Noongar Regional Corporation Bodies, the creation of a Noongar Land Estate in which up to 320,000 hectares of Crown Land would be transferred, the establishment of joint conservation programs for conservation lands, and recognition of Noongar people's connection to land by way of an Act of Parliament: the *Noongar (Koorah, Nitja, Boordahwan) (Past, Present, Future) Recognition Act 2016* (WA).³⁹ According to the State government:

the South West Native Title Settlement (the Settlement) is the most comprehensive native title agreement in Australian history, comprising the full and final resolution of all native title claims in the South West of Western Australia, in exchange for a range of benefits.⁴⁰

The 'full and final resolution'⁴¹ of the agreement includes the extinguishment of native title, which impacts approximately 30,000 Noongar people and covers about 200,000 square kilometres of Noongar land.

The decision to pursue an offer from the Western Australian State government, according to the land council body SWALSC, stemmed partly from the limitations of the *Mabo* decision that had resulted in widespread, if not complete, extinguishment

³⁵ *Bodney v Bennell* (2008) 167 FCR 84. See also Editors, 'Bodney v Bennell: Case Summary' (2008) 12(1) *Australian Indigenous Law Review* 100 at 101.

³⁶ For exceptions where ILUAs involve the exercise of native title rather than extinguishment, see, for example, *Native Title Act 1993* (Cth), ss 24CB(d).

³⁷ The 'South West Native Title Settlement Package' is available at Government of Western Australia, *Land, Approvals and Native Title Unit* (online) <<https://www.dpc.wa.gov.au/lantu/south-west-native-title-settlement/settlement-package/Pages/default.aspx>> (last accessed 18 October 2017).

³⁸ As above.

³⁹ See further Michael Mccagh, 'Native Title in The Southwest: The Noongar Recognition Bill' (2015) 8(18) *Indigenous Law Bulletin* 26.

⁴⁰ Government of Western Australia above note 37.

⁴¹ As above.

of native title in some regions.⁴² Also, where it exists, the native title rights can be regarded as ‘hollow and fragile’.⁴³ The land council SWALSC believed that even if Noongar people could ‘win’ native title in Court, this would provide formal recognition of Noongar people as traditional owners but ‘little else’. Instead, the alternative settlement was negotiated and pursued as it was seen as a ‘recognition of nationhood’.⁴⁴

2.4 *The Federal Court Case of ‘McGlade’*

The South West Native Title Settlement agreement did not have the unanimous support of Noongar people, principally as it involved the surrender and extinguishment of the native title and ancestral rights that Noongar people have to our lands. Several Noongar ‘Registered Native Title Claimants’ (‘RNTCs’), including Mingli McGlade, refused to sign the agreement for the Noongar settlement. Mingli and others opposed to the agreement took action in the Federal Court, disputing the validity of the ILUA. They won their case before the Full Federal Court in *Mingli Wanjurri McGlade v Native Title Registrar* [2017] FCAFC 10 (‘*McGlade*’) where it was held that an ILUA under the *Native Title Act 1993* (Cth) required the signature of all the RNTCs in order for the land use agreement to be valid.⁴⁵ Prior to the *McGlade* case, the common understanding as a result of the earlier decision in *QGC Pty Ltd v Bygrave* (2010) 189 FCR 412 (‘*Bygrave*’) was that only one or more of the RNTCs needed to agree to the ILUA for it to be valid.

2.5 *The Commonwealth Government’s Response to the McGlade Case*

The *McGlade* case was handed down on 2 February 2017 and had an immediate impact across Australia, affecting the validity of approximately 126 ILUAs nationwide.⁴⁶ This resulted in the Federal government immediately proposing amendments to the *Native Title Act 1993* (Cth).⁴⁷ Within two weeks, a bill was drafted and passed by the House of Representatives on 16 February 2017.⁴⁸ The *Native Title Amendment (Indigenous Land Use Agreements) Act 2017* (Cth) effectively overturned the decision, providing validation to all ‘area ILUAs’⁴⁹ impacted by the case. It also gave validity

⁴² Glen Kelly and Stuart Bradfield, ‘Winning Native Title, or Winning Out of Native Title?: The Noongar Native Title Settlement’ (2012) 8(2) *Indigenous Law Bulletin* 14 at 14.

⁴³ As above at 14.

⁴⁴ As above at 15.

⁴⁵ *McGlade (formerly Wanjurri-Nungula) v Native Title Registrar and others* (2017) 340 ALR 419; [2017] FCAFC 10; 155 ALD 236.

⁴⁶ Senate Legal and Constitutional Affairs Committee, *Report on Native Title Amendment (Indigenous Land Use Agreements) Bill 2017 [Provisions]* (Commonwealth of Australia 2017) 4–5. This report is available at Parliament of Australia, *Report* (online) 20 March 2017 <http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs/NativeTitleILU2017/Report> (last accessed 1 July 2017).

⁴⁷ As above. Amendments were directed towards subsection 24CD(2)(a) of the *Native Title Act 1993* (Cth).

⁴⁸ See Christina Raymond, Parliament of Australia, *Bills Digest* No 70 (7 March 2017) 12.

