Noel Pearson: A mighty moral victory

OPINION

Noel Pearson

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JUST when the whitefellas were getting relaxed and comfortable about native title, Justice Murray Wilcox of the Federal Court has dropped a bombshell right in the centre of Perth, a metropolis that governs the most booming natural resources economy in the world.

Australians have never experienced as much wealth as exists today and the China-driven resource boom has meant that the Labor politicians who govern Western Australia preside over unprecedented mountains of revenue. The whitefellas have never had it so good.

Of course, contrary to the evening news images of back yards filmed from helicopters, the ruling in Noongar is not a legal bombshell because it does not extend the law on native title beyond what was already decided by the High Court of Australia.

It is not even a political bombshell. The political arguments were well canvassed before the Keating government passed the Native Title Act in 1993, following the High Court's 1992 landmark decision in the Mabo case.

And for good measure we had another two bitter years of political argument when the Howard Government passed its 10-point plan amendments to the Native Title Act in 1998, following the High Court's second 1996 landmark decision in the Wik case.

The arguments about the law and politics of native title have been near exhausted in Australia.

The bombshell in Noongar is moral and psychological. Just when the whitefellas had come to regard native title benignly, as largely a symbolic form of title that would be found only in the remote and desert parts of central and northern Australia, the Noongar people establish native title over the city that was established on their traditional homelands. The Noongar are shadow dwellers in their own country and these urban-dwelling blackfellas were not supposed to get native title.

The Federal Court decision will not result in one square centimetre of land held by the whitefellas being lost. In fact the Noongar specifically did not claim any freehold or leasehold land, which everybody knows extinguishes native title, or indeed any other tenure that extinguishes native title.

Back yards were safe after Mabo. They are still safe after Noongar.

The effect of the Wilcox ruling is that the Noongar are entitled to whatever lands are left over in Perth. The stark reality is that not much will be left after 177 years: the Noongar will eventually recover only the remnants of their original estates. But what is left will be valuable. Most will see the value of the land as real estate in a booming city. The Noongar will no doubt see its economic value as well, but for them the value of the land is that it is their cultural hearth.

The Noongar can also be expected to be entitled to substantial compensation for the extinguishment of their native title as a result of land dealings following the Racial Discrimination Act in 1975.
Payment of compensation was provided for in the Native Title Act, but the sheer expense and difficulty involved in indigenous groups seeking compensation for lost property has meant that no compensation has been paid to a native title group. The native title compensation bill for the commonwealth and state governments since the Native Title Act in
1993 has been zero. The Noongar will be the first group to receive compensation for the loss of native title.

The ruling will also affect the capacity of local and state governments to deal with crown lands that they have assumed do not have surviving native title. These lands now must be understood to have an owner: the Noongar. There will be procedural and other provisions that they will have to abide by.

How did this extraordinary result come about? In 1993 I was a member of the team of indigenous negotiators led by Lowitja O'Donoghue and Mick Dodson who negotiated the terms of the Native Title Act with then prime minister Paul Keating. We were derided by our detractors among the blackfellas as "the Magnificent Seven". The team included a young Aranda man from central Australia, Darryl Pearce. Pearce largely disappeared from public view but in 2000 he became director of what is now the Southwest Aboriginal Land and Sea Council, based in Perth.
This would have been one of the hardest jobs in native title anywhere in the country.

The southwestern corner was a Balkanised mess of competing and overlapping native title claims. It's the kind of mess that we see far too often across the continent, with every two-bit lawyer hooked up with their own erstwhile client whose main aim seems to be to crush the claims of indigenous rivals rather than properly seeking native title. This madness fulfilled Dodson's prescient 1993 take on Bob Hawke's famous pledge: "By the year 2000 no Aboriginal child will be without their own lawyer!"

Into this cauldron Pearce, the outsider, dared to intervene. And through his energies and, no doubt, that of the Noongar elders, by

2003 all six native title claims that had been lodged in the southwest were consolidated into one united claim.

Pearce said at the time: "The aim of the single Noongar claim is to break out of the old way of thinking on native title and help finally resolve one of the most complex and difficult issues facing the West Australian community. The aim of the single Noongar claim is to secure negotiated native title outcomes for Noongars. No one wins if we continue to travel down the rocky road of litigation and conflict."

Alas, the overtures made by Pearce and the Noongar to state and local governments to settle the claims by negotiation were ultimately rejected, and the claim proceeded to hearing in the Federal Court in 2005.

Wilcox has ruled on the question of traditional connection to the claimed lands and has found in favour of the Noongar. He has not ruled on a second question: in what lands does native title still survive?
The answer to this second question will be complex and expensive, and can be dealt with only through negotiation. Each and every tenure that is not clearly an extinguishing tenure must be looked at. The WA Government must now respond to the original Noongar invitation to negotiate a comprehensive settlement.

Wilcox has ruled on connection which is a question of fact. Appeal courts rely on trial judges and are reluctant to disturb findings of fact. The path of appeal and further litigation is expensive and irresponsible. It is also morally reprehensible.

It is not surprising that a Labor government in WA has pledged to appeal the Wilcox decision. After all, it was a Labor government, that of Brian Burke, that scuttled the national land rights legislation proposed by the Hawke government in the 1980s. Had a national scheme for land rights been implemented by the commonwealth parliament back then, it would have been unlikely that the High Court would have needed to rule on native title.

Both Kim Beazley and John Howard support the WA Government's decision to appeal. Howard's aspiration to limit the extent of native title to a minimum is at least consistent with his well-known convictions.
Beazley was a minister in the government that enacted the Native Title Act in 1993 under the leadership of Keating and Gareth Evans.
Beazley's position on Noongar is a measure of the man: he has no convictions.