⁴⁹ *Native Title Act 1993* (Cth), pt 2 div 3 sub-div C. See also Senate Committee above note 46 at 2–4.

specifically to the Noongar Settlement, which was the subject of the ILUA, and the controversial Adani coal mine agreement in Queensland. In a practically unprecedented Parliamentary process, the Bill was introduced into the House of Representatives on 15 February 2017 and expedited to the Senate the following day. The Senate Inquiry process allowed people only two weeks to respond to the issues. According to Parliamentarian Linda Burney, the Federal government's handling of the proposed law was 'completely disrespectful' to Aboriginal people and the spirit of native title.⁵⁰

The Senate passed the Bill on 14 June 2017, amending the *Native Title Act 1993* (Cth) to respond to the Federal Court's decision in *McGlade*. The Amendment Act validates the legal status and enforceability of agreements which have been registered by the Native Title Registrar on the Register of Indigenous Land Use Agreements without the signature of all the RNTC members. This included validation of the 126 ILUAs across Australia affected by *McGlade*. It also enables the registration of agreements which have been made but have not yet been registered. In addition, it ensures that what are known as 'area specific' ILUAs can be registered without requiring every member that is a RNTC be a party to the agreement.⁵¹

During the short deliberation process, the Senate Legal and Constitutional Affairs Committee recommended that the Senate pass the Bill, subject to minor amendments.⁵² This was not the recommendation of the Australian Greens party ('the Greens') who expressed concerns regarding the hastiness of the legislation and the lack of consultation with Aboriginal and Torres Strait Islander communities. The Greens noted that the legislation lacked the support of the National Congress of Australia's First People ('National Congress'), the peak Aboriginal representative body in Australia. According to the submission of National Congress:

We strongly oppose ... the simple majority requirement in the proposed amendment to s24CD(2)(a). No Aboriginal or Torres Strait Islander person should have their native title rights violated by an ILUA they do not agree to. Allowing in ILUAs where a potentially large proportion of the native title claim group disagrees is unjust and compromises our native title rights.⁵³

The National Congress argued that all registered native title applicants should be required to sign an ILUA, noting this was the process before the decision in *Bygrave*. National Congress also recommended that 'a process be developed for determining voluntary and informed consent to mitigate against exploitation of our people'. The peak Australian legal body, the Australian Law Council, also did not support the legislation, preferring the approach of the Full Federal Court in *McGlade*. Leading native title lawyer Greg McIntyre SC pointed out that the Act's validation of a further 126

⁵⁰ SBS News, 'Labor Slams Govt Move on Native Title' (online) 16 February 2017 <<http://www.sbs.com.au/news/article/2017/02/16/labor-slams-govt-move-native-title>> (last accessed 19 May 2017).

⁵¹ Parliament of Australia, Native Title Amendment (Indigenous Land Use Agreement) Bill 2017 (online) <http://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result?bld=r5821> (last accessed 1 July 2017).

⁵² Senate Committee above note 46.

⁵³ As above at 30.

ILUAs across Australia was not in the best interests of native title holders and Aboriginal people, stating:

It should not be assumed without investigation that the majority decision of the native title claim group was correct and any view to the contrary has no legitimacy.⁵⁴

Professor John Altman observed that the *McGlade* decision with its ‘stronger legal terms’ strengthened native title holders leverage in negotiating area ILUAs, and their ability to secure agreements more favourable to them. He provides the timely warning that:

There is a real danger that the quick fix and an overemphasis on majoritarian rather than consensus decision making will be unproductive, potentially costly and legally contested in the future.⁵⁵

According to the Federal government, the Amendment Act is consistent with human rights including Aboriginal people’s right to self-determination.⁵⁶ This assessment was made on the basis that the Act gives native title holders ‘greater discretion to determine who can be party to an agreement’, and emphasises the ‘fundamental importance of authorisation to the integrity of the native title system’.⁵⁷ Furthermore, the Amendment Act also involves promoting the ‘efficient negotiation and settlement of area ILUAs’ so that Indigenous people can ‘access the potential social and economic benefits of native title’.⁵⁸

Representative bodies such as the National Congress opposed the Act, as did some Land Councils in Australia, including the Cape York Land Council who did not agree the Act should give a blanket validation for all ILUA agreements. The Cape York Council, Balkanu Cape York Development Corporation, and the Cape York Institute for Policy and Leadership argued that:

The fact that these current ILUAs that are implicated in the wake of the *McGlade* decision concern the interests of government and industry, explains the alacrity with which law reform is sought. Of course the interests of native titleholders under ILUAs are also implicated, but this should not mean we blindly rush into supporting blanket validation and not seeking a fair balance from law reform.⁵⁹

⁵⁴ As above at 38.

⁵⁵ Professor Jon Altman, Submission No 45 to the Senate Legal and Constitutional Affairs Committee *Re: Native Title Amendment (Indigenous Land Use Agreements) Bill 2017* 4 March 2017 at 6. This is available at Parliament of Australia, ‘Submissions’ (online) <https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs/NativeTitleILU2017/Submissions> (last accessed 18 October 2017).

⁵⁶ Parliament of Australia, *Native Title (Indigenous Land Use Agreement) Bill 2017* (online) <http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22legislation%2Fems%2Fr5821_ems_25735e08-4d63-430f-a2f9-0285925a4599%22> (last accessed 3 July 2017).

⁵⁷ As above at 8.

⁵⁸ As above at 20.

⁵⁹ Senate Committee above note 46 at 37.

2.6 This is Not ‘Human Rights’

The extremely hasty passage of the legislation through Parliament was no doubt linked to the significant political support of State and Federal governments to the Adani coal mine in Queensland, which was also affected by the *McGlade* case. The ILUA relevant to Adani did not have the required signature of all of the RNTCs, as senior native title holder Adrian Burragubba (supported by his families, including prominent lawyer Tony McAvoy SC) refused to agree to the development of the mine on their country. According to Burragubba:

We said ‘no means no’ and so we will continue to resist this damaging coal mine that will tear the heart out of our country. The stakes are huge. In the spirit of our ancestors, we will continue to fight for justice until the project falls over.⁶⁰

Indigenous human rights were clearly not the primary consideration in April 2017 when Prime Minister Malcolm Turnbull personally travelled to India to meet Gautam Adani and his executives to assure them that native title issues impacting the 21-billion-dollar Carmichael coal project ‘will be fixed’.⁶¹ Billionaire Mr Adani reportedly had ‘requested an early resolution of the native title issues’.⁶²

The Act is arguably inconsistent with Articles 3, 19, and 26(1) of the *United Nations Declaration on the Rights of Indigenous Peoples*:

Article 3

Indigenous peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

Article 19

States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them.

Article 26

1. Indigenous peoples have the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired.⁶³

⁶⁰ Joshua Robinson, ‘Carmichael Coalmine Appeal Says Adani Misled Native Title Tribunal over Benefits’ *The Guardian* (online) 8 September 2016 <<https://www.theguardian.com/environment/2016/sep/08/carmichael-coalmine-appeal-says-adani-misled-native-title-tribunal-over-benefits>> (last accessed 28 July 2017). See further Tony McAvoy, ‘I Urge MPs to Take a Deep Breath: Don’t Rush the Native Title Act Amendment’ *The Guardian* (online) 2 June 2017 <<https://www.theguardian.com/commentisfree/2017/jun/09/i-urge-mps-to-take-a-deep-breath-dont-rush-the-native-title-act-amendment>> (last accessed 28 July 2017).

⁶¹ Phillip Coorey, ‘Malcolm Turnbull Tells Adani Native Title Issues will be “Fixed”’ *Financial Review* (online) 11 April 2017 <<http://www.afr.com/news/politics/malcolm-turnbull-tells-adani-native-title-issues-will-be-fixed-20170410-gvi6i3>> (last accessed 28 July 2017).

⁶² As above.

⁶³ United Nations as above note 22. See also article 32(2) of the *Declaration* which recognises the requirement for States to obtain ‘free and informed consent’ when projects affect Indigenous lands, territories, and other resources.

Self-determination requires that Noongar people, not Parliament, decide on the future of the Noongar settlement. Noongar people have not given free, prior, and informed consent to the ILUA; in fact, only a small proportion of all Noongars voted at the registration meetings and the vote against the ILUA was high in some regions. The Act will forever extinguish Noongar people's rights to their traditional lands and resources.

3.0 MINGLI MCGLADE, A NOONGAR HISTORY OF SOCIAL JUSTICE, AND LAND RIGHTS

This is also a story about Mingli's history of activism, which is one that dates back to the 1970s and reflects Noongar history, culture, and opposition to racial abuse and injustice: a history that has barely been recognised in the neoliberal climate of native title and commercial engagements. It is a story highlighting Noongar women's distinct personal and cultural strengths and leadership, long displaced and undermined by the imposition of patriarchal European culture. While non-Aboriginal culture has been prepared to recognise, and at times arguably glamorise Aboriginal men's leadership ability and status, Aboriginal women leaders have been overwhelmingly marginalised and rendered invisible. There are few public records of Aboriginal women's leadership in the political and cultural domain because the dominant non-Aboriginal society has ascribed to Noongar women and all Aboriginal women the position of inconsequential.

The following is a dialogue between Mingli and myself, her daughter and human rights lawyer, also influenced by our history of human rights and justice claims.⁶⁴ This dialogue is necessary to correct the imbalance of mainstream media and powerful commentators who have sought to silence and denigrate the Noongar applicants who have effectively threatened corporate Australia's interests.

Following the *McGlade* decision, Western Australian Premier Colin Barnett described Mingli and the other court applicants Naomi Smith, Mervyn Eades, and Margaret Colbung, as a 'very small number of Aboriginal people ... who object to any settlement of native title, and they are frustrating it through the courts'.⁶⁵ The *McGlade* case was also condemned by the local land council SWALSC and conservative commentators as a win to non-Aboriginal activists intent on oppressing the true will of Indigenous traditional landowners who rightfully wish to make decisions that advance their own economic interests. Former Federal government advisor Warren Mundine went so far as to describe the case

⁶⁴ There are few accounts of Noongar social justice history post 1970s, but see however, Martha Ansara, *Always Was, Always Will Be: The Sacred Grounds of the Wauguk, Kings Park, Perth WA: The Old Swan Brewery Dispute* (M. Ansara 1989) and further the documentary film by Heather Williams, Marion Benjamin, Peter Kordyl, and Barbara Mariotti, 'In the Name of the Crow' (Documentary, Screen Australia 1988).

⁶⁵ Rebecca Trigger and Charlotte Hamlyn, 'Noongar Native Title Agreement: \$13b Deal Rejected by Federal Court' *ABC News* (online) 2 February 2017 <<http://www.abc.net.au/news/2017-02-02/billion-dollar-noongar-native-title-deal-rejected-by-court/8235138>> (last accessed 19 May 2017).

in *The Australian* newspaper as the ‘the greatest threat to Indigenous self determination in a very long time’.⁶⁶

It is not true that non-Aboriginal activists have had any role in the refusal of the Noongar applicants to sign the Noongar settlement claim. The suggestion that those opposing the agreement are at odds with their community is also inaccurate. While the Noongar ILUA was passed at the six regional meetings required to authorise the settlement, there was significant opposition to the ILUA and this was especially marked at the Waigyl Kaip meeting in Katanning where the vote in favour of the settlement agreement was very marginal (and reportedly fewer than 10 votes). Many Noongar people support the settlement, but there are also many who do not, and it is well known that the agreement has seen the Noongar community deeply divided in opinion. The biased reporting against the Noongar people who did not agree to ‘settle’ their native title highlights the pressure on Aboriginal people to make economic and business-like decisions that promote ‘certainty’ for commercial non-Aboriginal enterprise and interests.