Noel Pearson is director of the Cape York Institute for Policy and Leadership.

Native title furore grows
Amanda O'Brien, West Australian political reporter The Australian
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OUTSPOKEN Aboriginal leader Noel Pearson has launched a stinging attack on Labor leader Kim Beazley for backing an appeal against this week's landmark native title decision covering metropolitan Perth.

"Beazley's position on Noongar is a measure of the man: he has no convictions," Mr Pearson says in an article in The Weekend Australian.

But the Howard Government was also under fire yesterday, accused of deceit and scaremongering for claiming public access to beaches and parks across Australia might be put in jeopardy by the Federal Court ruling.

With both sides of politics supporting an appeal, Mr Pearson, director of the Cape York Institute for Policy and Leadership, said John Howard's desire to limit native title was consistent with his convictions, but Mr Beazley had been a minister in the government that enacted the Native Title Act in 1993.

But Mr Beazley yesterday reiterated his support, saying contradictions in recent native title decisions would make it difficult to negotiate future claims.

He said it was important there was clarity and if the West Australian Government felt an appeal was the way to go, he would support it.

"I trust the Western Australian state Government on this. They've got real outcomes, good outcomes that have been based largely, not exclusively, on consent agreements," Mr Beazley said.

"You've seen around the country ... very small pockets of achievement in the area of native title. In Western Australia, very large areas have been successfully made subject to native title. If they say they need to appeal these laws to get that clarity, they're right."

Meanwhile, claims by Attorney-General Philip Ruddock that areas of public open space could be blocked to the public as a result of the decision caused more furore. Mr Ruddock said that if land had not been clearly reserved and dedicated for public purposes, indigenous people might be able to claim exclusive use and require non-indigenous people to obtain permission to enter.

This had ramifications nationally because of native title claims around Brisbane, Melbourne and parts of Sydney, he said.

The comments triggered a rebuke from Labor's indigenous affairs spokesman, Chris Evans, who said they were untrue and reflected fear and race politics.

"The federal Government changed the (Native Title) Act in 1998 to ensure that these decisions could not impact on public access to parks, nature reserves or the beaches. There is legal certainty over these matters," Senator Evans said.

"What we don't need is people like Philip Ruddock out there saying we'd need permission to go to the beach. It's a nonsense, it was a nonsense when they ran that fear campaign in the 90s."

West Australian indigenous MP Ben Wyatt said he was stunned by Mr Ruddock's comments, which were "inflammatory and wrong".

"Justice (Murray) Wilcox (in the Perth ruling) specifically stated that parks and beaches were not under threat," he said.

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Talking native title
The Noongar judgment opens the door for negotiation

THE watershed Noongar judgment, which establishes native title over metropolitan Perth, is a milestone on the long and tortured road to Aboriginal reconciliation. It is a legacy left by the now retired Federal Court judge Murray Wilcox, who has challenged the parties involved to find a new way forward. If it survives appeal, Justice Wilcox's judgment extends the reach but not the scope of native title.
For indigenous leaders, it recovers ground lost in the failed Yorta Yorta claim in Victoria but does not mean claims over any other metropolitan area will automatically be successful. Native title continues to be limited and easily extinguished by the grant of other title. But the decision remains highly symbolic, both for its recognition of a community displaced by white settlement, intermarried and spread over a large area, and for the crossroads it presents. One path leads to appeal and more long years of expensive litigation. The alternative is the pragmatic approach, where all parties step back and negotiate their way forward.

The Noongar decision is the latest in a series of milestones since the High Court's historic Mabo decision in June 1992, which overthrew the concept of terra nullius and recognised native title. In December 1996, in the Wik decision, the High Court found native title could co-exist with pastoral leasehold. The federal Government responded with a 10-point plan in 1997 to clarify the superior rights of existing title. Fourteen years on from Mabo it is appropriate to take stock. The more dramatic claims that public lands would be placed out of bounds and land management would become impossible have proved baseless. But a native title

litigation industry has been created, of which lawyers have been the major beneficiaries. As National Indigenous Council member Wesley Aird said in an opinion article in the Australian yesterday, the cost of the legal fees in the Miriuwung-Gajerrong native title claims could have bought every cattle property in the Kimberley. The progress of claims through the courts has been both slow and costly. According to the National Native Title Tribunal, there are 547 native claims pending, including 12 compensation claims. Only 91 claims have been finalised. Of these, 62 said native title existed and 29 said it did not. Fifty-three determinations were by consent and only 20 were settled by litigation.
In contrast, 251 registered indigenous land use agreements have been put in place by negotiation.

This sort of negotiation is favoured by Justice Wilcox, who said the West Australian state and local government's should consider exactly what problems a grant of native title would create. And claimants should consider how they might help overcome them. Justice Wilcox's judgment vindicates a decision by the architects of the claim to amalgamate many smaller claims. In doing so, they have been able to secure a groundbreaking judgment that has established that displacement and intermarriage as a result of white settlement do not automatically disqualify a community from native title rights. Justice Wilcox found that an extended tribal network over a large area was a single community because they shared laws and customs that were not shared by communities to the north and east. He was greatly assisted by extensive contemporaneous writings on Aboriginal life, laws and customs made at the time of settlement, around 1829. The choice now is to keep spending money on lawyers and sour the symbolic and practical victory with a still-uncertain outcome, or choose a comprehensive negotiated agreement that delivers indigenous pride, practicality and legal certainty quicker and at a lesser cost.