Mingli is well known as a Noongar elder and her status as a Noongar elder is recognised widely, including by the City of Perth in 2014 in their exhibition ‘Gnarla Moort (Our People): An Exhibition Honouring The Lives and Achievements of 12 Noongar Leaders’.⁶⁷ While she and the other Noongar applicants in *McGlade* have been publicly portrayed as activists intent on frustrating any agreement with the State, less attention has been paid to the nature of their concerns with the Noongar settlement agreement. I spoke with Mingli McGlade about why she and other Noongar people were opposed to a highly significant land settlement comprising cash, land, and economic benefits, and I do this in the form of a dialogue with her as my mother. (Figure 1)

Mingli: Under Aboriginal culture this is not allowed, we should not do deals for our land. The land council has [not respected] the rights of Noongar people, the rights to country. Money was being offered to lure people into accepting the agreement. The agreement will not result in protection of heritage sites, it will deprive Noongar people of negotiations rights in relation to mining on country, and it does not recognise our hunting and fishing rights. It is the next step in a genocidal process, because it is about losing all our land! The land council never told me what this money would really give us, even though I have asked this question at the quarterly meetings of the Waigyl Kaip working group. In the time that the ILUA was negotiated I was never invited to a negotiation meeting, those meetings were closed and only Noongar people

⁶⁶ Nyunggai Warren Mundine, ‘Activists Are Like Colonial Oppressors in Opposing Native Title’ Opinion in *The Australian Newspaper* (online) 17 April 2017 <<http://www.theaustralian.com.au/opinion/activists-are-like-colonial-oppressors-in-opposing-native-rights/news-story/014d08232c41f3fc3ea39d9bf0b30f10>> (last accessed 19 May 2017).

⁶⁷ The exhibition was held from 17 October to 2 November 2014 at Perth Town Hall. See also the exhibition catalogue, Casey Kickett, Gabriel Maddock and Eva Fernandez, *Gnarla Moort (Our People): An Exhibition Honouring the Lives and Achievements of 12 Noongar Leaders* (City of Perth 2014).



Figure 1. Mingli McGlade at Wadjemup (Rottneest Island) in 1989. These protests were to have gravesite and history recognised. Photograph by Eversley Mortlock.

chosen by the land council took part in those meetings. Why were we, as senior elders, not informed of the progress of that vital committee? Noongars in the community were asking me how the agreement with the State was going and I would have to tell them I did not know. It was like confidential stealth under the table. There should have been regular reports and feedback. The ILUA is 800 pages – who could possibly read or understand this? Only a couple of Noongar men from the land council ever spoke properly to me at the meetings, as you would talk to an elder.

Hannah: I am personally aware that many Noongar people did not support the settlement, having witnessed the Wagyl Kaip meeting in Katanning in 2016 and observing a significant level of opposition to the land settlement. My own view is that the ILUA was substantive and had some merit, particularly as Australian courts have not consistently demonstrated respect for Aboriginal culture and people's connections to land and have been prepared to find 'extinguishment' has taken place in the lands of many Aboriginal nations. However, it was concerning that so many Noongar people felt so frustrated and left out of the settlement process. At the meeting it was clear that many people did not understand or know the terms of the ILUA. There was a strong view that the land council was not to be trusted and that Noongar people should not 'sell out' our land. The land council dominated the meeting with their lawyers and spoke for so long that it seemed that there would be insufficient time for other people to speak. According to Noongar culture, elders always are given proper time to speak and no one person should dominate.

Mingli: I was born in 1942 and grew up in Ongerup, Kendenup, and Bremer Bay in south east Western Australia in Kurin country. I lived with my grandmother Ethel Woyung McGlade and grandfather Jim McGlade. My father Roderick McGlade worked on the farms labouring, clearing land, and fencing. My mother, Ivy Woods, was unable to care for me. Growing up the bush, my family was quite isolated with few visitors. I played in the bush and moved around according to where my father was working. We had the best time camping at Bremer Bay, we ate ducks, swans, fish, kangaroo, and other bush foods. That's where we collected ochre too. Hundreds of Noongar people came to Bremer Bay in school holiday time. My granny told me that there used to be corroborrees but at that time the boys did rock and roll, we girls only watched.

At eight years old I went to school at Kendenup and at 15 I moved to Perth to attend Perth Girls' High. I do remember the *Native Welfare Act 1905* – it said I was 5/16 Aboriginal. When I came home from school I was not allowed in public toilets that had signs on them – 'No natives allowed'. There was also a special section for the

'Natives' at the Ongerup town picture hall. My father was exempted from the Act because his father was not Aboriginal and that meant we could not live at the Ongerup reserve where the conditions were better because they had housing, tin roofs and cement floors, washing machines, stoves, and bathrooms. My grandmother and I lived on a camp outside on the fringe of Ongerup and the Native welfare said we were not allowed on the reserve. We still visited our family living there though.

We have always been visiting our land in Bremer Bay, Quaalup, Jerramungup. Hundreds of Aboriginal people went down there. It was our country. Dad took us everywhere in a big old army truck. Later on, the rangers used to bother us sometimes, tell us not to make fires, say we shouldn't be camping here. Last year I went to Bremer Bay and saw the old places, the special places that Granny taught us about. This is how I keep connection to country. My family and grandchildren usually come with me and I show them bush tea and bush foods.

The Noongar people should have a Treaty so we can go back to our cultural and customary ways. The Treaty will give us our land and ability to negotiate with stakeholders like mining companies. No uranium, coal, or gas fracking allowed.

The land council has not [been] acting in a cultural way. Aboriginal politics can be complex, layered, and unjust. Aboriginal people learnt well from the whitefellas, some becoming middle class and 'money hungry'. Oppressed people can lose their culture and become oppressive of other Aboriginal people. The ILUA will not benefit all people as promised.

Hannah: My mother was born in an era of racism maintained through the law and the Native Welfare Department. I recently read her 'native welfare file' and saw the harassment that her parents endured. Her father was prohibited from living with her mother under the *Native Welfare Act 1905* because he was deemed 'one quarter native blood' and not 'native in law' whereas my grandmother was considered 'native in law' because she 'possesses three eighths native blood'. A file note of 1 August 1941 from the Commissioner of Natives to the Mission of Gnowangerup discussed my grandfather and grandmother's relationship. A later note of 5 May 1949 documents the intention of the department to prosecute my grandfather under Section 4 of the Act due to his relationship with my grandmother. I wondered about the impact this interference and threat had on my grandparents (who later separated) and on their daughter, my mother.

After finishing her primary school education, Mingli was able to continue her studies in Perth with support from her school principal. In 1958 the Native Welfare recorded her 'as one of the most successful of the young

native girls who have been given an opportunity for advancement in Perth'. On her own initiative she had found employment at Harris, Scarfe and Sandover Ltd, a department store.

In the 1970s Mingli and other Noongars began taking part in local and national dialogue about the recognition of Aboriginal rights. One of the few surviving Noongar activists of the 1970s, Mingli remembers 26 January 1972 where she helped set up the Noongar Tent Embassy in Perth in unity with the Aboriginal Tent Embassy in Canberra. She was 29 years of age and working at the post office.

Mingli: There must have been a call out in the Aboriginal community. We all gathered up at Parliament House. There were the ladies who worked at the Aboriginal Advancement Council where I used to visit and meet up with other Noongars in Perth. They had a soup kitchen and meetings to talk politics. It was about Aboriginal politics, to do with legal and medical services, the essential services. We wanted improvement in all the social aspects of Aboriginal life. People used to camp around Perth, there was no housing and they were fringe camps. Noongars would come to the Advancement Council for the soup kitchen. Ken Colbung, Jack Davis, Phillipa Cook. Mrs Hanson and Mrs Isaacs ran the kitchen. They had dances and bands occasionally.

We had a huge tent that was set up on the lawn just outside of Parliament House. Meetings were held in the tent to talk about the political position of Noongars and some phone calls were made to Canberra to support the Tent Embassy that had been set up there. Anyone could come into the tent and talk with us. We were there for about a week and we had to take the tent down as we weren't allowed to camp at Parliament House, we got moved out.

In 1974 I started to work for the Aboriginal Legal Service as a receptionist. It had not long opened and Aboriginal people were flocking in for police matters and mistreatment from the police. Many cases were about resisting arrest and being disorderly because according to the clients they were being hassled by the police. I also went to work at the Aboriginal Medical Service.

There were meetings in the 1970s out at Gnangara where Ken Colbung had an Aboriginal school. Ken, a war veteran, had managed to obtain land for a community at Gnangara. We heard about Gough Whitlam giving Vincent Lingiari his lands back to the people. Noongar people, we marched for land rights, for land to be given back to Noongars.

In the late 1970s the WA Teacher College decided to train Aboriginal people as teachers and I saw it as a way that all kids could learn

about Aboriginal culture and be a role model for Aboriginal kids, teach them they could do anything they wanted to do. I received my Diploma of Teaching in 1978 and it allowed me to go into the schools, I was part of the first group of Aboriginal teachers to graduate at that time. When I went to work with Aboriginal kids in Guildford they were quite disturbed, probably due to their living conditions. It didn't worry me at all actually. They liked to make paper planes in class so I adapted to that and worked with them. We didn't make a big deal of them swearing, that was their frustration I guess.

Afterwards I taught in Fremantle prison and later went to Broome, Warmun, and Kununurra to live with Miriuwung Gajerrong people. The women took me to law ceremonies, where they sang and danced together while the men went bush. I felt it was tremendous and I was sure this must have been the way it once was for Noongar people, we once had our own strong laws and ceremony.

Hannah: When I finished my law degree in 1994 I was required to complete articles training and on one occasion this included attending a training session at the Department of Lands Administration (DOLA). I was shocked sitting in this meeting when all the law students were told that the High Court *Mabo* native title case meant that lands in the north of the State could no longer be sold off but that land in the south could be as there was no native title in the south! And here were the 'vacant Crown lands' land that they were now selling at Bremer Bay! After hearing that I met with a lawyer from the Aboriginal Legal Service of WA and they agreed to lodge the first Noongar native claim. However, they did not recognise my grandfather Rod McGlade who was an elder who knew the land better than many. I decided that I would make our own family claim over the country 'Quaalup' and it was only withdrawn on the basis that my mother Mingli would be included in the Wagyl Kaip claim, we felt then it would protect our family interests if Mingli was named as a registered native title applicant.

Mingli: Aboriginal people never had land rights in West Australia though and that is probably because the government doesn't care. I remember the Premiers we had, Charlie Court, Richard Court, Peter Dowding, Carmen Lawrence, they didn't understand our culture, our laws, they didn't want to acknowledge our way of looking after country. It was all the Westminster system and very frustrating.

It's disgusting that the State never agreed on land rights, without land we have no culture. The Songlines are where people travelled and had ceremony. You can't really practice culture if you are prohibited from going on your land. I keep going on my land and so do many others, but we are not supposed to according to the government.

The former Premier Carmen Lawrence once came to Rottnest Island or Wadjemup and agreed on survey work to find out where the graves of the men were on the island. They found 734 gravesites that hadn't been protected and people were camping on them in 'Tentland'. Finally they declared that there was to be no more camping on the graves. In 1991 the Department of Aboriginal Affairs supported three days of meetings for 500 Aboriginal people, mainly senior elders, from all around the State. There was an official burial of the Aboriginal remains that had been found and Kevin Cameron was in charge of the burial. The elders all said that seeing Wadjemup was on Noongar country, the Noongars would take responsibility for what was agreed on at the meetings. 1993 was the International Year of Indigenous Peoples and I managed to approach the then Premier Carmen Lawrence and offer her small bags of flour, tea, and sugar. I asked her to give back the Noongar lands in exchange for the goods. Carmen Lawrence took the flour, tea, and sugar from me and she was quite sweet really.

Hannah: I was working for the Aboriginal radio station at this time. We all took the ferry to Wadjemup to protect the unmarked burial sites and have our true history recognised. It was shocking that non-Aboriginal Wadjella people could camp on the unmarked graves of Aboriginal people who had been imprisoned and treated so cruelly, even executed at the island. There was a sense of sadness when we went to Wadjemup. Mingli and elders made a fire at the beach when we arrived and showed us to throw some sand into the water and let the Waugyl know we were there. That's our custom, to show respect to our Ancestral beings, acknowledging their continual presence. I remember many of us Noongars going to Wadjemup in 1988, we walked around the island and asked people not to camp on graves. The crows were always there and we felt they were the spirits of the old men who had died at Wadjemup.

Mingli: In 1987 some Noongars in Perth started a protest at the Old Swan Brewery site. Len Colbung, a former Vietnam veteran, had set up Black Deaths in Custody and Clarrie Isaacs worked with him. This place is also known as Goonininup and it was an important place because there was a women's birthing place and a men's site there. The Waugyl, also known as the Rainbow Serpent, laid eggs at this place and they became large rocks that were removed some years ago. It had also been a government-designated reserve in the past where Noongars collected food and that was because of the way that the Noongars were stopped from traditional food gathering. The government wanted to develop the site and they gave the Multiplex corporation a peppercorn lease to do that. We said it should be parkland to commemorate Noongar history, a place where all people could learn about Aboriginal culture and history. People called the 'Fringe Dwellers' who were mainly the Bropho family set up a camp on Mounts Bay Road and this camp actually lasted more

than 10 years. During that time I camped there, one time I camped a whole winter. It was a protest camp and we did stop work at the site many times. The unions agreed with us – they accepted our beliefs and decided it was the right thing to do. There was also abuse at night from people driving in the cars past us. Many non-Aboriginal people and churches supported us. People came from everywhere, Australia and overseas, to support us. I remember the Queen visiting and even waving to us!

There was a court case to stop work at the site and it did get stopped for a while. There is an Act in Western Australia to protect Aboriginal heritage but the protection was often not given and even when it was decided that a site was significant, the Minister for Heritage would not protect a site. There were many court cases to stop the development from proceeding to protect the site.

People were arrested for stopping work at the site. I was arrested a couple of times and had a few charges made against me. They locked me up at the East Perth lockup and I went to court. They put a restraining order to stop me from going to the site but I went back and got arrested for breaching the order.

What was happening at this time was the workers were starting to come in and the protest was getting tense. There might have been about 300 protestors and the police were violent, shoving people. I saw one of them grab an Aboriginal woman protesting, who was sitting down trying to block access to the gate, and he actually pulled her up from the ground by her hair. She was screaming so I ran in and wrestled with him. I was arrested for that and put into the police van. There was a huge police presence, one time I counted 80 police. They stayed for two weeks when the work began.

This was the State protecting the corporate interests of Multiplex. The development of the site went ahead eventually. It is an apartment block for wealthy people and when I drive past it today I remember the camp and how we cared for that place. We wanted to have our heritage reflected, we had heritage laws and we thought it would protect our places. Every time we had a fight about it we lost.

Hannah: At the time of the protest at Goonininup I was studying law and I also took part in the protests because I believed, along with many other young people who came, that our Noongar heritage was never being acknowledged and respected in Perth. It was very confrontational at times, a senior officer gave me a rough shove in the chest once and I was lucky not to be arrested myself! We were determined though that we wouldn't give in easily. A lawyer named Greg McIntyre went to court several times seeking heritage protection under

State and Federal legislation. Greg later acted in the famous native title case of *Mabo v State of Queensland*. I sat behind him in the Federal Court, passing cases to him as he argued for the protection of Aboriginal heritage. That was my first courtroom experience and real introduction to law.

Not only are heritage sites routinely desecrated in West Australia, the State government has also attempted to remove Aboriginal heritage sites from the Registrar of Aboriginal sites. They used policy to justify an interpretation that Aboriginal people had to actively engage in religious-like activities at a site for it to be regarded as a significant site. I supported a Pilbara case that successfully challenged the State's actions. It always seems that the heritage of non-Aboriginal people is given significant weight in comparison to that afforded Noongar people.

Mingli: Ken Colbung had been searching for Yagan's *kaart* (head) for 20 years and it was finally located in Liverpool [in England] in 1997. It was really savage that his *kaart* had been removed and awful not knowing where it was. A delegation of Noongars decided to travel to London to retrieve Yagan's *kaart* and finally bring him home to his resting place. It's very important to our culture that people are properly laid to rest. There was Ken Colbung, Richard Wilkes, Robert Bropho, and myself. I was nervous to go and it was also an honour to be a part of this important delegation.

We caught the train to Liverpool and the next morning at the museum we received the *kaart* in a casket. I was given some earth from where he was murdered in the Swan Valley area, and poured it on his head. When we got to the airport everyone was crying over Princess Diana who had died while we were there. People were saying that we retrieved our son and they lost their daughter. We carried Yagan's *kaart* on the plane with us, and the officials in Hong Kong airport looked very shocked when they saw what we were carrying. When we came home to Perth we were full of tensions as there were some people who were saying negative things about why we were the Noongar people who brought his *kaart* home. When we arrived about 300 Noongars met us at the airport and we felt much relief that we had brought Yagan home at last. Unfortunately, his *kaart* was stored for a few years while people tried to find the rest of his remains. Later on a park was built for him, there was a ceremony, and he was finally laid to rest.⁶⁸

⁶⁸ See generally, South West Aboriginal Land and Sea Council, 'Kaartdijin Noongar – Noongar Knowledge' (online) <<https://www.noongarculture.org.au/yagan/>> (last accessed 19 May 2017).

While we were in London bringing Yagan home, *The West Australian* newspaper published a cartoon making fun of us and denigrating Yagan and the Waugyl. The cartoon was a real denigration of Noongar culture and we were quite offended by it. It was especially disrespectful to Ken Colbung because he spent 20 years researching and finding Yagan and we thought [it] was a fantastic moment in our history to bring his *kaart* home. The cartoonist was mocking us, Yagan and Noongar people, and our religion by referring to the Waugyl in such a wrong and bad way.

We took a case against the cartoonist for that, under the *Race Discrimination Act 1975*. The judges said it was an offensive cartoon but it was allowed as 'free speech'.⁶⁹ There was another complaint made against Howard Sattler from 6PR. He allowed some taxi drivers on his show to make statements that Gooniniup protest[ors] ... were 'urinating, fornicating and defecating' on the site. This wasn't true and we were very shocked. We respected the site. In that case, the judge found in our favour and said it was a race vilification and the radio station was liable for it too. The station was ordered to make a compensation payment to myself and other elders because of that racist broadcast.⁷⁰ Nowadays when I listen to the radio I don't hear much like that, I hear complaints about Muslims and racist taunting of Aboriginal footballers.

Hannah: These cases were lodged for the Noongar elders, and in the belief that Noongar people had a right to be protected from racial vilification under Section 18C. My experiences with the *Race Discrimination Act 1975*, including my own Federal Court case against a Liberal Senator named Ross Lightfoot who publicly opposed the teaching of Aboriginal culture in schools on the grounds that Aboriginal people were 'primitive' and 'the lowest colour on the civilization spectrum', left me questioning the law's ability to provide an effective response to race vilification. Although I 'won' some case it was clear that the non-Aboriginal legal system was not concerned enough about the harm of race vilification and our international obligation under human rights law to provide effective remedies and responses.⁷¹

⁶⁹ See generally, Hannah McGlade, 'Race Vilification Before the Human Rights and Equal Opportunity Commission' (2001) 5(7) *Indigenous Law Bulletin* 8. This is also available at Austlii (online) <<http://www.austlii.edu.au/au/journals/IndigLawB/2001/18.html>> (last accessed 19 May 2017).

⁷⁰ As above.

⁷¹ See generally, Hannah McGlade, 'Race Discrimination in Australia: A Challenge for Treaty Settlement?' in Marcia Langton, Lisa Palmer, Maureen Tehan, and Kathryn Shain (eds) *Honour Among Nations? Treaties and Agreements with Indigenous Peoples* (Melbourne University Press 2004) 273.

Mingli: Pauline Hanson was a bit of shock, to see this woman on television and her attitudes to Aboriginal people, she was very ignorant and narrow minded about people. When she came to WA many Aboriginal people protested at her speaking events. She had a lot of support because she was talking in a racist way. We felt like we might be going go back to the days of the White Australia Policy, the way she talked! She said Aboriginal people were cannibals and we should have to work for our money, we were too lazy and had too many benefits and handouts. She wanted to stop Asians immigrating on the basis of their race. She got into Parliament by speaking like this and it was worrying that she had an enormous amount of support that really made us think about White Australia and how much racism was out there. I was so stressed out that I asked Senator Dee Margetts to seek asylum for me and any other Aboriginal people in another country. I was cross. I would have gone away for a while especially if a country like Canada had offered me asylum. I had some hate mail sent to me, some people said they would pay my airfare to South Africa, and another person told me I was on a good thing here and what was wrong with me.

Hannah: Mingli's friends up north had heard on the news that she wanted asylum and called her to ask her if she really was going to get asylum and live overseas! We laughed about that – we have Aboriginal humour and our own Aboriginal grapevine.

I found her activism in *The Age* newspaper report 'Aborigine Seeks Asylum':⁷²

Upset about Ms Hanson's campaign against Aborigines and the campaign of the Queensland Premier, Mr Rob Borbidge, to extinguish native title on pastoral leases, Ms Wanjurri said white Australia had taken everything and left 'only skeletons'. 'They have researched and researched us as nations of Aboriginal people' she said. 'They have put us in their frameworks with little or no regard for our culture, where we come from, how we have been torn from our mother's arms, literally'. She pleaded with non-Aboriginal community to speak out against Ms Hanson, who she said was 'now the mouthpiece for white Australia's racism'. 'White Australians, if you say you are not racist, stand up for us now. Be outraged. Don't let this happen. Give us back our land. It's stolen' she said.

Mingli: In the last 20 years I have been talking to the students in schools, primary and high school, about Aboriginal land and culture. Helping some Noongar families, raising my grandchildren, and looking out

⁷² Karen Middleton, 'Aborigine Seeks Asylum' *The Melbourne Age* 26 April 1997 p 9.

for other children. My interest was the Aboriginal culture, the work I started a long time ago when I developed the Karla program to teach Aboriginal culture in schools. I set Karla up in 1993, it means fires, and this was an educational group to promote Indigenous culture and keep the traditional fires alive. One of the issues facing Aboriginal children was and is racism. There was one time a Noongar girl from my local school, she was 10 years old, was pepper sprayed by four train guards who were called into the school because she had a small pair of scissors. She was playing up because she was upset at something that happened in the playground. It ruined her life – she told me how upset she was about what happened. She was a good student and she had reason to keep going to school.

Later on in 2012 and again in 2014 we set up the camp at Martigarup (around Heirisson Island). We wanted sovereignty. I was there most days for months until the police kept coming down and closing the camp. A big officer one time pushed me, hurting me in my back after he issued me with a ‘move on’ notice.⁷³ We were there to talk about land rights and it was a registered site, we were still fighting for land – the meetings about native title we didn’t agree with. We preferred land rights to native title. Land rights means you have rights to land, you don’t have to sell it and do deals for land. We feel with land rights everyone will be more equal.

Hannah: We never had land rights in West Australia and it was a great shame that the ALP [Australian Labor Party] who officially supported land rights could not follow through on this commitment. New South Wales and the Northern Territory have had significant gain through land rights. When we won the decision in the Federal Court before Justice Wilcox who so graciously recognised our continuing cultures, the State government (which was the Labor party), immediately refused to accept the decision and lodged an appeal disputing Noongar people’s rights to land. I organised a rally outside Parliament House, Noongar men danced and our elders, leaders, and the community people voiced our opposition to this ongoing oppression and disrespect of our human rights.

Unfortunately West Australia is like the ‘deep south’ of the nation where cases of Aboriginal people dying in police cells and vans have continued and shocked many. Twenty-five years since the Royal Commission into Aboriginal Deaths in Custody, sparked by the death of 16-year-old John Pat in Roebourne, the case of Ms Dhu, show us that State and

⁷³ See generally, ‘Arrests as Police Remove Tents at Perth’s Heirisson Island Protests’ *ABC News* (online) 30 April 2015 <<http://www.abc.net.au/news/2015-04-30/arrests-as-police-remove-tents-at-heirisson-island-protest/6434364>> (last accessed 19 May 2017).

structural violence against Aboriginal people, especially Aboriginal women at risk of race and gender-based oppression, remains ongoing.

There is so much more I could say about Mingli. She faced many personal and public battles in her life. I am indebted to her, the activists and leaders; they taught us culture, justice, and what it means to be a part of our Noongar community. Kaya!

4.0 CONCLUSION

The Noongar settlement signed in 2015 is likely to go ahead due to the *Native Title Amendment (Indigenous Land Use Agreements) Act 2017* (Cth), which overruled the *McGlade* court decision. The Noongar Settlement ILUA provides substantial benefits that may not have resulted if people had pursued native title under common law, considering the high level of extinguishment that has taken place in Australia through inconsistent tenures and by way of interpretation of Aboriginal culture by the Anglo-Australian courts.

Notwithstanding this, it is still important that we hear and respect the views of many Noongar people who did not support the agreement and who wanted to see Noongar sovereignty recognised. They disagreed with ‘selling’ Noongar lands and the extinguishment of Noongar native title that is at the heart of the ILUA. Many of these feel they had little or no say in the negotiation for the Noongar agreement and are aggrieved and unhappy by the decision to negotiate extinguishment. They are understandably fearful and concerned that ancestral and sovereign rights to land, which were never conceded through a Treaty, may be lost forever due to the ILUA.

Aboriginal people widely regard colonisation as an ongoing cultural process. Whilst native title across Australia has been a belated recognition of rights for some, it has also been regarded as another form of colonisation for others. Native title and governance models and settlements under the ILUA process that have been imposed upon Aboriginal people reflect a system of law based on non-Aboriginal forms of liberal democracy and formal equality (for example, one vote, one person) that does not translate to or accord respect to Aboriginal cultures.⁷⁴ Aboriginal cultures are hierarchical and decision-making is largely by consensus and also determined by factors related to age, relationship to land, sometimes gender, and also cultural requirements in relation to leadership, authority, and respect. At the same time, our cultures place a high value on personal autonomy and people cannot make decisions for others without their consent.⁷⁵

The Act passed in response to the Federal Court decision of *McGlade* is arguably yet another incursion into Noongar life that undermines a history of Noongar people’s resistance to colonisation in favour of extinguishment, commercial benefits, and

⁷⁴ See generally, Gaynor McDonald, ‘Colonizing Process, the Reach of the State and Ontological Violence: Historicizing Aboriginal Australian Experience’ (2010) 52(1) *Anthropologica* 49 at 50.

⁷⁵ See generally, Gaynor McDonald, ‘Difference or Disappearance: The Politics of Indigenous Inclusion in the Liberal State’ (2008) 50(2) *Anthropologica* 341 at 350.

economic ‘certainty’. The public criticism and attacks on all opposed to the Noongar settlement and ILUA also neglects and repudiates a proud Noongar history of social justice and land rights activism. In the Noongar community, many of us know that there were people who took up the fight for Aboriginal rights during oppressive times in our history, when there was nothing to benefit or gain from being Aboriginal, and when some families and individuals left our community to instead live and ‘pass’ as non-Aboriginal white people. The Aboriginal activists of days past may not be the people negotiating commercial agreements on our behalf, but their commitment to Aboriginal rights and justice was critical to the recognition of native title in Australian law and their voices should be heard and respected in native title processes.

The *Native Title Amendment (Indigenous Land Use Agreement) Act 2017* (Cth) represents a contemporary example of how Aboriginal legal rights are able to be readily subsumed by wider commercial and largely non-Indigenous interests, arguably to the detriment of Aboriginal people. It remains to be seen whether more legal action will result from this recent legislative history. The nature and extent of the benefits the ILUA will secure for Noongar people in future will be relevant to the question of whether the settlement process adopted was the best way forward for Noongar people. Recent calls for a Treaty process endorsed at the Uluru Constitutional Convention highlight that lack of Treaty remains central to outstanding Aboriginal rights discourse and claims. The risk is that the Noongar settlement is positioned as a Treaty agreement even though it falls quite short of what Treaty should actually mean for Noongar people: the right to determine our own internal affairs and be who we want to be as Noongar people.